

YEARBOOK

Volume XLI: 2010



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UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW

YEARBOOK

Volume XLI: 2010



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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.

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INTRODUCTION

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

The present volume consists of three parts. Part one contains the Commission's report on the work of its forty-third session, which was held in New York, from 21 June-9 July 2010, 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-third 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-third session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook*.

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

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication Sales No. 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
XI	1980	E.81.V.8
XII	1981	E.82.V.6
XIII	1982	E.84.V.5
XIV	1983	E.85.V.3

<i>Volume</i>	<i>Years covered</i>	<i>United Nations publication Sales No. or document symbol</i>
XV	1984	E.86.V.2
XVI	1985	E.87.V.4
XVII	1986	E.88.V.4
XVIII	1987	E.89.V.4
XIX	1988	E.89.V.8
XX	1989	E.90.V.9
XXI	1990	E.91.V.6
XXII	1991	E.93.V.2
XXIII	1992	E.94.V.7
XXIV	1993	E.94.V.16
XXV	1994	E.95.V.20
XXVI	1995	E.96.V.8
XXVII	1996	E.98.V.7
XXVIII	1997	E.99.V.6
XXIX	1998	E.99.V.12
XXX	1999	E.00.V.9
XXXI	2000	E.02.V.3
XXXII	2001	E.04.V.4
XXXIII	2002	E.05.V.13
XXXIV	2003	E.06.V.14
XXXV	2004	E.08.V.8
XXXVI	2005	E.10.V.4
XXXVII	2006	A/CN.9/SER.A/2006
XXXVIII	2007	A/CN.9/SER.A/2007
XXXIX	2008	A/CN.9/SER.A/2008
XL	2009	A/CN.9/SER.A/2009

Part One

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

THE FORTY-THIRD SESSION (2010)

A. Report of the United Nations Commission on International Trade Law on its forty-third session (New York, 21 June-9 July 2010) (A/65/17)

[Original: English]

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-third session of the Commission, held in New York from 21 June to 9 July 2010.

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-third session of the Commission was opened by the Under-Secretary-General for Legal Affairs, the Legal Counsel, on 21 June 2010.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the General Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 22 May 2007, on 3 November 2009 and on 15 April 2010, are the following States, whose term of office expires on the last day prior to the beginning

of the annual session of the Commission in the year indicated:¹ Algeria (2016), Argentina (2016), Armenia (2013), Australia (2016), Austria (2016), Bahrain (2013), Belarus (2011), Benin (2013), Bolivia (Plurinational State of) (2013), Botswana (2016), Brazil (2016), Bulgaria (2013), Cameroon (2013), Canada (2013), Chile (2013), China (2013), Colombia (2016), Czech Republic (2013), Egypt (2013), El Salvador (2013), Fiji (2016), France (2013), Gabon (2016), Germany (2013), Greece (2013), Honduras (2013), India (2016), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2013), Jordan (2016), Kenya (2016), Latvia (2013), Malaysia (2013), Malta (2013), Mauritius (2016), Mexico (2013), Morocco (2013), Namibia (2013), Nigeria (2016), Norway (2013), Pakistan (2016), Paraguay (2016), Philippines (2016), Poland (2012), Republic of Korea (2013), Russian Federation (2013), Senegal (2013), Singapore (2013), South Africa (2013), Spain (2016), Sri Lanka (2013), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2013), United States of America (2016) and Venezuela (Bolivarian Republic of) (2016).

5. With the exception of Bahrain, Bolivia (Plurinational State of), Botswana, Gabon, Latvia, Malta, Morocco, Namibia, Sri Lanka and Uganda, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Belgium, Ethiopia, Finland, Ghana, Guatemala, Iraq, Kuwait, Libyan Arab Jamahiriya, Madagascar, Netherlands, Panama, Qatar, Slovakia, Slovenia, Switzerland, Trinidad and Tobago, and United Arab Emirates. In addition, an observer from the Holy See attended the session.

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

(a) *United Nations system*: Office of Legal Affairs of the Secretariat, International Monetary Fund, International Telecommunication Union (ITU), World Bank and World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: Asian-African Legal Consultative Organization, European Bank for Reconstruction and Development (EBRD), European Union and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Arbitration Association (AAA), American Bar Association (ABA), American Bar Foundation, Arab Association for International Arbitration, Asia Pacific Regional Arbitration

¹ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 30 were elected by the Assembly at its sixty-first session, on 22 May 2007 (decision 61/417), 28 were elected by the Assembly at its sixty-fourth session, on 3 November 2009, and two were elected by the Assembly at its sixty-fourth session, on 15 April 2010. By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election. The following six States members elected by the General Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).

Group, Association for the Promotion of Arbitration in Africa, Association Française des Entreprises Privées, Cairo Regional Centre for International Commercial Arbitration, Center for International Legal Studies, Comité Français de l'Arbitrage, Commercial Finance Association, Consultative Group to Assist the Poor, Corporate Counsel International Arbitration Group, European Communities Trade Mark Association, Independent Film and Television Alliance, Insolvency and Bankruptcy Professionals (INSOL), International Air Transport Association (IATA), International Arbitration Institute, International Association of Restructuring, International Bar Association (IBA), International Institute for Sustainable Development, International Law Institute, International Swaps and Derivatives Association, International Trademark Association, Moot Alumni Association, New York City Bar, Pace Institute of International Commercial Law, Regional Centre for International Commercial Arbitration - Lagos, and Queen Mary University of London, School of International Arbitration;

(d) *Other entities having received a standing invitation to participate as observers in the General Assembly and maintaining permanent offices at Headquarters:* Sovereign Military Order of Malta.

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

C. Election of officers

9. The Commission elected the following officers:

Chair: Ricardo Sandoval López (Chile)

Vice-Chairs: Salim Moollan (Mauritius)

Kathryn Sabo (Canada)

Wisit Wisitsora-at (Thailand)

Rapporteur: Gerard Jirair Mekjian (Armenia)

D. Agenda

10. The agenda of the session, as adopted by the Commission, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules.

5. Finalization and adoption of a draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property.
6. Finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency.
7. Procurement: progress report of Working Group I.
8. Possible future work in the areas of electronic commerce and online dispute resolution.
9. Possible future work in the area of insolvency law.
10. Possible future work in the area of security interests.
11. Possible future work in the area of microfinance.
12. Monitoring implementation of the 1958 New York Convention.
13. Technical assistance to law reform.
14. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts.
15. Status and promotion of UNCITRAL legal texts.
16. Working methods of UNCITRAL.
17. Coordination and cooperation:
 - (a) General;
 - (b) Reports of other international organizations.
18. Role of UNCITRAL in promoting the rule of law at the national and international levels.
19. International commercial arbitration moot competitions.
20. Relevant General Assembly resolutions.
21. Other business.
22. Date and place of future meetings.
23. Adoption of the report of the Commission.

E. Establishment of a Committee of the Whole

11. The Commission established a Committee of the Whole and referred to it for consideration agenda item 4. The Commission elected Michael Schneider (Switzerland) to chair the Committee of the Whole in his personal capacity. The Committee of the Whole met from 21 to 25 June 2010 and held 10 meetings. At its 910th meeting, on 25 June, the Commission considered and adopted the report of the Committee of the Whole and agreed to include it in the present report (see para. 187 below). (The report of the Committee of the Whole is reproduced in paras. 16-186 below.)

F. Adoption of the report

12. At its 910th meeting, on 25 June, 915th and 916th meetings, on 30 June, 919th meeting, on 2 July, and 924th meeting, on 9 July 2010, the Commission adopted the present report by consensus.

III. Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules

A. Organization of deliberations

13. The Commission had before it the reports of Working Group II (Arbitration and Conciliation) on the work of its fifty-first (Vienna, 14-18 September 2009) and fifty-second (New York, 1-5 February 2010) sessions (A/CN.9/684 and A/CN.9/688, respectively) and the text of the draft revised UNCITRAL Arbitration Rules, as it resulted from the third reading by the Working Group at its fifty-second session and as contained in document A/CN.9/703 and Add.1. The Commission took note of the summary of the deliberations on the draft revised UNCITRAL Arbitration Rules since the forty-fifth session of the Working Group (Vienna, 11-15 September 2006). The Commission also took note of the comments on the draft revised UNCITRAL Arbitration Rules that had been submitted by Governments and international organizations, as set out in document A/CN.9/704 and Add.1-10.

14. The Commission recalled that, at its thirty-ninth session, in 2006, it had noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules (1976)² were widely recognized as a very successful text, having been adopted by many arbitration centres and used in many different instances. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of them 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.³ At its fortieth session, in 2007, the Commission had noted 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.⁴

15. The Committee of the Whole, established by the Commission at its current session (see para. 11 above), proceeded with the consideration of the text of the draft revised UNCITRAL Arbitration Rules. The report of the Committee is reproduced in section B below.

² *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, para. 57.

³ *Ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 184.

⁴ *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 174.

B. Report of the Committee of the Whole

Section I. Introductory rules

Scope of application

Draft article 1

16. The Committee agreed that the words in brackets in paragraph 2 should be replaced with the words “15 August 2010”. The Committee agreed that the revised Rules should be effective as from that date. With that modification, the Committee adopted the substance of draft article 1.

Notice and calculation of periods of time

Draft article 2

17. The Committee considered draft article 2 and noted that it was one of the provisions that had not been fully considered by the Working Group during the third reading of the draft revised Rules.

18. A number of concerns were raised regarding draft article 2. As a matter of structure, it was suggested that it was preferable to describe first the acceptable means of communication, as currently laid out in paragraph 3, and only thereafter to deal with issues regarding receipt of a notice delivered through such means of communication. For that reason, it was proposed to place paragraph 3 as a first paragraph in draft article 2.

19. It was said that the requirement in paragraph 3 for the communication to provide a record of the information contained therein would seem to rule out many commonly used methods of verifying that a communication had been received, such as courier receipts. In addition, the requirement that the means of communication provide a record of its receipt was said to appear inconsistent with the purpose of paragraphs 1 (b) and 2, which dealt with deemed receipt. That requirement was said to be unusual and likely to give rise to practical difficulties. It was proposed to refer instead to the “transmission”, “delivery” or “sending” of the notice and to avoid any reference to the notion of receipt in paragraph 3. It was said that, in cases where the addressee denied that a notice had been received, that matter would have to be dealt with by the arbitral tribunal, according to draft article 27, paragraph 1, on the burden of proof.

20. The Committee recalled the decision made in the Working Group to expressly include in the Rules language that authorized both electronic and traditional forms of communication. In that respect, it was said that the revised version of draft article 2 should include language consistent with previous standards prepared by UNCITRAL in the field of electronic commerce, such as the UNCITRAL Model Law on Electronic Commerce⁵ and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).⁶ It was suggested that the use of the term “dispatch” in draft article 2 would be more appropriate to align

⁵ United Nations publication, Sales No. E.99.V.4.

⁶ United Nations publication, Sales No. E.07.V.2.

draft article 2 with the aforementioned instruments. Others questioned the appropriateness of the proposed language.

21. In relation to paragraph 2, the view was expressed that that provision should be augmented to deal with the situation where the addressee would refuse to take delivery or receive a notice as it was not viewed as covering that situation.

22. Support was expressed for draft article 2, as it appeared in document A/CN.9/WG.II/WP.157, which was said to follow more closely the language of the 1976 version of that article in the Rules.

23. The Committee considered the following proposal for draft article 2:

“1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.

“2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.

“3. In the absence of such designation or authorization, a notice is:

“(a) Received if it is physically delivered to the addressee; or

“(b) Deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

“4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee’s last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.

“5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4.

“6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice 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.”

24. General support was expressed for the substance of the proposal. With a view to clarifying the time of delivery where transmission took place by means of electronic communication, the following proposal was made for a possible addition to paragraph 5: “A notice transmitted by electronic means is deemed to have been received on the day it is transmitted.” Views expressed earlier in the discussion regarding the possible need to ensure consistency between the revised Rules and other UNCITRAL standards dealing with issues of electronic communication were reiterated. More generally, the discussion focused on whether all notices under the

Rules should rely on a receipt or on a dispatch rule. The question whether a specific rule should be designed for the notice of arbitration was also discussed. Support was expressed for a rule under which electronic communication should be deemed to have been received on the day when it was sent. It was generally acknowledged that a rule relying on deemed receipt at the time when notification reached the addressee's electronic address would be more consistent with other UNCITRAL texts and thus more conducive to the promotion of electronic communication in international arbitration. However, concern was expressed that, in daily arbitration practice, requiring a sender of an electronic notice to confirm the date of delivery to the addressee's address before being able to calculate time periods for the parties' further obligations in the arbitration (pursuant to draft art. 2, para. 6) could be excessively burdensome, whereas the date of sending could be readily ascertained. In that regard, it was noted that paragraph 5 only pertains to the question as to *when* a notice sent by electronic means is deemed received. The question *whether* it is deemed received is governed by paragraph 2, which conditions deemed receipt upon delivery of the notice to the address. It was therefore said that it remained open to a non-sending party to object that a particular notice, even if electronically sent to that party's address at an identified time, was in fact not delivered (and thus could not in the end be "deemed received"). The view was expressed that draft article 2 should be reflective of a practice where reliance on electronic communication was still limited.

25. After discussion, the Committee adopted the following wording to be inserted at the end of paragraph 5: "A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address."

26. It was clarified that the words "specifically for this purpose" in paragraph 2 following the words "designated by a party" should be understood as also including the indication of addresses for general notices in contracts that contained or referred to the arbitration agreement.

27. The Committee confirmed its understanding that the first sentence of paragraph 6 was to be understood as encompassing both actual and deemed receipt of a notice.

28. After discussion, the Committee adopted the substance of draft article 2 as contained in paragraphs 23 and 25 above.

Notice of arbitration

Draft article 3

29. For the sake of consistency with the provisions of draft article 2, the Committee agreed to replace the word "give" appearing before the words "to the other party" in paragraph 1 with the word "communicate". With that modification, the Committee adopted the substance of draft article 3.

Response to the notice of arbitration

Draft article 4

30. The Committee recalled that the purpose of draft article 4 was to provide the respondent with an opportunity to state its position before the constitution of the arbitral tribunal by responding to the notice of arbitration, and to clarify at an early stage of the procedure the main issues raised by the dispute.

Paragraph 1

31. It was observed that the 30-day time period for the communication of the response to the notice of arbitration might be too short in certain cases, in particular in complex arbitration or arbitration involving entities such as States or intergovernmental organizations.

32. In that context, it was pointed out that the specific practices and procedures of the United Nations, including its subsidiary organs, and other intergovernmental organizations might affect the ability of such organizations to take action within such time periods.

33. It was said that lengthening the time period for the communication of the response to the notice of arbitration would not be a satisfactory solution in relation to purely commercial arbitration between private parties. It was proposed that the concerns raised in relation to arbitration involving States or intergovernmental organizations or complex arbitration could be dealt with by adding language to the effect that the response to the notice of arbitration should be given “as far as possible” within 30 days. Another proposal was made to provide that the response to the notice of arbitration was only indicative.

34. Those proposals were objected to on the grounds that, in practice, the notice of arbitration and the response thereto were aimed at clarifying outstanding issues, and that goal might not be reached if the time limit for the communication of response to the notice of arbitration was not mandatory.

35. It was said that the response to the notice of arbitration dealt mainly with two types of issue, one relating to the response to the claim and the other to the composition of the arbitral tribunal. It was said that only the first type of issue was a novelty introduced by draft article 4, compared with the 1976 version of the Rules. In addition, it was pointed out that draft article 30, paragraph 1 (b), already provided that a failure by the respondent to communicate its response to the notice of arbitration should not be treated by the arbitral tribunal as an admission of the claimant’s allegations.

36. The Committee agreed that the response to the notice of arbitration was not intended to limit the right of the respondent to respond on the merits of the case at a later stage of the procedure, in particular in its statement of defence as provided in draft article 21. It was further said that the concerns raised in relation to the time period for the communication of the response to the notice of arbitration could be dealt with in practice, by the respondent either requesting an extension of time, or emphasizing the provisional nature of its response.

37. After discussion, the Committee adopted the substance of paragraph 1 without modification.

Paragraph 2

38. As a matter of drafting, the Committee agreed to add the words “to be” before the word “constituted” in paragraph 2 (a) and, with that modification, the Committee adopted the substance of paragraph 2.

Paragraph 3

39. The Committee adopted the substance of paragraph 3 without modification.

Representation and assistance**Draft article 5**

40. A proposal was made to modify the second sentence of draft article 5 along the lines of: “The credentials of such persons (representatives) must be certified in due form in accordance with the private law of the country of arbitration, and their names and addresses must be communicated to all parties and to the arbitral tribunal.” That proposal did not receive support.

41. The Committee adopted the substance of draft article 5 without modification.

Designating and appointing authorities**Draft article 6**

42. The Committee considered draft article 6, which dealt with designating and appointing authorities. That provision reflected the principle that the appointing authority could be appointed by the parties at any time during the arbitration proceedings, and not only in circumstances currently provided for in the Rules. It also sought to clarify the importance of the role of the appointing authority, particularly in the context of non-administered arbitration.

Paragraph 1

43. The question was raised whether the Secretary-General of the PCA should be mentioned in the Rules as one example of who could serve as appointing authority. It was proposed to delete the words “including the Secretary-General of the PCA” in paragraph 1. That proposal did not receive support.

44. It was further suggested that the functions of the Secretary-General of the PCA should be expressly limited under the Rules to those of a designating authority. In response to that suggestion, it was pointed out that there were instances in which the Secretary-General of the PCA had acted also as an appointing authority under the Rules. It was also said that that suggestion, if accepted, would run contrary to that existing practice and entail the risk of invalidating arbitration agreements designating the Secretary-General of the PCA as an appointing authority.

45. After discussion, the Committee adopted the substance of paragraph 1 without modification.

Paragraphs 2 and 3

46. It was stated that the specific practices and procedures of the United Nations, including its subsidiary organs, and other intergovernmental organizations might

affect the ability of such organizations to designate an appointing authority within the time period established under paragraph 2 to take action.

47. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Paragraph 4

48. The Committee noted that paragraph 4 did not deal with the consequences attached to a failure to act of an appointing authority in case of challenge of an arbitrator. Since no time limit had been set for an appointing authority to decide on a challenge under draft article 13, that occurrence did not fall under any of the instances listed in paragraph 4. To address that concern, it was proposed to amend the first sentence of paragraph 4 as follows: "If the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party's request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority". That proposal was adopted by the Committee.

49. The Committee agreed that, for the sake of clarity, the functions of the Secretary-General of the PCA in relation to the review of fees and expenses of arbitrators should be dealt with under draft article 41, paragraph 4. Consequently, the Committee agreed to delete the last sentence of paragraph 4 and to include the words "Except as referred to in article 41, paragraph 4," as the opening words of draft article 6, paragraph 4.

50. The Committee adopted the substance of paragraph 4 with the modifications referred to in paragraphs 48 and 49 above.

Paragraphs 5-7

51. The Committee adopted the substance of paragraphs 5-7 without modification.

Section II. Composition of the arbitral tribunal

Number of arbitrators

Draft article 7

52. The Committee took note of a proposal to the effect that the single arbitrator who would be designated unless the parties had decided otherwise would be entitled, at the request of any of the parties, to determine that the arbitral tribunal should be composed of three arbitrators (see A/CN.9/704/Add.6). No support was expressed for that proposal.

53. The Committee adopted the substance of draft article 7 without modification.

Appointment of arbitrators (draft articles 8-10)

Draft article 8

54. The Committee adopted the substance of draft article 8 without modification.

Draft article 9*Paragraph 1*

55. It was said that draft article 9, paragraph 1, did not provide for the possibility of consultation between the arbitrators and the parties prior to choosing the presiding arbitrator. In order to avoid draft article 9 being construed as precluding such consultation, which was said to occur in practice, it was proposed to amend the second sentence of draft article 9, paragraph 1, as follows: “The two arbitrators thus appointed shall, after consultation with the parties should the arbitrators so decide, choose the third arbitrator who will act as presiding arbitrator of the arbitral tribunal.”

56. The need to amend paragraph 1 as proposed was questioned. It was said that, while consultations occurred in practice, international arbitral institutions did not provide in the text of their arbitration rules for such consultations. It was also suggested that, before adding such language, more precision was required as to how the arbitrators would carry out such consultations. In response to concern that such consultations between parties and arbitrators could create issues with regard to the duty of impartiality and independence of the arbitrators, the Committee agreed that such consultations should not be considered an infringement of that duty. It was further pointed out that codes of ethics for arbitrators, such as the IBA Rules of Ethics for International Arbitrators⁷ or the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes⁸ provided in substance that in arbitrations in which the two party-appointed arbitrators were expected to appoint the third arbitrator, each party-appointed arbitrator might consult with the party who appointed him or her concerning the choice of the third arbitrator.

57. After discussion, the Committee adopted the substance of paragraph 1 without modification.

Paragraph 2

58. The Committee adopted the substance of paragraph 2 without modification.

Paragraph 3

59. It was pointed out that paragraph 3 (pursuant to which the presiding arbitrator was to be appointed in the same way as a sole arbitrator would be appointed under draft article 8, paragraph 2), appropriately referred to “article 8, paragraph 2”. In order to capture in draft article 9, paragraph 3, also the important rule of draft article 8, paragraph 1, according to which the appointing authority should act “at the request of a party”, it was proposed that the reference in the last sentence of draft article 9, paragraph 3, should be to article 8 and not only to article 8, paragraph 2. The proposal to delete the words “, paragraph 2” was adopted and, with that modification, the Committee adopted the substance of paragraph 3.

⁷ Available at the date of this report from www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

⁸ Available at the date of this report from www.abanet.org/dispute/commercial_disputes.pdf.

Draft article 10

60. It was noted that the principle in paragraph 3 that the appointing authority should appoint the entire arbitral tribunal when parties were unable to do so was an important principle, in particular in situations like the one that had given rise to the case *BKMI and Siemens v. Dutco*.⁹ It was stated that the decision in the *Dutco* case had been based on the requirement that parties received equal treatment, which paragraph 3 addressed by shifting the appointment power to the appointing authority. In that light, a proposal was made to insert at the end of paragraph 3 the words “while respecting the equality of the parties”.

61. The Committee agreed that party equality was one of the fundamental principles of arbitration to also be observed by the appointing authority. However, it was noted that the shifting of all appointing power to the appointing authority safeguarded the principle of equality of the parties. The Committee concluded that there was no need to add such language in the Rules.

62. After discussion, the Committee adopted the substance of draft article 10 without modification.

Disclosures by and challenge of arbitrators (draft articles 11-13)**Draft article 11**

63. It was proposed to include language in draft article 11 that would relieve an arbitrator of his or her obligation to disclose circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence where those circumstances were already known to the parties. That proposal received little support. It was said that that situation was already addressed by both draft article 12, paragraph 2, which gave a party the right to challenge the arbitrator appointed by it only for reasons of which it became aware after the appointment had been made, and draft article 13, paragraph 1, which included a time limit of 15 days for a party to challenge an arbitrator after the circumstances became known to it.

64. Another proposal was to qualify the standard of “circumstances likely to give rise to justifiable doubts” by including the words “in the view of an impartial third party” after the words “justifiable doubts”. That proposal did not find support.

65. After discussion, the Committee adopted the substance of draft article 11 without modification.

Draft article 12

66. The Committee adopted the substance of draft article 12 without modification.

Draft article 13

67. With a view to limiting frivolous challenges, a proposal was made to include at the end of paragraph 2 the following words: “and, as far as possible, the documents and the evidence on which the challenge is based”. Another proposal was made to require the appointing authority to state the grounds on which its decision

⁹ *BKMI and Siemens v. Dutco*, French Court of Cassation, 7 January 1992 (see *Revue de l'Arbitrage*, 1992, p. 470).

on challenge of arbitrator was made. A further proposal was made to include the words “within a reasonable time” at the end of paragraph 4 to avoid needless prolongation of the proceedings if the appointing authority was not sufficiently responsive. Those proposals did not find support.

68. It was noted that draft article 2 provided a general rule of interpretation, according to which periods of time stipulated in the Rules “begin to run on the day following the day when a notice, notification, communication or proposal is received”. It was further noted that draft article 13, paragraph 4, however, referred to the “date of the notice of challenge” rather than the date of its receipt as the starting point for the calculation of the time period. The Committee confirmed that the starting date in draft article 13, paragraph 4, was correctly stated for the purposes of draft article 13, paragraph 4.

69. The Committee adopted the substance of draft article 13 without modification.

Replacement of an arbitrator

Draft article 14

70. The Committee adopted the substance of draft article 14 without modification.

Repetition of hearings in the event of the replacement of an arbitrator

Draft article 15

71. The Committee adopted the substance of draft article 15 without modification.

Exclusion of liability

Draft article 16

72. The Committee considered draft article 16, which aimed at establishing immunity for the participants in the arbitration and sought to preserve exoneration in cases where the applicable law allowed contractual exoneration from liability, to the fullest extent permitted by such law, save for intentional wrongdoing.

73. The Committee recalled that the purpose of the provision was to ensure that arbitrators were protected from 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. It was also recalled that a waiver “to the fullest extent permitted under the applicable law” did not and should not extend to intentional wrongdoing.

74. It was stated that the existence of liability was regulated by the applicable law and not by the agreement between the parties. The Rules, it was further said, were an agreement between the parties. Therefore, the question was raised whether draft article 16 should be amended so as to avoid creating the impression that it regulated the existence of liability, and focus instead on the allocation of its consequences between the parties.

75. It was further said that draft article 16 might give rise to differing interpretations, in particular the proviso “save for intentional wrongdoing” might be interpreted differently in various jurisdictions. Also, the view was expressed that

that proviso might create the impression that the Rules created liability even if there was no such liability under the applicable law.

76. A proposal was made to address those concerns along the lines of: “The parties waive, to the extent permitted under the applicable law, any claim that they may have under that law against the arbitrators, ...”. That proposal did not receive support. The Committee agreed that even though the liability regime differed depending on the applicable law, “intentional wrongdoing” was a concept that would be understandable to judges in different jurisdictions.

77. The Committee noted that the Secretary-General of the PCA was mentioned as being among those against whom parties would waive liability under the revised Rules. However, according to the comments of the Court, it already enjoyed immunity against legal process under various agreements and international conventions. The Committee agreed to delete the words “the Secretary-General of the PCA” in draft article 16 for the reason that a specific waiver under the revised Rules was unnecessary for the Court.

78. After discussion, the Committee adopted the substance of draft article 16 with the modification contained in paragraph 77 above.

Section III. Arbitral proceedings

General provisions

Draft article 17

Paragraph 1

79. It was noted that the Working Group had agreed to delete the word “full” that appeared before the word “opportunity” in article 15, paragraph 1, of the 1976 version of the Rules (corresponding to draft article 17, paragraph 1), in recognition of the fact that the phrase “a full opportunity” could be invoked to delay proceedings or otherwise misused and that it might be more appropriate simply to refer to “an opportunity”.

80. A suggestion was made to include the word “reasonable” or “adequate” before the word “opportunity” in paragraph 1. Objections were made to that suggestion on the ground that it might be interpreted as weakening the ability of parties to present their case. It was also pointed out that the word “opportunity” appeared under various provisions of the Rules and the use of the word “reasonable” before the word “opportunity” in draft article 17, paragraph 1, would create a discrepancy with those other provisions.

81. Strong support was expressed for the inclusion of the word “reasonable” before the word “opportunity” on the ground that it corresponded to a commonly used and well-accepted standard.

82. After discussion, the Committee agreed to replace the word “an” appearing before the word “opportunity” in the first sentence of paragraph 1 with the words “a reasonable”. The Committee adopted the substance of paragraph 1 with that modification.

Paragraph 2

83. It was noted that paragraph 2 provided for the power of the arbitral tribunal to change “any period of time”. A suggestion was made to except from that power extension of the period of time for issuing an award, as certain domestic legislation prohibited any such extension. Accordingly, it was suggested to add at the end of paragraph 2 the words “provided that this does not include the power to alter the period of time for issuing the award”. That suggestion did not receive support. It was explained that draft article 1, paragraph 3, of the Rules contained a general reservation stating that the Rules might not derogate from mandatory provisions of the law applicable to the arbitration, and that provision appropriately addressed that concern.

84. After discussion, the Committee adopted the substance of paragraph 2 without modification.

Paragraph 3

85. The Committee adopted the substance of paragraph 3 without modification.

Paragraph 4

86. A proposal was made to place the provision of paragraph 4, which dealt with all communications, as a new paragraph of draft article 2. It was further proposed to delete from draft articles 20, paragraph 1, 21, paragraph 1, 37, paragraph 1, and 38, paragraph 1, the notification requirement they contained since draft article 17, paragraph 4, it was said, already addressed the matter. Those proposals did not receive support.

87. The Committee considered paragraph 4 in the light of its decision to delete draft article 26, paragraph 9 (see paras. 121-125 below). In order to preserve the possibility for a party to apply to the arbitral tribunal for a preliminary order, it was proposed to modify draft article 17, paragraph 4, as follows:

“All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties except if delayed communication to the other party is necessary so that the arbitral tribunal can consider, when it is otherwise authorized to do so, a party’s request that it issue a preliminary order directing the other party not to frustrate the purpose of a requested interim measure while the tribunal considers that request.”

88. It was pointed out that there were other instances where communications by a party could not be sent at the same time to the other parties. An example was the situation where arbitral institutions required that all communications be sent through them. With the aim of adopting a broader approach to possible exceptions to the requirement of simultaneous communication, a proposal was made to delete the words “at the same time” from paragraph 4. An alternative proposal was made to amend paragraph 4 as follows:

“All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties, except as otherwise permitted by the arbitral tribunal.”

89. The alternative proposal received support. It was proposed to add at the end of the alternative proposal the words “or by applicable law”. That proposal received some support, as it was seen as a safeguard and a limit to the possibility for delayed communications.

90. However, it was suggested that that inclusion might import in the Rules application of domestic law principles that might not be desirable, in particular in those instances where the laws did not contain limitations to delayed communications.

91. In order to avoid any ambiguity as to the fact that the exception applied only to the timing of communication, it was suggested to divide the alternative proposal into two sentences along the lines of:

“All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Except as otherwise permitted by the arbitral tribunal, all such communications shall be made at the same time.”

92. In response to concerns expressed by a few delegations on the alternative proposal, it was stated that the alternative proposal was not meant to affect the question whether an arbitral tribunal was authorized to issue orders without hearing parties. In that respect, one delegation recalled that draft article 17, paragraph 1, required the arbitral tribunal to treat the parties with equality and to provide a fair and efficient process for resolving their dispute. With a view to clarifying that the Rules remained neutral by reference to applicable law as to whether the arbitral tribunal had the power to permit delayed communications, a suggestion was made to amend the second sentence of the alternative proposal so that paragraph 4 would read as follows:

“All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.”

The Committee adopted that suggestion.

93. The Committee adopted the substance of paragraph 4 as it appeared in paragraph 92 above.

Paragraph 5

94. The Committee considered paragraph 5, which allowed the arbitral tribunal to join a third party in the arbitration, under certain circumstances. It was pointed out that paragraph 5 provided that if a joinder would prejudice any of the parties, the provision gave the tribunal the possibility to deny it. It was said that joining a third person might deprive that person of its right to participate in the constitution of the arbitral tribunal. In that respect, it was clarified that the possible impact of the joinder on the validity or the enforceability of the award was a matter to be taken into account by the arbitral tribunal when assessing whether the joinder would cause prejudice to any of the parties.

95. After discussion, the Committee adopted the substance of paragraph 5 without modification.

Place of arbitration**Draft article 18**

96. It was said that draft article 18, paragraph 1, of the Rules stated that “the award shall be deemed to have been made at the place of arbitration”, and it was clarified that when the Rules were used by intergovernmental organizations, including the United Nations and its subsidiary organs, the reference to the place of arbitration should not be interpreted as a waiver of the organizations’ privileges and immunities. It was said that the United Nations and its subsidiary organs were not subject to local laws, including procedural laws concerning the conduct of the arbitration proceedings.

97. The Committee confirmed the decision made by the Working Group to retain the phrase “place of arbitration”, and adopted the substance of draft article 18 without modification.

Language**Draft article 19**

98. The Committee adopted the substance of draft article 19 without modification.

Statement of claim**Draft article 20***Paragraph 1*

99. As a matter of drafting, it was proposed to add the words “referred to” in the second sentence of paragraph 1 before the words “in article 3”. That proposal was adopted by the Committee and, with that modification, the Committee adopted the substance of paragraph 1.

Paragraphs 2 and 3

100. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Paragraph 4

101. A suggestion was made to complement paragraph 4 with a text providing that in case documents could not be submitted with the statement of claim, the statement of claim should provide explanation and an indication as to when the missing document could be made available. That suggestion did not receive support as it was considered overregulating the matter.

102. The Committee adopted the substance of paragraph 4 without modification.

Statement of defence**Draft article 21***Paragraph 1*

103. As a matter of drafting, the Committee agreed to include the words “referred to” before the reference to “article 4” in the second sentence of draft article 21,

paragraph 1. With that modification, the Committee adopted the substance of paragraph 1.

Paragraphs 2 and 3

104. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Paragraph 4

105. It was noted that paragraph 4 provided that draft article 20, paragraphs 2 and 4, applied to a counterclaim and a claim relied on for the purpose of a set-off. It was suggested that a reference to draft article 20, paragraph 3, be added to cater for the situation where a counterclaim or claim for the purpose of a set-off would be based on a contract or legal instrument different from the one submitted by the claimant in the statement of claim.

106. It was also proposed to include the phrase “, a claim under article 4, paragraph 2 (f),” after the words “a counterclaim”, in order to address the situation in which a respondent would have formulated a claim against a party to the arbitration agreement other than the claimant.

107. Both proposals received broad support and the Committee adopted the substance of paragraph 4 with the modifications contained in paragraphs 105 and 106 above.

Amendments to the claim or defence

Draft article 22

108. The Committee adopted the substance of draft article 22 without modification.

Pleas as to the jurisdiction of the arbitral tribunal

Draft article 23

Paragraph 1

109. It was noted that the phrase “shall have the power to rule” contained in article 21, paragraph 1, of the 1976 Rules had been replaced with the words “may rule” in draft article 23 of the revised Rules, which might be interpreted as weakening the power of the arbitral tribunal with respect to decisions on its own jurisdiction. It was explained that the modification had been made for the purpose of aligning the language of the Rules with that of the UNCITRAL Model Law on International Commercial Arbitration.¹⁰ While it was acknowledged that the words “may rule” were appropriate in the context of a legislative text, it was said that the wording of the 1976 version of the Rules should be retained as it better expressed the power granted to the arbitral tribunal under a text of a contractual nature such as the Rules. It was agreed to revert to the language in the 1976 version of the Rules and to replace in the first sentence of paragraph 1 the word “may” appearing before

¹⁰ See article 16, paragraph 1, of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006 (United Nations publication, Sales No. E.08.V.4).

the word “rule” with the words “shall have the power to”. With that modification, the Committee adopted the substance of paragraph 1.

Paragraphs 2 and 3

110. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Further written statements

Draft article 24

111. It was clarified that draft article 24, which dealt with further written statements that might be required from the parties, was meant to be a provision of a general nature and to include the possibility for the arbitral tribunal to require a response by the claimant to a counterclaim or claim for the purpose of a set-off.

112. The Committee adopted the substance of draft article 24 without modification.

Periods of time

Draft article 25

113. It was said that the possibility for the arbitral tribunal to extend time limits provided for in the second sentence of draft article 25 if it considered that an extension was justified defeated the purpose of the first sentence of that provision, which was to determine a maximum time limit of 45 days for the communication of written statements. Therefore, it was proposed to also provide for a time limit with respect to extension of time limits that might be decided by the arbitral tribunal. That proposal did not receive support.

114. The Committee adopted the substance of draft article 25 without modification.

Interim measures

Draft article 26

Paragraph 1

115. The Committee adopted the substance of paragraph 1 without modification.

Paragraph 2

116. As a matter of drafting, it was agreed to replace the words “to, including, without limitation:” appearing in the chapeau of paragraph 2 with the words “, for example and without limitation, to:”.

117. With respect to paragraph 2 (c), which allowed the arbitral tribunal to order a party to provide a means of preserving assets out of which a subsequent award might be satisfied, it was said that the property and assets of the United Nations were immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action pursuant to article II, section 3, of the Convention on the Privileges and Immunities of the United Nations.¹¹ It was further said that such immunity was

¹¹ General Assembly resolution 22 A (1).

absolute and might not be disposed of by any court or tribunal. In that regard, it was clarified that paragraph 2 (c) was not intended to affect the regime of privileges and immunities of the United Nations.

118. With regard to state entities, a proposal was made to add to paragraph 2 (c) wording along the lines of: “nothing regarding that paragraph should be construed as derogating from the law on state immunity from execution”. A proposal was made to include a general provision to the effect that nothing in the Rules should be implied as a waiver of state immunities. After discussion, the Committee agreed that such addition to paragraph 2 (c) was not appropriate in view of the generic nature of the Rules. It was also said to be unnecessary as nothing in the Rules was intended to affect the system of immunities and privileges of States and state entities.

119. After discussion, the Committee adopted the substance of paragraph 2 with the modification referred to in paragraph 116 above.

Paragraphs 3-8

120. The Committee adopted the substance of paragraphs 3-8 without modification.

Paragraph 9

121. The Committee recalled that, pursuant to chapter IV A of the Model Law on Arbitration with amendments as adopted in 2006,¹² preliminary orders might be granted by an arbitral tribunal upon request by a party, without prior notice of the request to any other party, in the circumstances where it considered that prior disclosure of the request for the interim measure to the party against whom it was directed risked frustrating the purpose of the measure. The Committee further recalled the extensive discussions in the Working Group that had resulted in the adoption of paragraph 9. It was recalled that there were diverging views in the Working Group with respect to preliminary orders.

122. It was explained that the Working Group had agreed to the inclusion of paragraph 9 on the basis that it clarified that it would not be possible for an arbitral tribunal to grant preliminary orders in legal systems that did not allow them and that the power to grant preliminary orders had to be found outside these Rules. It was further explained that the text of draft paragraph 9 had been initially drafted for insertion in explanatory material accompanying the Rules.

123. It was suggested to delete paragraph 9 on the basis that its drafting was unclear, did not provide a rule and was unnecessary.

124. In support of retaining paragraph 9, it was stated that paragraph 9 reflected existing practice and promoted a neutral approach to the question of preliminary orders. It was also pointed out that draft article 17, paragraph 4, which required that all communications to the arbitral tribunal by one party be at the same time communicated to all other parties, contained a reference to draft article 26, paragraph 9 (see para. 93 above). It was stated that deletion of paragraph 9 would disassemble a carefully crafted compromise, which was seen as reconciling the diverging views expressed in the Working Group on the question of preliminary orders.

¹² United Nations publication, Sales No. E.08.V.4.

125. After discussion, the Committee agreed to delete paragraph 9.

Paragraph 10

126. The Committee adopted the substance of paragraph 10 without modification.

Evidence

Draft article 27

127. In response to a suggestion to include in draft article 27 a provision regarding the possibility of cross-examining witnesses, it was clarified that there were no restrictions under draft article 27 as to the manner in which witnesses might be examined. That suggestion did not receive support.

128. After discussion, the Committee adopted the substance of draft article 27 without modification.

Hearings

Draft article 28

Paragraphs 1-3

129. The Committee adopted the substance of paragraphs 1-3 without modification.

Paragraph 4

130. A suggestion was made to add language at the end of paragraph 4 to clarify that examination of witnesses or experts in a manner that would not require their physical presence should be justified by specific circumstances. In response to that suggestion, it was said that it might not be appropriate to provide for such a restriction in the light of technological developments in the field of communication.

131. After discussion, the Committee adopted the substance of paragraph 4 without modification.

Experts appointed by the arbitral tribunal

Draft article 29

132. The Committee adopted the substance of draft article 29 without modification.

Default

Draft article 30

133. In response to a question whether there could be any inconsistency between draft article 30, paragraph 1 (b), and draft article 32, it was explained that those two provisions dealt with different matters: draft article 30, paragraph 1 (b), addressed matters pertaining to the substance of the case, whereas draft article 32 related to matters of a procedural nature.

134. The Committee adopted the substance of draft article 30 without modification.

Closure of hearings**Draft article 31**

135. In paragraph 1, a drafting suggestion was made to replace the word “or” appearing before the word “witnesses” with the word “including”, as witnesses were a mode of proof. That proposal did not receive support.

136. The Committee adopted the substance of draft article 31 without modification.

Waiver of right to object**Draft article 32**

137. The Committee adopted the substance of draft article 32 without modification.

Section IV. The award**Decisions****Draft article 33**

138. It was suggested to modify draft article 33 to the effect that, in the absence of a majority, the award could be made by the presiding arbitrator alone. In response, the Committee recalled the extensive discussion in the Working Group that had led to the current text of the provision. Since the proposed change continued to provoke a division of opinion, it was not agreed to.

139. After discussion, the Committee adopted the substance of draft article 33 without modification.

Form and effect of the award**Draft article 34***Paragraph 1*

140. The Committee adopted the substance of paragraph 1 without modification.

Paragraph 2

141. The Committee considered paragraph 2 and noted that it was one of the provisions on which the Working Group did not reach agreement during the third reading of the draft revised Rules.

142. The Committee adopted the substance of the first two sentences of paragraph 2. The discussion focused on the third sentence, which contained a waiver to recourse.

143. While some support was expressed for spelling out the recourses that were excluded from the scope of the waiver, it was also felt that the language proposed might create ambiguity regarding the scope of the waiver, in particular with regard to whether the waiver encompassed the ability to resist enforcement of an award. It was proposed to replace the third sentence of paragraph 2 with a formulation along the lines of rule 28, paragraph 6, of the Rules of Arbitration of the International

Chamber of Commerce (ICC)¹³ or rule 26.9 of the Arbitration Rules of the London Court of International Arbitration (LCIA),¹⁴ which provided in substance that the parties waived their rights insofar as such waiver could validly be made, without defining the specific recourses waived.

144. It was also said that it would not be possible to accurately list the exceptions to the waiver as proposed in paragraph 2, as such list would have to cover all forms of recourse that might not be waived in all legal systems. Following that approach, a proposal was made to amend the third sentence of paragraph 2 as follows: “Insofar as they may validly do so by adopting these Rules, the parties waive their right to any form of appeal or review of an award to any court or other competent authority.”

145. The concern was expressed that a general waiver without any qualifications might be ineffective and would not provide sufficient guidance to the parties. Parties might not be aware that certain forms of recourse could not be waived in most legal systems. In the few systems where a waiver was possible, various requirements had to be met for the waiver to be valid, depending on the applicable law. An alternative proposal was made to modify the third sentence of paragraph 2 as follows: “The parties waive their right to any form of appeal, review or recourse against an award to any court or other competent authority that may be waived under the applicable law, and the waiver of which does not require a specific agreement.”

146. Another concern was expressed regarding the consequence that such a general waiver might entail for the privileges and immunities of sovereign entities or intergovernmental organizations when using the UNCITRAL Arbitration Rules. It was pointed out that the provision on waiver of recourses should not be deemed a waiver, express or implied, of any of the privileges and immunities of sovereign entities or of intergovernmental organizations, including the United Nations and its subsidiary organs.

147. In view of the difficulties in properly defining the limits of the waiver, and on the basis that that matter should be left to be addressed by applicable law, a proposal was made to delete the third sentence from paragraph 2 and to place its substance in an annex to the Rules, following the draft model arbitration clause for contracts. That proposal was adopted by the Committee with the waiver statement reading as follows: “The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.”

148. It was further proposed to include the waiver statement under the draft model arbitration clause for contracts, as an additional item that the parties should consider adding. In support of that approach, it was said that such a waiver provision in the model arbitration clause would be a useful reminder for the parties to explicitly waive recourses. However, it was said that the matters listed under the model arbitration clause related to basic procedural aspects, such as the number of arbitrators, place of arbitration and language. It was pointed out that the waiver

¹³ Available at the date of this report from www.iccwbo.org/court/arbitration/id4093/index.html.

¹⁴ Available at the date of this report from www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx.

statement was of a different nature, and it would be useful to provide some guidance to the parties on the effect of that statement and its interplay with applicable laws.

149. Therefore, it was proposed to place the waiver statement following the draft model arbitration clause with the heading “Possible waiver statement” and to add a note before the waiver statement along the lines of: “If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering however that the effectiveness and conditions of such an exclusion depend on the applicable law.” Support was expressed for that proposal.

150. Concern was expressed that not including the waiver in the model arbitration clause might diminish its importance for the users of the Rules. In response, it was said that both the waiver and the model arbitration clause were placed in the annex to the Rules and thus both were optional to the parties.

151. After discussion, the Committee agreed to delete the third sentence of paragraph 2 and to include the “possible waiver statement” following the draft model arbitration clause in the annex to the Rules as provided for in paragraphs 147 and 149 above.

Paragraphs 3-6

152. With respect to paragraph 5, which regulated conditions of publication of an award, it was said that as a means of ensuring the adequate protection of the privileges and immunities of the United Nations, including its subsidiary organs, the Organization generally provided that, when required by law, a third party was allowed to disclose certain information pertaining to the United Nations, subject to and without any waiver of the privileges and immunities of the United Nations. For that reason, third parties were generally required to give the United Nations sufficient prior notice of a request for the disclosure of such information in order to allow the United Nations to take protective measures or such other action as might be appropriate before any such disclosure was made. It was clarified that paragraph 5 should not be interpreted as a limitation on the United Nations ability to impose restrictions on the disclosure of information against its privileges and immunities.

153. The Committee adopted the substance of paragraphs 3-6 without modification.

Applicable law, *amiable compositeur*

Draft article 35

Paragraph 1

154. It was pointed out that the reference in the second sentence of paragraph 1 to “the law” that the arbitral tribunal determined to be appropriate in the absence of an express choice of the parties could be interpreted as excluding the arbitral tribunal’s power to apply “rules of law”. It was said that such an approach would differ from the solutions adopted by rules of other international arbitration institutions (such as art. 17, para. 1, of the ICC Rules, article 22.3 of the LCIA Rules or art. 33, para. 1 of the Swiss Rules of International Arbitration).¹⁵ It was suggested to amend the

¹⁵ Available at the date of this report from www.sccam.org/sa/en/rules.php.

second sentence of draft article 35, paragraph 1, as follows: “Failing such designation by the parties, the arbitral tribunal shall apply the law or rules of law which it determines to be appropriate.”

155. In response, it was explained that paragraph 1 was meant to increase the parties’ and the arbitral tribunal’s flexibility in determining the applicable law. It was noted that, while under the corresponding provision of the 1976 version of the UNCITRAL Arbitration Rules¹⁶ the parties were expected to choose the “law” to be applied to the merits of the dispute, under the draft revised version they would be allowed to choose “rules of law”, a phrase generally understood to mean any body of rules, not necessarily emanating from a State. It was further noted that, regarding the arbitral tribunal’s choice of the applicable law in case the parties had not made a choice themselves, the 1976 version of the Rules instructed the tribunal to choose the governing law by applying conflict-of-laws rules that it considered applicable. It was explained that the draft revised version did not mention conflict-of-laws rules, thereby enhancing flexibility. It was also said that the decision of the Working Group not to give to the arbitral tribunal the discretion to designate “rules of law” where the parties had failed to make a decision regarding the applicable law was the result of careful consideration.

156. It was also stated that, in any case, parties and the arbitral tribunal were not completely free to choose the applicable law. It was explained that the validity and enforceability of the award depended on the applicable law and on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)¹⁷ (the New York Convention). For instance, under article V of the New York Convention, an award was invalid or unenforceable if a party to the arbitration agreement was under some incapacity under its law, if the award was on a matter that was not arbitrable under the law applied by the court or if it conflicted with the public policy of the forum. It was highlighted that relevant laws regarding legal capacity, arbitrability and public policy should be taken into consideration.

157. After discussion, the Committee adopted the substance of paragraph 1 without modification.

Paragraphs 2 and 3

158. The Committee adopted the substance of paragraphs 2 and 3 without modification.

Settlement or other grounds for termination

Draft article 36

159. The Committee adopted the substance of draft article 36 without modification.

Interpretation of the award

Draft article 37

160. The Committee adopted the substance of draft article 37 without modification.

¹⁶ See article 33, paragraph 1, of the 1976 UNCITRAL Arbitration Rules.

¹⁷ United Nations, *Treaty Series*, vol. 330, No. 4739.

Correction of the award**Draft article 38**

161. The Committee adopted the substance of draft article 38 without modification.

Additional award**Draft article 39**

162. The Committee adopted the substance of draft article 39 without modification.

Definition of costs**Draft article 40**

163. It was noted that the definition of costs contained in draft article 40, paragraph 2 (f), referred to “any fees and expenses of the appointing authority”, but only to “the expenses” of the Secretary-General of the PCA. It was suggested to add the word “fees” in the reference to the Secretary-General of the PCA in that paragraph. That suggestion received support and, with that modification, the Committee adopted the substance of draft article 40.

Fees and expenses of arbitrators**Draft article 41**

164. The Committee considered draft article 41 and noted that paragraphs 3 and 4 had not been fully considered by the Working Group during the third reading of the draft revised Rules.

Paragraph 1

165. The Committee adopted the substance of paragraph 1 without modification.

Paragraph 2

166. It was observed that the words “has been agreed upon by the parties or designated by the Secretary-General of the PCA, and if that authority” appearing in paragraph 2 could be deleted as they were viewed as redundant. That proposal received support. It was further proposed to replace the word “an” appearing before the words “appointing authority” at the beginning of paragraph 2 with the word “the” for the sake of clarity. Concern was expressed that those proposals would not be consistent with the fact that an appointing authority would not necessarily be designated in each case. To accommodate that concern, it was proposed to begin paragraph 2 with the words “If there is an appointing authority and it applies”. That proposal received broad support. The Committee adopted the substance of paragraph 2 with the aforementioned modification.

Paragraph 3

167. The Committee adopted the substance of paragraph 3 without modification.

Paragraph 4

168. As a matter of principle, the question was raised whether the cost review mechanism designed under draft article 41 should be included in the Rules, as it might be seen as introducing complexities, and might give rise to abuse by losing parties that might seek review of fees to delay enforcement of an award. It was further said that the review mechanism would only address a situation rarely occurring in practice. In response, it was said that the review mechanism included in paragraph 4 would promote confidence in arbitration, that the risk of abuse was countered by the fact that the review did not affect any determination in the award, that paragraph 4 constituted the best compromise reached after extensive discussion in the Working Group and that the review mechanism would make the Rules attractive for users.

169. After discussion, the Committee agreed on the principle of including a cost review mechanism in the Rules and turned its attention to the drafting of paragraph 4 with a view to simplifying it.

170. It was noted that the second and third sentences of paragraph 4 were not consistent as the second sentence dealt with the hypothesis of the non-existence of an appointing authority whereas the third sentence, by referring to draft article 6, paragraph 4, dealt with the situation where the appointing authority refused or failed to act. It was suggested that those words should be deleted along with the second sentence of draft article 6, paragraph 4, and that the second sentence of paragraph 4 be modified along the lines of: “Within 15 days of receiving the arbitral tribunal’s determination of fees and expenses, any party may refer for review such determination to the appointing authority, or if no appointing authority has been agreed upon or designated or if the appointing authority refuses or fails to make any decision, to the Secretary-General of the PCA.”

171. It was further proposed to delete the words “pursuant to article 38” at the end of paragraph 4 and to add a sentence at the end of paragraph 4 along the lines of “Article 38, paragraph 3, shall apply.”, which would clarify that the adjustments to be made on the fees and expenses were not errors or omissions in the sense of draft article 38, but that the procedure of draft article 38, paragraph 3, applied.

172. After discussion, the Committee adopted the substance of paragraph 4 as follows:

“4. (a) When informing the parties of the arbitrators’ fees and expenses that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;

“(b) Within 15 days of receiving the arbitral tribunal’s determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA;

“(c) If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal’s determination is inconsistent with the arbitral tribunal’s proposal (and any adjustment thereto) under paragraph 3 or is

otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;

“(d) Any such adjustments shall either be included by the tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of article 38, paragraph 3, shall apply.”

Deposit for the payment of the fee review

173. Concern was expressed that draft article 41, paragraph 4, did not provide for the payment of the costs incurred by the appointing authority or the Secretary-General of the Permanent Court of Arbitration for their review of the arbitrator's fees and expenses. In that regard, it was proposed to include an additional paragraph following paragraph 4 along the lines of:

“A party referring for review, under paragraph 4, the arbitral tribunal's determination of fees and expenses shall at the time of such referral deposit with the reviewing authority a sum, to be determined by the reviewing authority to cover the estimated cost of such review. Any excess amount shall be determined by the reviewing authority at the completion of the review.”

Some support was expressed for the inclusion of such a provision on the ground that the payment of a deposit would deter parties from making frivolous requests for review.

174. After discussion and particularly in view of the agreed additions to paragraph 6 (see para. 177 below), the Committee agreed that it was not necessary to include a provision on a deposit for the costs of the reviewing authorities.

Paragraph 5

175. The Committee adopted the substance of paragraph 5 without modification.

Paragraph 6

176. It was said that the cost review mechanism could delay the arbitral proceedings and might go beyond the scope of a review on the costs of the arbitrators only. To address the concern that the cost review might delay the recognition and enforcement of the award, it was proposed to include a second sentence in paragraph 6 along the lines of: “If an award containing the tribunal's determination of its fees and expenses is referred for review pursuant to paragraph 4, all provisions in the award other than those that relate to the determination of fees and expenses shall, to the maximum extent authorized by applicable law, be subject to immediate recognition and enforcement.”

177. That proposal received support and, with a view to simplifying its drafting, the Committee agreed to add at the end of paragraph 6 the words “; nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal's fees and expenses”. With that modification, the Committee adopted the substance of paragraph 6.

Allocation of costs**Draft article 42**

178. The question was raised whether the words “any other award” appearing in paragraph 2 should be replaced with the words “any other decision”, so as to align the wording of that paragraph with the term used in draft article 40, paragraph 1. In response, it was explained that draft article 42 dealt with the determination of amounts that a party might have to pay to another party as a result of the decision on allocation of costs, and that decision was to be found in an award.

179. After discussion, the Committee adopted the substance of draft article 42 without modification.

Deposit of costs**Draft article 43**

180. The Committee adopted the substance of draft article 43 without modification.

Placement of the draft model arbitration clause for contracts and the model statements of independence pursuant to article 11 of the Rules

181. The Committee agreed to place the draft model arbitration clause for contracts and the draft model statements of independence pursuant to article 11 of the Rules in an annex to the revised Rules and to include a reference to them in the table of contents of the revised Rules, as well as in a footnote to the corresponding articles referring to that annex.

Draft model arbitration clause for contracts

182. The Committee adopted the substance of the draft model arbitration clause for contracts without modification.

Draft model statements of independence pursuant to article 11 of the Rules

183. As a matter of drafting, the Committee agreed to delete the word “hereby” where that word appeared in the draft model statements of independence.

184. A proposal was made to include in the statements a reference to legal counsels, witnesses and experts, from which the arbitrator had to be independent. In response, it was said that such a statement would be difficult to make in relation to witnesses and experts, as they were not all known to the arbitrator at the time his or her statement would be made. Although some support was expressed for the inclusion of the legal counsels to the parties, the prevailing view was that such an inclusion might not be necessary as the statement was drafted in a broad manner, encompassing all circumstances likely to give rise to doubts as to the impartiality or independence of the arbitrators.

185. After discussion, the Committee adopted the substance of the draft statements of independence pursuant to article 11 of the Rules with the deletion of the word “hereby” where it appeared in the draft statements.

Note on a statement of availability of the arbitrator

186. It was also observed that the note on a statement of availability could be either requested by the parties or made by the arbitrator on his or her own motion. The Committee adopted the note on the draft statement on the availability of the arbitrator with the following modification to its chapeau: “Note. Any party may consider requesting from the arbitrator the following addition to the statement of independence:”.

C. Adoption of the UNCITRAL Arbitration Rules as revised in 2010

187. At its 910th meeting, on 25 June 2010, the Commission adopted the report of the Committee of the Whole and agreed that it should form part of the present report (see paras. 16-186 above). After considering the text of the draft revised Arbitration Rules (reproduced in annex I to this report), the Commission adopted the following decision:

“The United Nations Commission on International Trade Law,

“Recalling General Assembly resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

“Recalling General Assembly resolution 31/98 of 15 December 1976 recommending the use of the UNCITRAL Arbitration Rules,¹⁸

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

“Noting that the UNCITRAL Arbitration Rules are recognized as a very successful text and are used in a wide variety of circumstances covering a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions, in all parts of the world,

“Recognizing the need for revising the UNCITRAL Arbitration Rules to conform to current practices in international trade and to meet changes that have taken place over the last thirty years in arbitral practice,

“Believing that the UNCITRAL Arbitration Rules as revised in 2010 to reflect current practices will significantly enhance the efficiency of arbitration under the Rules,

“Convinced that the revision of the UNCITRAL Arbitration Rules in a manner that is acceptable to countries with different legal, social and economic systems can significantly contribute to the development of harmonious international economic relations,

¹⁸ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), chap. V, sect. C.*

“*Noting* that the preparation of the UNCITRAL Arbitration Rules as revised in 2010 was the subject of due deliberation and extensive consultations with Governments and interested circles and that the revised text can be expected to contribute significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of international commercial disputes,

“*Expressing* its appreciation to Working Group II (Arbitration and Conciliation) for formulating the UNCITRAL Arbitration Rules as revised in 2010,

“1. *Adopts* the UNCITRAL Arbitration Rules as revised in 2010 as they appear in annex I to the present report;

“2. *Recommends* the use of the UNCITRAL Arbitration Rules as revised in 2010 in the settlement of disputes arising in the context of international commercial relations;

“3. *Requests* the Secretary-General to make all efforts to ensure that the UNCITRAL Arbitration Rules as revised in 2010 become generally known and available.”

D. Possible recommendations to arbitral institutions and other interested bodies

188. The Commission had before it a note by the Secretariat on possible recommendations to arbitral institutions and other interested bodies with respect to the revised Rules (A/CN.9/705). The Commission recalled that, at its fifteenth session, in 1982, it had adopted “Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules”.¹⁹ The preparation of the Recommendations had been undertaken by the Commission to facilitate the use of the 1976 UNCITRAL Arbitration Rules in administered arbitration and to deal with instances where the Rules were adopted as institutional rules of an arbitral body or when the arbitral body was acting as appointing authority or provided administrative services in ad hoc arbitration under the Rules.

189. After discussion, the Commission agreed that similar recommendations to arbitral institutions and other relevant bodies should be issued with respect to the UNCITRAL Arbitration Rules as revised in 2010 in view of the extended role granted to appointing authorities. It was said that the recommendations would promote the use of the Rules and that arbitral institutions in all parts of the world would be more inclined to accept acting as appointing authorities if they had the benefit of such guidelines. The Commission also agreed that the recommendations on the revised Rules should follow the same pattern as the Recommendations adopted in 1982. The Commission entrusted the Secretariat with the preparation of that document, for consideration by the Commission at a future session.

¹⁹ Ibid., *Thirty-seventh Session, Supplement No. 17* and corrigenda (A/37/17 and Corr.1 and 2), paras. 74-85 and annex I.

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

190. With respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules.²⁰ The Commission entrusted its Working Group II (Arbitration and Conciliation) with the task of preparing a legal standard on that topic. The Commission was informed that, pursuant to the request received from the Commission at the forty-first session, the Secretariat had circulated a questionnaire to States with regard to their practice on transparency in investor-State arbitration and that replies thereto would be made available to the Working Group.

191. Support was expressed for the view that the Working Group could also consider undertaking work in respect of those issues which arose more generally in treaty-based investor-State arbitration and would deserve additional work. The prevailing view, in line with the decision previously made by the Commission, was that it was too early to make a decision on the precise form and scope of a future instrument on treaty-based arbitration and that the mandate of the Working Group should be limited to the preparation of rules of uniform law on transparency in treaty-based investor-State arbitration. However, it was agreed that, while operating within that mandate, the Working Group might identify any other topic with respect to treaty-based investor-State arbitration that might also require future work by the Commission. It was agreed that any such topic might be brought to the attention of the Commission at its next session, in 2011.

IV. Finalization and adoption of a draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property

A. Introduction

192. The Commission had before it: (a) the draft supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property (A/CN.9/700 and Add.1-7)); (b) the reports of the sixteenth (Vienna, 2-6 November 2009) and seventeenth (New York, 8-12 February 2010) sessions of Working Group VI (Security Interests) (A/CN.9/685 and A/CN.9/689, respectively); (c) chapter V of the report of Working Group V (Insolvency Law) on the work of its thirty-eighth session (New York, 19-23 April 2010) (A/CN.9/691), addressing the impact of insolvency of a licensor or licensee on a security right in that party's rights under a licence agreement; and (d) a note by the Secretariat transmitting comments of international organizations on the draft supplement (A/CN.9/701).

193. At the outset, the Commission expressed its appreciation to Working Group VI (Security Interests) for its work in the development of the draft supplement, to Working Group V (Insolvency Law) for its contribution to the development of the

²⁰ Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.

insolvency chapter of the draft supplement and to the Secretariat for its work in coordinating this work and preparing the documents for the session. The Commission also expressed its appreciation to all the organizations that have assisted Working Group VI in its work, in particular, to WIPO and to the Permanent Bureau of the Hague Conference on Private International Law.

194. The Commission also noted with appreciation the publication of the *UNCITRAL Legislative Guide on Secured Transactions*²¹ and a separate publication consisting of the terminology and recommendations of the *Guide*.²² Both texts had been adopted by the Commission at the second part of its fortieth session (Vienna, 10-14 December 2007).²³

B. Consideration of the draft supplement

195. With regard to the title of the supplement, the Commission agreed that it should be “UNCITRAL Legislative Guide on Secured Transactions. Supplement on Security Rights in Intellectual Property”. It was also agreed that the notes to the Commission at the beginning of each chapter of the draft supplement, which provided information about the relevant discussion by Working Group VI, would not need to be reproduced in the final version of the supplement. The Commission gave the Secretariat the mandate to make the necessary editorial changes to ensure consistency among the various chapters of the draft supplement and between the draft supplement and the *Guide*.

1. Preface and introduction (A/CN.9/700)

196. With respect to the preface, it was agreed that:

(a) The first sentence of the third paragraph should be revised to read along the following lines: “... the Secretariat organized, with the cooperation of WIPO, a colloquium ...”;

(b) In the third sentence of the fifth paragraph, after the phrase “organizations from the public and the private sector”, the phrase “which attended its meetings as observers” should be added.

197. With respect to the introduction, it was agreed that:

(a) At the end of the second sentence of paragraph 1 and the first sentence of paragraph 7, the phrase “as security for credit” should be added;

(b) The last sentence of paragraph 32 should be revised to read along the following lines: “the expression ‘transfer other than an outright transfer’ may denote the granting of rights from a licensor to a licensee where the licensor retains some control over the use of the intellectual property”;

²¹ United Nations publication, Sales No. E.09.V.12; also available at the date of this report from www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf.

²² United Nations publication, Sales No. E.09.V.13; also available at the date of this report from www.uncitral.org/pdf/english/texts/security-lg/e/Terminology-and-Recs.18-1-10.pdf.

²³ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part II, para. 100.

(c) At the end of the third sentence of paragraph 41, the phrase “with the consent of the licensor, if the licence agreement provides that the rights of Company D are non-transferable” should be added;

(d) At the end of the last sentence of paragraph 41, the phrase “to determine whether company D may grant a security right” should be added;

(e) Prior to paragraph 43, a subheading “Security rights in tangible assets with respect to which intellectual property is used” should be inserted to cover examples 6 and 7;

(f) The second and third sentences of paragraph 43 should be revised to read along the following lines: “This category of transactions, illustrated by examples 6 and 7 below, involve security rights in tangible assets. As discussed in the

draft supplement, a security right in a tangible asset does not automatically extend to the intellectual property used with respect to that asset, except if otherwise agreed by parties.”;

(g) The third sentence of paragraph 44 should be revised to read along the following lines: “Company F provides bank F with its trademark licence agreements evidencing its right to use the trademarks and to grant a security right in the trademarked inventory, and its obligations to the trademark owner.”;

(h) At the end of the second sentence of paragraph 45, the phrase “and that it has rights to grant a security right in those jeans” should be inserted;

(i) At the end of the second sentence of paragraph 48, the reference to “licensors or licensees” having exclusive rights should be deleted, as only owners had exclusive rights.

198. Subject to those changes, the Commission adopted the substance of the preface and the introduction.

2. Chapter I. Scope of application and party autonomy (A/CN.9/700/Add.1)

199. The Commission agreed that:

(a) In subparagraph (g) dealing with patents in paragraph 11, the word “patent” should be replaced with the word “invention”, as an inventor would invent the invention and not the patent;

(b) A subparagraph (h) should be added under patents in paragraph 11 to refer to “the transferability of patents and the right to grant a licence”;

(c) At the end of paragraph 17, text along the following lines should be added: “A State implementing the recommendations of the Guide may wish to address this question.”

200. Subject to those changes, the Commission adopted the substance of chapter I.

3. Chapter II. Creation of a security right in intellectual property (A/CN.9/700/Add.2 and recommendation 243)

201. It was agreed that paragraph 32 should be revised to refer to cars or other devices that included a copy of copyrighted software or design rights. It was also agreed that the word “product” at the end of the paragraph should be replaced with

the word “component”. Subject to those changes, the Commission adopted the substance of chapter II. The Commission also adopted recommendation 243 unchanged.

4. Chapter III. Effectiveness of a security right in intellectual property against third parties (A/CN.9/700/Add.3, paras. 1-9)

202. It was agreed that the fourth sentence of paragraph 9 should be revised to read along the following lines: “... a security right in intellectual property is treated as another type of (outright or conditional) transfer ...”. Subject to those changes, the Commission adopted the substance of chapter III.

5. Chapter IV. The registry system (A/CN.9/700/Add.3, paras. 10-52, and recommendation 244)

203. It was agreed that:

(a) In the fourth sentence of paragraph 13, the reference to “the Madrid Agreement concerning the International Registration of Marks (1891), the Madrid Protocol (1989)” should be deleted;

(b) After the words “For example” in the second sentence of paragraph 14, the phrase “the Madrid Agreement concerning the International Registration of Marks (1891) and the Protocol Relating to that Agreement (1989) provides for the possibility to record a restriction of the holder’s right of disposal in an international application or registration (see Form MM19 at www.wipo.int/madrid/en/forms/) and” should be inserted;

(c) Paragraph 29 should be revised to avoid unnecessarily emphasizing the fact that the general security rights registry provided less information and to clarify the advantages and disadvantages of such a general registry.

204. Subject to those changes, the Commission adopted the substance of chapter IV. The Commission also adopted recommendation 244 unchanged.

6. Chapter V. Priority of a security right in intellectual property (A/CN.9/700/Add.4 and recommendation 245)

205. The Commission agreed that the phrase in parenthesis at the end of paragraph 35 should be deleted. Subject to that change, the Commission adopted the substance of chapter V. The Commission also adopted recommendation 245 unchanged.

7. Chapter VI. Rights and obligations of the parties to a security agreement relating to intellectual property (A/CN.9/700/Add.5, paras. 1-5, and recommendation 246)

206. The Commission adopted the substance of chapter VI unchanged. The Commission also adopted recommendation 246 unchanged.

8. Chapter VII. Rights and obligations of third-party obligors in intellectual property financing transactions (A/CN.9/700/Add.5, paras. 6-7)

207. The Commission adopted the substance of chapter VII unchanged.

**9. Chapter VIII. Enforcement of a security right in intellectual property
(A/CN.9/700/Add.5, paras. 8-32)**

208. The Commission adopted the substance of chapter VIII unchanged.

**10. Chapter IX. Acquisition financing in an intellectual property context
(A/CN.9/700/Add.5, paras. 33-62, and recommendation 247)**

209. The Commission considered replacing the text in paragraphs 43-47 with a text that would clarify that a licensor or its secured creditor could obtain the benefits of an acquisition security right as it could register the licence or the security right in the relevant intellectual property registry before a secured creditor of the licensee. It was stated that that result would be achieved only if registration of security rights in future intellectual property was not permitted under the relevant specialized registration regime. It was also observed that, if such advance registration was permitted, the general financier of a licensee could obtain priority over an acquisition secured creditor of the licensor. After discussion, it was agreed that, while the proposed text contained an important element that could usefully be added to the text in paragraphs 43-47, it should not replace the text in those paragraphs. The Secretariat was authorized to make the necessary editorial amendments. Subject to that change, the Commission adopted the substance of chapter IX. The Commission also adopted recommendation 247 unchanged.

**11. Chapter X. Law applicable to a security right in intellectual property
(A/CN.9/700/Add.6, paras. 1-54, and recommendation 248)**

210. In addition to options A-D, the Commission considered the following options for recommendation 248:

“Option E

“248. The law should provide that, notwithstanding recommendations 208 and 218, in the case of a security right in intellectual property:

“(a) The law applicable to property issues relating to whether a security right in the intellectual property may be created [, such as whether the intellectual property right exists, whether the grantor has an interest in it, and whether and to whom that interest is transferable,] is the law of the State in which the intellectual property is protected;

“(b) Subject to paragraph (a), the law applicable to the creation of a security right in intellectual property is the law of the State in which the grantor is located;

“(c) The law applicable to the effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected; however, if rights in the intellectual property may not be registered in an intellectual property registry in the State in which the intellectual property is protected, the law applicable to the effectiveness against third parties and priority of the security right in the intellectual property as against another secured creditor or the grantor’s insolvency representative is the law of the State in which the grantor is located; and

“(d) The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located, provided that, with respect to sale or other disposition of the intellectual property, the law applicable to property issues relevant to the rights in the intellectual property created by the sale or other disposition is the law of the State in which the intellectual property is protected.

“*Option F*

“248. The law should provide that, notwithstanding recommendations 208 and 218, in the case of a security right in intellectual property:

“(a) The law applicable to property issues relating to whether a security right in the intellectual property may be created and the rights in the intellectual property created by enforcement of the security right is the law of the State in which the intellectual property is protected; [such property issues include those that determine whether the intellectual property right exists, whether the grantor has an interest in it, the transferability of the intellectual property and the requirements for creating a property right in the transferee upon disposition;]

“(b) Subject to paragraph (a), the law applicable to the creation and enforcement of a security right in intellectual property is the law of the State in which the grantor is located; and

“(c) The law applicable to effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected; however, if rights in the intellectual property may not be registered in an intellectual property registry in the State in which the intellectual property is protected, the law applicable to effectiveness against third parties and priority of the security right in the intellectual property as against another secured creditor or the grantor’s insolvency representative is the law of the State in which the grantor is located.

“*Option G*

“The law should provide that the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in intellectual property is the law of the State in which the intellectual property is protected. The law should in addition provide that a security right in intellectual property may also be created under the law of the State in which the grantor is located and made effective under that law against third parties other than another secured creditor, a transferee or a licensee.”

211. With respect to options E and F, which were substantially identical, it was stated that they were guided by the twin principles of accommodating the interests of secured creditors and intellectual property right holders, and of appropriately deferring to law relating to intellectual property. It was also observed that options E and F, the preparation of which was significantly aided by discussions at a meeting held in June by the European Max-Planck Group for Conflicts of Laws in Intellectual Property (CLIP), aimed at referring: (a) issues relating to the ownership and transferability of intellectual property to the law of the State in which the intellectual property was protected (*lex protectionis*); (b) the creation and

enforcement of a security right in intellectual property to the law of the State in which the grantor was located; and (c) the third-party effectiveness and priority of a security right in intellectual property, with two narrowly defined exceptions, to the *lex protectionis*.

212. With respect to option E, subparagraph (d), concern was expressed that it might be unworkable to the extent that it appeared to separate enforcement issues into two different categories and refer them to two different laws. In response, it was stated that all enforcement issues were referred to the law of the State in which the grantor was located. It was also observed that, once an enforcement sale was concluded, issues relating to the transfer (and possibly the registration of the intellectual property) would normally be subject to the *lex protectionis*.

213. With respect to option G, it was stated that it was intended to reflect an approach based essentially on the *lex protectionis*, in the sense that it referred the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property to the *lex protectionis*. However, it was also observed that option G permitted the secured creditor to create and make effective against third parties a security right in intellectual property according to the law of the State in which the grantor was located. It was explained that, as a result, that option provided for the application of the law of the State in which the grantor was located to the effectiveness of a security right in the case of the grantor's insolvency. In response to a question, it was explained that if a security right was effective as against an insolvency representative, its effectiveness had to be respected and thus no issue of priority arose.

214. It was also pointed out that option G was short and simple and thus promoted certainty and predictability with respect to the law applicable to a security right in intellectual property. In addition, it was mentioned that another advantage of option G was that it did not distinguish between types of intellectual property that could be registered in an intellectual property registry and those which could not be registered in such a registry. In response to a question, it was observed that, in the case of multiple security rights in multiple intellectual property assets protected under the laws of multiple States, under option G, there would be one law governing priority, namely the law of the State in which the relevant intellectual property asset that was subject to the competing security rights was protected.

215. While it was explained that enforcement in multiple jurisdictions was a common situation with respect to security rights in intellectual property, strong concern was expressed that referring enforcement issues in particular in the case of a security right in a portfolio of intellectual property assets protected under the law of multiple States to the laws of those jurisdictions would add complexity and cost to intellectual property financing transactions and would thus run counter to the overall objective of the *Guide* to facilitate access to secured credit at more affordable rates. The suggestion was thus made that enforcement should be referred to the law of the State in which the grantor was located. There was broad support for that suggestion.

216. After a preliminary discussion, the Commission agreed that, in view of the fact that options E-G had attracted some support and covered all the elements reflected in options B-D, the latter could be set aside. As a result, the Commission decided to focus on options A and E-G.

217. In support of option A, it was stated that it was consistent with various intellectual property conventions. In that regard, some doubt was expressed as to whether those conventions dealt with the law applicable to a security right in intellectual property. It was also observed that option A was consistent with the law in many States. In that connection, it was pointed out that option G was also an approach based on the *lex protectionis*, with the additional advantage that it allowed the secured creditor to obtain a security right that could be created and made effective against the grantor's insolvency representative and judgement creditors under the law of the State in which the grantor was located.

218. Broad support was expressed for option G, provided that it was revised to refer enforcement issues to the law of the grantor's location. To address that point, option G was revised to read as follows:

“The law should provide that:

“(a) The law applicable to the creation, effectiveness against

third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected;

“(b) A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee; and

“(c) The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located.”

219. General support was expressed for the revised version of option G on the understanding that it: (a) was essentially based on the *lex protectionis*; (b) allowed the secured creditor to obtain a security right that could also be created and made effective against the grantor's insolvency representative and judgement creditors under the law of the State in which the grantor was located; and (c) referred enforcement issues to the law of the State in which the grantor was located.

220. One of the delegations that supported option A stated that, despite the fact that it preferred option A and in view of the overwhelming support for the revised option G, it did not wish to stand in the way of consensus and was thus prepared to accept the revised option G. That delegation added, however, that the commentary should clarify that issues relating to the ownership and transferability of intellectual property would not be affected by the proposed recommendation. It also stated that, if law relating to intellectual property had an intellectual property-specific rule that provided for a different applicable law, that rule would prevail in accordance with recommendation 4, subparagraph (b). There was general agreement that the commentary should include a statement to clarify those matters.

221. After discussion, the Commission adopted the revised option G as recommendation 248.

222. The Commission next turned to the commentary of chapter X. It was agreed that: (a) the analysis of possible approaches should be revised to reflect the Commission's adoption of revised option G and the reasons for that decision; (b) the commentary should emphasize the fact that the *Guide* did not affect the law applicable to ownership and transferability issues, drawing on the relevant text of

options E and F; and (c) like any other recommendation of the *Guide* and the draft supplement, recommendation 248 was subject to recommendation 4, subparagraph (b). It was also agreed that a so-called “accommodation rule”, under which a forum would equate a security right that was created and made effective under the law of the grantor’s location to the closest equivalent of the security right under the *lex protectionis*, was not necessary as the text of recommendation 248 adopted gave appropriate recognition to the *lex protectionis*.

223. Subject to the changes agreed to be made in chapter X under paragraphs 220 and 222 above, the Commission adopted the substance of chapter X.

12. Chapter XI. Transition (A/CN.9/700/Add.6, paras. 55-59)

224. The Commission adopted the substance of chapter XI unchanged.

13. Chapter XII. The impact of insolvency of a licensor or licensee of intellectual property on a security right in that party’s rights under a licence agreement (A/CN.9/700/Add.6, paras. 60-82, and A/CN.9/691, paras. 94-98)

225. The Commission noted that Working Group V (Insolvency Law), at its thirty-eighth session (New York, 19-23 April 2010), had considered the text on automatic termination and acceleration clauses in intellectual property licence agreements referred to it by Working Group VI (Security Interests) at its sixteenth session (A/CN.9/685, para. 95; the text currently reflected in A/CN.9/700/Add.6, paras. 64-66). The Commission further noted that Working Group V had approved that text subject to the addition of the following text possibly after paragraph 64 (A/CN.9/691, paras. 94-98):

“The commentary to the *Insolvency Guide* explains the perceived advantages and disadvantages of such clauses, the types of contracts that may be appropriate to be exempted and the inherent tension between promoting the debtor’s survival, which may require the preservation of contracts, and introducing provisions which override contractual clauses. The possible application of such provisions to intellectual property is addressed in the commentary at part two, chapter II, paragraph 115, of the *Insolvency Guide*.”

226. Subject to that change, the Commission adopted the substance of chapter XII.

C. Adoption of the UNCITRAL Legislative Guide on Secured Transactions. Supplement on Security Rights in Intellectual Property

227. At its 914th meeting, on 29 June 2010, the Commission adopted the following decision:

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

“*Recognizing* the importance of efficient secured transactions regimes in promoting access to secured credit,

“*Recognizing also* the need to make secured credit more available and at lower cost to intellectual property owners and other intellectual property right

holders, and thus the need to enhance the value of intellectual property rights as security for credit,

“*Noting that the UNCITRAL Legislative Guide on Secured Transactions generally applies to security rights in intellectual property, without inadvertently interfering with the basic rules and objectives of law relating to intellectual property,*

“*Taking into account the need to address the interaction between secured transactions law and law relating to intellectual property at both national and international levels,*

“*Recognizing that States would need guidance as to how the recommendations of the UNCITRAL Legislative Guide on Secured Transactions would apply in an intellectual property context and as to the adjustments that need to be made in their laws to avoid inconsistencies between secured transactions law and law relating to intellectual property,*

“*Noting further the importance of balancing the interests of all stakeholders, including grantors, whether they are owners, licensors or licensees of intellectual property, and secured creditors,*

“*Noting with satisfaction that the Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property is consistent with the UNCITRAL Legislative Guide on Insolvency Law²⁴ with regard to the treatment of the impact of insolvency of a licensor or licensee of intellectual property on a security right in that party’s rights under a licence agreement,*

“*Expressing its appreciation to international intergovernmental and non-governmental organizations active in the fields of secured transactions law and law relating to intellectual property, in particular, the World Intellectual Property Organization and the Hague Conference on Private International Law, for their participation in and support for the development of the Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property,*

“*Expressing its appreciation to the participants of Working Group VI (Security Interests), as well as to the Secretariat, for their contribution to the development of the Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property,*

“1. *Adopts the Supplement under the title “UNCITRAL Legislative Guide on Secured Transactions. Supplement on Security Rights in Intellectual Property”, consisting of the text contained in documents A/CN.9/700 and Add.1-7, with the amendments adopted by the Commission at its forty-third session, and authorizes the Secretariat to edit and finalize the text of the Supplement pursuant to the deliberations of the Commission at that session;*

“2. *Requests the Secretary-General to disseminate broadly the text of the Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property, transmitting it to*

²⁴ United Nations publication, Sales No. E.05.V.10.

Governments and other interested bodies, in both the fields of secured financing and intellectual property;

“3. *Recommends* that all States utilize the Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property, to assess the economic efficiency of their secured transactions regimes as well as their intellectual property regimes and give favourable consideration to the Supplement when revising or adopting legislation relevant to secured transactions and intellectual property, and invites States that have used the *Guide* and the Supplement to advise the Commission accordingly.”

V. Finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency

A. Consideration of draft part three of the UNCITRAL Legislative Guide on Insolvency Law

228. The Commission recalled that, at its thirty-ninth session, in 2006, it had referred the topic of the treatment of corporate groups in insolvency to Working Group V (Insolvency Law) for consideration.²⁵ The term “corporate groups” was subsequently replaced with the term “enterprise groups” (see A/CN.9/622, paras. 77-84, and A/CN.9/643). The Commission also recalled that, at its forty-second session, in 2009, it had taken note of the close connection between the work on the international treatment of enterprise groups and both the *UNCITRAL Model Law on Cross-Border Insolvency*²⁶ and the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*²⁷ and had emphasized the need to ensure consistency with those two texts. The Commission further recalled that, at that session, it had noted that the text resulting from the work on enterprise groups should form part three of the *UNCITRAL Legislative Guide on Insolvency Law* and adopt the same format, that is, recommendations and commentary.²⁸

229. The Commission noted that the Working Group had agreed at its thirty-seventh session (Vienna, 9-13 November 2009) that the draft of part three (as set forth in documents A/CN.9/WG.V/WP.90 and Add.1) should be circulated to Governments in sufficient time for comment and for compilation of those comments for the forty-third session of the Commission (A/CN.9/686, para. 125).

230. The Commission had before it the revised draft of part three (A/CN.9/WG.V/WP.92 and Add.1), which the Working Group had approved at its thirty-eighth session (New York, 19-23 April 2010), the comments by Governments and international organizations on draft part three (A/CN.9/699 and Add.1-4), the

²⁵ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 209.

²⁶ United Nations publication, Sales No. E.99.V.3.

²⁷ United Nations publication, Sales No. E.10.V.6.

²⁸ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 303 and 304.

reports of the thirty-seventh and thirty-eighth sessions of the Working Group (A/CN.9/686 and A/CN.9/691, respectively) and a note by the Secretariat on the revision of draft part three as agreed by the Working Group at its thirty-eighth session (A/CN.9/708).

231. The Commission considered the domestic and international treatment of enterprise groups in insolvency as set forth in the documents noted in paragraph 230 above and adopted the commentary and recommendations with the following modifications:

(a) With respect to draft recommendations 242 and 248, the Commission agreed to include the words “to facilitate coordination of those proceedings” at the end of both draft recommendations;

(b) With respect to draft recommendation 244, paragraph (c), the Commission agreed to delete the words “and claims” following the words “substantive rights”, to align it with draft recommendation 243, paragraph (f).

232. With respect to paragraph 28 of document A/CN.9/WG.V/WP.92/Add.1 on recording of the communication by courts as part of the record, it was suggested that the word “may” appearing in the second sentence should be replaced with the word “should”, as the inclusion of the transcript in the record was seen as a mandatory consequence of the recording and the transcribing of the communication. In response, it was widely felt that the language should be kept as wide as possible, in order to maintain flexibility. The Commission agreed to retain the paragraph as drafted.

B. Decision on adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law

233. At its 918th meeting, on 1 July 2010, the Commission adopted the following decision:

“The United Nations Commission on International Trade Law,

“Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as fostering entrepreneurial activity and preserving employment,

“Noting that because the business of corporations is increasingly conducted, both domestically and internationally, through enterprise groups, the formation of enterprise groups is a feature of the increasingly globalized world economy and thus significant to international trade and commerce,

“Recognizing that where the business of an enterprise group fails, it is important not only to know how the group will be treated in insolvency proceedings, but also to ensure that that treatment facilitates, rather than hinders, the fast and efficient conduct of the insolvency proceedings,

“Being aware that very few States recognize an enterprise group as a legal entity, except in limited ways for specific purposes and that very few, if any, have a comprehensive regime for the treatment of enterprise groups in insolvency,

“Noting that while the *UNCITRAL Legislative Guide on Insolvency Law* provides a sound basis for the unification of insolvency law and forms key elements of a modern commercial law framework, it does not address the insolvency of enterprise groups,

“Recalling the mandate given to Working Group V (Insolvency Law) to complement the *UNCITRAL Legislative Guide on Insolvency Law* with provisions concerning the treatment of enterprise groups in insolvency,

“Appreciating the support for and the participation of international intergovernmental and non-governmental organizations active in the field of insolvency law reform in the development of an additional part of the *UNCITRAL Legislative Guide on Insolvency Law* addressing the treatment of enterprise groups in insolvency,

“Expressing its appreciation to Working Group V (Insolvency Law) for its work in developing part three of the *UNCITRAL Legislative Guide on Insolvency Law* on the treatment of enterprise groups in insolvency,

“1. *Adopts* part three of the *UNCITRAL Legislative Guide on Insolvency Law*, consisting of the text in documents A/CN.9/WG.V/WP.92 and Add.1, the revisions agreed by the Working Group at its thirty-eighth session (as set forth in documents A/CN.9/691 and A/CN.9/708), and the amendments adopted by the Commission at the current session, and authorizes the Secretariat to edit and finalize the text of part three of the *UNCITRAL Legislative Guide on Insolvency Law* in the light of the deliberations of the Commission;

“2. *Requests* the Secretary-General to transmit the text of part three of the *UNCITRAL Legislative Guide on Insolvency Law* to Governments and other interested bodies;

“3. *Recommends* that all States utilize the *UNCITRAL Legislative Guide on Insolvency Law* to assess the economic efficiency of their insolvency law regimes and give favourable consideration to the Guide when revising or adopting legislation relevant to insolvency, and invites States that have used the Guide to advise the Commission accordingly;

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

“5. *Recommends* that the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* continue to be given due consideration by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings.”

VI. Procurement: progress report of Working Group I

234. The Commission recalled that, at its thirty-seventh session, in 2004, it had agreed that the *UNCITRAL Model Law on Procurement of Goods, Construction and Services* (1994)²⁹ would benefit from being updated to reflect new practices, in

²⁹ United Nations publication, Sales No. E.98.V.13.

particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of the 1994 Model Procurement Law as a basis for law reform.³⁰ The Commission also recalled that at that session it had decided to entrust the drafting of proposals for the revision of the 1994 Model Procurement Law to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations.³¹

235. The Commission noted that the Working Group had begun its work at its sixth session (Vienna, 30 August-3 September 2004), since when it had held 13 one-week sessions to consider revisions to the 1994 Model Procurement Law.³² The Commission recalled that, from its thirty-eighth session, in 2005, to its forty-first session, in 2008, it had taken note of the reports of the sixth to thirteenth sessions of the Working Group and had reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in a revised model law on public procurement (the revised model law).³³ It also recalled that, at its thirty-ninth session, the Commission recommended that the Working Group, in updating the 1994 Model Procurement Law and the Guide to Enactment, should take into account issues of conflicts of interest and should consider whether any specific provisions addressing those issues would be warranted in the revised model law;³⁴ at its fortieth session, the Commission had recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work;³⁵ and, at its forty-first session, the Commission had invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised model law, together with its guide to enactment, within a reasonable time.³⁶

236. The Commission further recalled that, at its forty-second session, in 2009, it had taken note of the reports of the fourteenth to sixteenth sessions of the Working Group³⁷ and established a Committee of the Whole to consider a draft revised model law, including the issues of defence sector procurement and the use of socioeconomic factors in public procurement.³⁸ At that session, the Commission had also taken note of the report of the Committee of the Whole, in which the Committee in particular had concluded that the revised model law was not ready for

³⁰ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 81.

³¹ *Ibid.*, para. 82.

³² For the reports of the Working Group on the work of its sixth to eighteenth sessions, see A/CN.9/568, A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640, A/CN.9/648, A/CN.9/664, A/CN.9/668, A/CN.9/672, A/CN.9/687 and A/CN.9/690, respectively.

³³ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 172; *ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 192; *ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 170; and *ibid.*, *Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, para. 307.

³⁴ *Ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 192.

³⁵ *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 170.

³⁶ *Ibid.*, *Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, para. 307.

³⁷ A/CN.9/664, A/CN.9/668 and A/CN.9/672, respectively.

³⁸ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 11, 48 and 284.

adoption at that session of the Commission, and had requested the Working Group to continue its work on the review of the 1994 Model Procurement Law.³⁹

237. At its forty-third session, the Commission had before it the reports of the seventeenth (Vienna, 7-11 December 2009) and eighteenth (New York, 12-16 April 2010) sessions of the Working Group (A/CN.9/687 and A/CN.9/690, respectively). It noted that the Working Group, at those sessions, had completed a second reading of all chapters of the draft revised model law and had begun a third reading of the text. It was also noted that the Working Group had settled many of the substantive issues and requested the Secretariat to redraft certain provisions to reflect its deliberations at the sessions. The Commission further noted that the Working Group, at its eighteenth session, agreed to address the remaining outstanding issues throughout the draft revised model law with a view to finalizing the text at its nineteenth session. The Commission also noted that the Working Group had also agreed to undertake work on a draft revised guide to enactment. The Commission noted the Working Group's intention to present the draft revised model law for adoption by the Commission at its forty-fourth session, in 2011 (A/CN.9/690, paras. 156-157).

238. The Commission recalled that at its previous sessions it had called for the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised model law within a reasonable time (see para. 235 above). Support was expressed for the suggestion that the Commission, at its current session, should ask the Working Group to complete its work so that a draft revised model law could be submitted to the Commission's next session, in 2011, and additionally instruct the Working Group not to reopen issues on which a decision had already been taken.

239. After discussion, the Commission requested the Working Group to complete its work on the revision of the 1994 Model Procurement Law during the next two sessions of the Working Group (see para. 352 (a) below) and present a draft revised model law for finalization and adoption by the Commission at its forty-fourth session, in 2011. The Commission instructed the Working Group to exercise restraint in revisiting issues on which decisions had already been taken.

VII. Possible future work in the areas of electronic commerce and online dispute resolution

A. Possible future work in the area of electronic commerce

1. Introduction

240. It was recalled that, at its fortieth session, in 2007, the Commission had requested the Secretariat to continue to follow closely legal developments in the area of electronic commerce, with a view to making appropriate suggestions in due course.⁴⁰

³⁹ Ibid., paras. 283 and 284.

⁴⁰ Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part I, para. 195.

241. At the forty-third session, the Commission had before it a note by the Secretariat (A/CN.9/692) containing an update on the progress of the work of the World Customs Organization (WCO)-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window on the implementation and operation of a single window facility. The note also provided information relating to electronic transferable records and an update on recent developments in the field of electronic commerce, with particular regard to identity management and electronic commerce conducted with mobile devices, including payments.

2. Electronic single window facilities

242. The Commission recalled that, at its forty-first session, in 2008, it had requested the Secretariat to engage actively in cooperation with WCO and the United Nations Centre for Trade Facilitation and Electronic Business and, with the involvement of experts, in the study of the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document on legal aspects of creating and managing a single window, and to report to the Commission on the progress of that work.⁴¹ That request had been reiterated by the Commission at its forty-second session, in 2009.⁴²

243. The Commission noted with appreciation the involvement of the Secretariat in the second meeting of the Joint Legal Task Force. The Commission took note of the decision of the Joint Legal Task Force to gather the necessary information on possible user models and cases from experts in customs procedures and to compile it for use as reference in legal analysis. With regard to the legal issues identified by the Joint Legal Task Force as suitable for further study, it was suggested that caution should be taken in dealing with issues related to enforcement as those generally fell into the realm of domestic regulatory matters.

244. After discussion, the Commission requested the Secretariat to continue its active participation in the work on single windows carried out by the Joint Legal Task Force and by other organizations, with a view to exchanging views and formulating recommendations on possible legislative work in that domain.

3. Electronic transferable records

245. It was recalled that, at its forty-second session, in 2009, the Commission had requested the Secretariat to prepare a study on electronic transferable records in the light of written proposals received at that session (documents A/CN.9/681 and Add.1 and A/CN.9/682) and to organize a colloquium on that topic, resources permitting, with a view to reconsidering those matters at a future session.⁴³ At the current session, the Commission was reminded that previous documents had already dealt in depth with the substantive aspects of that topic (A/CN.9/WG.IV/WP.69 and A/CN.9/WG.IV/WP.90, which had been before Working Group IV at its thirtieth and thirty-eighth sessions, respectively).

⁴¹ Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 333-338.

⁴² Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 340.

⁴³ Ibid., para. 343.

246. The Commission noted that the use of electronic communications in international trade had gained further acceptance, including with respect to the use of registries for the creation and transfer of rights. The Commission took note of a detailed description of the recently enacted legislation of the Republic of Korea enabling the use of electronic bills of lading based on a designated registry operator approach. In that context, the concern was expressed that any work by the Commission in the area of electronic transferable records should take a cautious approach not to deviate from or contradict other UNCITRAL texts, such as the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008) (the Rotterdam Rules).⁴⁴ As an example, it was noted that the registry-based approach, reflected in the legislation of the Republic of Korea, could possibly contradict the control-based approach adopted in the Rotterdam Rules. Another view was that there was not necessarily such a conflict.

247. During the discussion, it was also suggested that work on electronic transferable records could embrace issues related to single window facilities and identity management and that it might be possible to address all those topics in a single project. However, it was also recalled that limited elements of commonality in the different records and rights transferred would not warrant immediate work at the working group level with respect to electronic transferable records.

4. Identity management

248. The Commission took note of the information contained in the note by the Secretariat (A/CN.9/692) regarding the notion of identity management system, its business model, processes and main actors as well as potential benefits. The Commission noted that identity management raised several relevant legal issues and that calls had been made for compiling a set of uniform legal rules to address such issues.

5. Use of mobile devices in electronic commerce

249. With respect to the use of mobile devices in electronic commerce, the Commission agreed that communication via mobile devices could be regarded as a subset of electronic communications as dealt with in relevant legislative standards adopted by UNCITRAL. The Commission further agreed that the predictability of the legal status of transactions conducted with mobile devices would be greatly enhanced by the adoption of appropriate legislation. In that connection, it was acknowledged that guidance on the adoption of appropriate legislative standards, with particular respect to the use of mobile devices, might be useful, in particular, in developing countries, where the broader use of mobile devices could make a significant contribution to widening access to electronic means of communication. It was also noted that payment services had been identified as an area of special importance for mobile technology and that mobile payments could support financial inclusion, especially in rural areas.

⁴⁴ United Nations publication, Sales No. E.09.V.9.

6. Decision by the Commission with respect to future work in the area of electronic commerce

250. After discussion, the Commission requested the Secretariat to convene a colloquium and possibly other informal meetings to discuss all of the above-mentioned topics. The Secretariat was requested to report to the Commission at its next session on the results of the colloquium. The note to be prepared by the Secretariat should summarize the discussion and possibly identify a road map for future work by the Commission in the area of electronic commerce. It was agreed that that note, which would serve as a basis for discussion at the forty-fourth session of the Commission, in 2011, should provide sufficient information for the Commission to make an informed decision and to give a clearly defined mandate to a working group, if deemed appropriate.

B. Possible future work in the area of online dispute resolution in cross-border electronic commerce transactions

1. Introduction

251. It was recalled that, at its forty-second session, in 2009, the Commission had heard a recommendation that a study be prepared on possible future work on the subject of online dispute resolution in cross-border electronic commerce (e-commerce) transactions, with a view to addressing the types of e-commerce dispute that might be solved by online dispute-resolution systems, the appropriateness of drafting procedural rules for online dispute resolution, the possibility or desirability to maintain a single database of certified online dispute-resolution providers and the issue of enforcement of awards made through the online dispute-resolution process under the relevant international conventions.⁴⁵ The Commission had agreed on the importance of the proposals relating to future work in the field of online dispute resolution to promote e-commerce and requested the Secretariat to prepare a study on the basis of the proposals contained in document A/CN.9/681/Add.2 and to hold a colloquium on the issue of online dispute resolution, resources permitting.⁴⁶

252. At its forty-third session, the Commission had before it a note by the Secretariat on the issue of online dispute resolution (A/CN.9/706). The note, in particular, summarized the discussion at the colloquium organized jointly by the Secretariat, the Pace Institute of International Commercial Law and the Penn State University Dickinson School of Law, under the title “A fresh look at online dispute resolution (ODR) and global e-commerce: towards a practical and fair redress system for the 21st century trader (consumer and merchant)” (Vienna, 29 and 30 March 2010).⁴⁷ The Commission also had before it a note by the Secretariat (A/CN.9/710) transmitting information provided by the Institute of International Commercial Law in support of possible future work by UNCITRAL in the field of online dispute resolution.

⁴⁵ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 338, and A/CN.9/681/Add.2, para. 4.

⁴⁶ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 342-343.

⁴⁷ Information about the colloquium is available at the date of this report from www.uncitral.org/pdf/english/news/IICL_Bro_2010_v8.pdf.

253. The Commission noted that, during the colloquium, it had been said that proposals for regional online dispute-resolution systems were in the process of being developed and it might therefore be timely to deal with the matter internationally from the outset in order to avoid development of inconsistent mechanisms. It was further noted that the goal of any work undertaken by UNCITRAL in that field should be to design generic rules, which, consistent with the approach adopted in UNCITRAL instruments (such as the Model Law on Electronic Commerce),⁴⁸ could apply in both business-to-business and business-to-consumer environments.

254. The Commission was informed that the commonly shared view expressed during the colloquium was that traditional judicial mechanisms for legal recourse did not offer an adequate solution for cross-border e-commerce disputes, and that the solution — providing a quick resolution and enforcement of disputes across borders — might reside in a global online dispute-resolution system for small-value, high-volume business-to-business and business-to-consumer disputes. E-commerce cross-border disputes required tailored mechanisms that did not impose costs, delays and burdens that were disproportionate to the economic value at stake. Those views were generally supported in the Commission. The Commission also noted that work on the topic should recognize the digital divide and that more efforts should be made to hear the views of developing States.

255. The Commission was generally of the view that topics identified at the colloquium required attention and that work by the Commission in the field of online dispute resolution would be timely. However, some concerns were expressed with regard to the scope of work to be undertaken. It was suggested that such scope should be limited, at an initial stage, to business-to-business transactions. It was pointed out that issues related to consumer protection were difficult to harmonize, since consumer protection laws and policies varied significantly from State to State. It was also stated that work in that area should be conducted with extreme caution to avoid undue interference with consumer protection legislation.

256. In response, the view was expressed that, in the present electronic environment, consumer transactions constituted a significant portion of electronic and mobile commercial transactions and were often cross-border in nature. It was also argued that it was practically and theoretically difficult to make a distinction not only between business-to-business and business-to-consumer transactions but also between merchants and consumers. It was concluded that work by a working group should be carefully designed not to affect the rights of consumers. Although it was generally felt that it would be feasible to develop a generic set of rules applicable to both kinds of transactions, it was also agreed that the working group should have the discretion to suggest different approaches, if necessary.

2. Decision by the Commission with respect to future work in the area of online dispute resolution in cross-border e-commerce transactions

257. After discussion, the Commission agreed that a working group should be established to undertake work in the field of online dispute resolution relating to cross-border e-commerce transactions, including business-to-business and business-to-consumer transactions. It was also agreed that the form of the legal standard to be

⁴⁸ United Nations publication, Sales No. E.99.V.4.

prepared should be decided by the working group after further discussion of the topic.

VIII. Possible future work in the area of insolvency law

258. The Commission had before it a series of notes (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6) setting forth a number of proposals for future work on insolvency law. The proposals contained in those documents were discussed at the thirty-eighth session of Working Group V (Insolvency Law) (A/CN.9/691, paras. 99-107). An additional document (A/CN.9/709) was submitted after that session of Working Group V, which set forth material additional to the proposal of Switzerland contained in document A/CN.9/WG.V/WP.93/Add.5.

259. After discussion, the Commission endorsed the recommendation by Working Group V contained in document A/CN.9/691, paragraph 104, that activity be initiated on two insolvency topics, both of which were of current importance, and where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability. Those topics were:

(a) The United States' proposal as described in paragraph 8 of document A/CN.9/WG.V/WP.93/Add.1 to provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Insolvency Law relating to centre of main interests and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention;⁴⁹

(b) The proposals of the United Kingdom (see A/CN.9/WG.V/WP.93/Add.4), INSOL (A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (A/CN.9/582/Add.6) concerning the responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases. In the light of concerns raised during extensive discussion, the Commission agreed that the focus of the work on that topic should only be upon those responsibilities and liabilities that arose in the context of insolvency and that criminal law issues were outside the scope of the mandate.

260. With respect to the proposal by Switzerland, the Commission agreed that the study (see A/CN.9/709, para. 7) should be undertaken by the Secretariat as resources permitted. It was noted in that regard that reports on work being undertaken by a number of other organizations on the same topic were expected by the end of 2010 and that those reports should be factored into the Secretariat's work. It was anticipated that coordination would be sought between the Secretariat and other interested international organizations.

261. The Commission heard a proposal by the Secretariat, which noted that participants in the judicial colloquiums that had been held by UNCITRAL in cooperation with INSOL and the World Bank (the Ninth Colloquium is scheduled for 2011) had indicated a desire for information and guidance for judges on

⁴⁹ See the related proposal of the Union internationale des Avocats referred to in the report of Working Group V on the work of its thirty-seventh session (Vienna, 9-13 November 2009) (A/CN.9/686, paras. 127-130).

cross-border-related issues and in particular on the UNCITRAL Model Insolvency Law. To that end, the Commission was informed that the Secretariat had been working on the preparation of a draft text that provided a judicial perspective on the use and interpretation of the UNCITRAL Model Insolvency Law. The Commission agreed that the Secretariat should be mandated to develop that text in the same flexible manner, resources permitting, as was achieved with respect to the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation*. That would involve consultation, principally with judges, but also with insolvency practitioners and professionals; consideration, at an appropriate stage, by Working Group V; and finalization and adoption by the Commission, possibly in 2011.

IX. Possible future work in the area of security interests

262. The Commission recalled that, at its forty-second session, in 2009, it had noted with interest the future work topics discussed by Working Group VI (Security Interests) at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126, respectively). The Commission also noted that, at that session, it had agreed that: (a) the Secretariat could hold an international colloquium early in 2010 with broad participation of experts from Governments, international organizations and the private sector; and (b) the Commission would be in a better position to consider and make a decision on the future work programme of the Working Group at its forty-third session on the basis of a note by the Secretariat.⁵⁰ At its forty-third session, the Commission had before it a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1).

263. In addition, the Commission noted that Working Group VI, at its seventeenth session (New York, 8-12 February 2010), had engaged in a preliminary discussion of its future work programme (A/CN.9/689, paras. 59-61). The Commission also noted that, at that session, some support had been expressed for work on registration of security rights and a model law on secured transactions based on the recommendations of the *UNCITRAL Legislative Guide on Secured Transactions*, while any work on security rights in securities would have to be limited to non-intermediated securities and any work on intellectual property licensing would need to be closely coordinated with WIPO (A/CN.9/689, para. 61).

264. The Commission agreed that four issues related to secured transactions law listed in document A/CN.9/702, paragraph 2 (a)-(d), were interesting (non-intermediated securities, registration of security rights, a model law and a contractual guide on secured transactions) and should be retained on its future work agenda (for the discussion of intellectual property licensing, see paras. 269-273 below). At the same time, in view of the limited resources available to it, the Commission agreed that it could not undertake work on all four issues at the same time and that, as a result, it should set priorities. In that regard, there was general agreement that priority should be given to work on registration of security rights in movable assets.

⁵⁰ *Official Records of the General Assembly, Sixty-fourth session, Supplement No. 17 (A/64/17)*, paras. 313-320.

265. It was widely felt that such a text would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of security rights registries. It was stated that secured transactions law reform could not be effectively implemented without the establishment of an efficient publicly accessible security rights registry. It was also emphasized that the *Guide* did not address in sufficient detail the various legal, administrative infrastructural and operational questions that needed to be resolved to ensure the successful and efficient implementation of a registry.

266. It was also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the *Guide*, texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the *Guide*. In response to a statement that work by the Commission on registration of security rights should not duplicate work done, for example, in the context of the Convention on International Interests in Mobile Equipment (Cape Town, 2001),⁵¹ it was pointed out that the Cape Town Convention registry was different from the registry recommended in the *Guide* at least to the extent that the Cape Town Convention registry was an asset-based international registry permitting registration of sales transactions.

267. With respect to work on security rights in non-intermediated securities, differing views were expressed. One view was that work should be undertaken to provide guidance to States with respect to security rights in a very important type of asset. It was stated that non-intermediated securities were used as security for credit in commercial financing transactions and yet they were generally excluded from the scope of the *Guide* and the Unidroit Convention on Substantive Rules for Intermediated Securities (2009).⁵² Another view was that there was no reason why the recommendations of the *Guide* should not apply to security rights in non-intermediated securities, a result that could be achieved by a change in the scope provisions of the *Guide*. It was stated that the Secretariat could study that matter and report to the Commission at a future session. Yet another view was that any work on security rights in non-intermediated securities should be postponed until the International Institute for the Unification of Private Law (Unidroit) had had a chance to complete its work on a commentary and an accession kit to the Geneva Securities Convention, as well as to consider its future work in the area of financial markets.

268. After discussion, the Commission decided that Working Group VI should be entrusted with the preparation of a text on registration of security rights in movable assets as a matter of priority. It was also agreed that other topics, such as security rights in non-intermediated securities, a model law based on the recommendations of the *Guide* and a text dealing with the rights and obligations of the parties should be retained in the future programme of Working Group VI for further consideration

⁵¹ Available at the date of this report from www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf.

⁵² Available at the date of this report from www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf.

by the Commission at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources.

269. The Commission next considered the topic of intellectual property licensing, a topic at the intersection of intellectual property and contract law. It was widely felt that the Commission did not have sufficient information to make a decision as to the desirability and feasibility of any work on that topic. The Commission, therefore, considered whether to request the Secretariat to prepare a desirability and feasibility study that would identify any particular needs and suggest specific ways in which those needs could be addressed by a legal text to be prepared by the Commission with a view to removing any legal obstacles to intellectual property licensing practices hindering the development of international trade.

270. Differing views were expressed as to whether the topic of intellectual property licensing fell within the mandate of the Commission and, as a result, whether the Commission could undertake any work on that topic. One view was that, to the extent that intellectual property licensing involved contract issues and formed an important part of international trade, it was within the mandate of the Commission. Another view was that intellectual property licensing was more properly viewed as an intellectual property law topic that fell within the scope of work of other organizations, such as WIPO. After discussion, the Commission agreed that intellectual property licensing was a topic at the intersection of intellectual property and commercial law and thus, while it fell within the mandate of the Commission, any work by the Commission should be undertaken in cooperation with other organizations, such as WIPO.

271. Differing views were also expressed as to the scope of any study to be prepared by the Secretariat. One view was that the study should examine the desirability and feasibility of work on various issues related to intellectual property licensing. It was stated that the outcome of the study should not be prejudged. In that connection, it was observed that the result of the study could well be that work was both necessary and possible on a narrow topic or on no topic at all. In addition, it was pointed out that the Commission had experience in the preparation of such desirability and feasibility studies in the context of a careful, open and deliberate process, involving expert group meetings, colloquiums and seminars, and was confident that that process would produce the best possible and broadly acceptable result for consideration by the Commission. Moreover, it was said that, as the study would have to be prepared within existing resources and other work had priority, the Secretariat would probably need some time to prepare it.

272. Another view was that the study should examine a narrow topic related to secured transactions, such as, for example, whether licensee rights could be used as security for credit and, if so, in which rights exactly and under which conditions. It was stated that, in the absence of any specific indication of a particular need, no work was warranted of a broader scope. It was also observed that experience gained from work on intellectual property licensing at the national level suggested that such work was not desirable or feasible. In that connection, it was emphasized that issues arising with respect to patent licensing were different from those arising with respect to copyright licensing. It was also pointed out that, even within the area of copyright licensing, the issues arising with respect to software licensing were different from those arising in the context of movie or music licensing. In addition, it was said that difficulties would be compounded at the international level in view

of the wide divergences existing between the various legal systems. Some doubt was expressed as to whether the topic of licensee rights as security for credit warranted any future work in particular in view of the work that had been done by the Commission on the Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property.

273. After discussion, the Commission requested the Secretariat to prepare a study, within existing resources, that would identify specific topics and discuss the desirability and feasibility of the Commission preparing a legal text with a view to removing specific obstacles to international trade in the context of intellectual property licensing practices. It was widely felt that the study should establish specific needs and appropriate ways in which those needs could be addressed, and carefully identify the suitability and the scope of work to facilitate consideration of the topic by the Commission at a future session. It was also generally agreed that the Secretariat should consult relevant international organizations, such as WIPO, and experts who had significant experience in intellectual property licensing, both from the public and the private sector, including those who relied on the licensing of intellectual property in their own commercial practices. It was also generally agreed that the Secretariat should consider addressing a questionnaire to States to assess the needs and any possible ways in which they could be addressed.

X. Possible future work in the area of microfinance

274. The Commission recalled that, at its forty-second session, in 2009, it had heard a suggestion that it would be timely for UNCITRAL to carry out a study on microfinance with the purpose of identifying the need for a legal and regulatory framework aimed at protecting and developing the microfinance sector so as to allow its continuous development, consistent with the purpose of microfinance, which was to build inclusive financial sectors for development. It was further recalled that, after discussion at that session, the Commission had requested the Secretariat, subject to the availability of resources, to prepare a detailed study on the legal and regulatory issues of microfinance as well as proposals as to the form and nature of a reference document that the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world in establishing a favourable legal framework for microfinance. The Commission had also requested the Secretariat to work in conjunction with experts and to seek possible cooperation with other interested organizations for the preparation of such a study, as appropriate.⁵³

275. At its forty-third session, the Commission had before it a note by the Secretariat containing a study and proposals as requested (A/CN.9/698). The note, it was explained, sought to examine and provide an overview of the issues relating to the regulatory and legal framework of microfinance.

276. It was recognized that, in facilitating access to financial services to the many poor who were not currently served by the formal financial system, microfinance could play an important role as a tool for the alleviation of poverty and achievement

⁵³ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 432-433.

of the Millennium Development Goals.⁵⁴ It was also noted that an appropriate regulatory environment contributed to the development of the microfinance sector.

277. A number of delegates cautioned against UNCITRAL straying too far into the field of domestic banking and financial regulation, one delegation noting that this had proved to be a subject of acrimonious debate when raised in other international forums. The question was raised as to whether microfinance was an appropriate field of work for UNCITRAL, given that its mandate related to international trade. It was also stated that many aspects of microfinance seemed to be largely domestic issues and that the supranational aspect of any work in the area should be made clear.

278. One observer outlined some of the key current developments in the field, including the increasing “commercialization” of microfinance over the past several years; the extension of the microfinance concept beyond credit to encompass a wider array of financial services to the poor, including insurance and remittances; the growth of “branchless banking”; and the expansion of mobile telephony in the delivery of financial services.

279. Several speakers noted that, since a number of other organizations were currently actively developing policy and standards in the microfinance field, it was necessary to ensure that any involvement by UNCITRAL should be undertaken in close cooperation with other key players. It was stated that care should be taken to complement, and avoid duplication of, work that other organizations were doing.

280. After discussion, the Commission agreed that the Secretariat should convene a colloquium, with the possible participation of experts from other organizations working actively in that field, to explore the legal and regulatory issues surrounding microfinance that fell within the mandate of UNCITRAL. The colloquium should result in a report to the Commission at its next session, outlining the issues at stake and containing recommendations on work that UNCITRAL might usefully undertake in the field.

XI. Monitoring implementation of the New York Convention

281. 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 IBA, aimed at monitoring the legislative implementation of the New York Convention and at considering procedural mechanisms that States had adopted for the recognition and enforcement of arbitral awards under that Convention.⁵⁵ A questionnaire had been circulated to States with the purpose of identifying how the 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 Convention. It was also recalled that the Secretariat had presented an interim report

⁵⁴ Further information about the Millennium Development Goals is available at the date of this report from www.un.org/millenniumgoals/bkgd.shtml.

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

to the Commission at its thirty-eighth session, in 2005, which had set out the issues raised by the replies received in response to the questionnaire circulated in connection with the project (A/CN.9/585).⁵⁶

282. The Commission further recalled that, at its forty-first session, in 2008, it had considered a written report in respect of the project, covering implementation of the New York Convention by States, its interpretation and application, and the requirements and procedures put in place by States for enforcing an award under the Convention, based on replies sent by 108 States parties (A/CN.9/656 and Add.1). At that session, the Commission had welcomed the recommendations and conclusions contained in the report, noting that they highlighted areas where additional work might need to be undertaken to enhance uniform interpretation and effective implementation of the Convention. The Commission had been generally of the view that the outcome of the project should consist in the development of a guide to enactment of the 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 diverged from the spirit of the Convention. The Commission had requested the Secretariat to study the feasibility of preparing such a guide and to publish on the UNCITRAL website the information collected during the project implementation, in the language in which it was received.⁵⁷

283. The Commission also recalled that, at its forty-second session, in 2009, it had heard an oral report on the project. The Commission had noted in particular that a draft guide to enactment of the New York Convention was being planned for preparation and that information collected during the project implementation, to the extent it was confirmed to be accurate, would be published on the UNCITRAL website.⁵⁸

284. At its current session, the Commission noted with appreciation that, pursuant to its request, the information collected during the project implementation had been published on the UNCITRAL website in the language in which it had been received. To keep the compilation of information up to date and to enable the study based on that compilation to be as effective as possible, the Commission urged States to continue to provide the Secretariat with information regarding their implementation of the Convention. The Commission requested the Secretariat to pursue its efforts towards the preparation of the guide to enactment of the Convention. It was agreed that a more substantive presentation on progress made in the preparation of the guide would be made at a future session of the Commission.

XII. Technical assistance to law reform

285. The Commission had before it a note by the Secretariat (A/CN.9/695 and Add.1) describing the technical cooperation and assistance activities undertaken subsequent to the date of the note on that topic submitted to the Commission at its forty-second session, in 2009 (A/CN.9/675 and Add.1). The Commission

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

⁵⁷ Ibid., *Sixty-third Session, Supplement No. 17 and corrigendum* (A/63/17 and Corr.1), paras. 355-356.

⁵⁸ Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 360.

emphasized the importance of such technical cooperation and assistance, in particular to the adoption and use of UNCITRAL texts, and expressed its appreciation for the activities undertaken by the Secretariat referred to in document A/CN.9/695 and in particular for the broad range of activities undertaken to promote adoption of the Rotterdam Rules (see A/CN.9/695/Add.1). It was emphasized that legislative technical assistance, in particular to developing countries, was an activity that was not less important than the formulation of uniform rules itself. For that reason, the Secretariat was encouraged to continue to provide such assistance to the broadest extent possible and to improve its outreach to developing countries in particular. The Commission welcomed the suggestion of the Secretariat that a special report on promotional activities relating to each of the newly adopted legislative texts could be prepared for the Commission on an annual basis.

286. The Commission noted that the continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance activities was dependent upon the availability of funds to meet associated UNCITRAL costs. The Commission noted in particular 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 cooperation and assistance activities had to be very carefully considered and the number of such activities limited. The Commission requested the Secretariat to continue exploring alternative sources of extrabudgetary funding and the availability of other resources to provide technical assistance, noting that UNCITRAL should have at its disposal the means necessary to carry out technical cooperation and assistance activities.

287. The Commission appealed to all States to assist the Secretariat in identifying sources of available funding in their States or organizations that might partner with UNCITRAL to support technical cooperation and assistance activities to promote the use and adoption of UNCITRAL texts, as well as wider participation in their development. In particular, the Secretariat was encouraged to explore ways of collaborating further with other organizations, such as Unidroit and the Hague Conference on Private International Law, to jointly promote related texts.

288. The Commission also reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions, or as specific-purpose contributions, in order to facilitate planning and enable the Secretariat to meet the increasing number of requests from developing countries and countries with economies in transition for technical cooperation and assistance activities. The Commission expressed its appreciation to Cameroon and Singapore for contributing to the Trust Fund since the Commission's forty-second session and to organizations that had contributed to the programme by providing funds or by hosting seminars.

289. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the trust fund established to provide travel assistance to developing countries that were members of the Commission.

XIII. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts

290. The Commission had before it a note by the Secretariat (A/CN.9/696), which set out the current status of the system for the collection and dissemination of case law on UNCITRAL texts (the CLOUT system) and provided an update on work undertaken by the Secretariat on digests of case law relating to the United Nations Convention on Contracts for the International Sale of Goods (1980)⁵⁹ and the Model Law on Arbitration. It also drew attention to the resource-intensive nature of that work and the need for additional resources to sustain it.

291. The Commission noted with appreciation the continuing work under the CLOUT system. As at 14 April 2010, 92 issues of compiled case-law abstracts from the CLOUT system had been published, dealing with 925 cases relating mainly to the United Nations Sales Convention and the Model Law on Arbitration. In addition, the Commission noted the increase in the abstracts of case law on the UNCITRAL Model Insolvency Law as well as the publication of abstracts on the New York Convention. The Commission also noted that a majority of the published abstracts concerned cases from Western European and other States and the remainder of the published abstracts concerned cases from other regions (Asia and the Pacific, Eastern Europe, Africa and Latin America and the Caribbean, listed in order of the number of published abstracts per region). It was widely agreed that the CLOUT system continued to be an important aspect of the overall technical cooperation and 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 continue its efforts to extend the composition and vitality of the network of contributors to the CLOUT system.

292. The Commission took note that the digest of case law on the United Nations Sales Convention was currently being updated with a view to finalizing the draft in the fourth quarter of 2010. Preparation of the digest on the Model Law on Arbitration was also under way and should continue until the fourth quarter of 2010.

293. The Commission thanked the Secretariat for its work in this area and agreed that CLOUT and digests were important assets — which it was essential to sustain — for promoting awareness, harmonization and uniform interpretation of the law relating to UNCITRAL texts. The Commission fully supported a call for increased resources to support and enlarge the work of the Secretariat in this area.

XIV. Status and promotion of UNCITRAL texts

294. 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.9/694) and information obtained by the Secretariat subsequent to the submission of that note. The Commission noted with appreciation

⁵⁹ United Nations, *Treaty Series*, vol. 1489, No. 25567.

the information on the following treaty actions and legislative enactments received since its forty-second session regarding the following instruments:

- (a) [Unamended] Convention on the Limitation Period in the International Sale of Goods, 1974 (New York)⁶⁰ (28 States parties);
- (b) Convention on the Limitation Period in the International Sale of Goods, as amended, 1980 (New York)⁶¹ (20 States parties);
- (c) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)⁶² (34 States parties);
- (d) United Nations Convention on Contracts for the International Sale of Goods (1980)⁶³ (new actions by the Dominican Republic and Turkey (accessions); 76 States parties);
- (e) United Nations Convention on International Bills of Exchange and International Promissory Notes (1988)⁶⁴ (the Convention has 5 States parties; it requires 10 States parties for entry into force);
- (f) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, (1991)⁶⁵ (the Convention has four States parties; it requires five States parties for entry into force);
- (g) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995)⁶⁶ (eight States parties);
- (h) United Nations Convention on the Assignment of Receivables in International Trade (2001)⁶⁷ (the Convention has one State party; it requires five States parties for entry into force);
- (i) United Nations Convention on the Use of Electronic Communications in International Contracts (2005)⁶⁸ (new actions by Honduras and Singapore (ratifications); the Convention has two States parties; it requires three States parties for entry into force);
- (j) United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules)⁶⁹ (signatures by Armenia, Cameroon, the Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Madagascar, Mali, the Netherlands, the Niger, Nigeria, Norway, Poland, Senegal,

⁶⁰ *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.

⁶¹ United Nations publication, Sales No. E.95.V.13.

⁶² United Nations publication, Sales No. E.95.V.14.

⁶³ United Nations publication, Sales No. E.95.V.12.

⁶⁴ United Nations publication, Sales No. E.95.V.16.

⁶⁵ *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.

⁶⁶ United Nations publication, Sales No. E.97.V.12.

⁶⁷ United Nations publication, Sales No. E.04.V.14.

⁶⁸ United Nations publication, Sales No. E.07.V.2.

⁶⁹ United Nations publication, Sales No. E.09.V.9.

Spain, Switzerland, Togo and the United States; the Convention requires 20 States parties for entry into force);

(k) Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁷⁰ (new action by the former Yugoslav Republic of Macedonia (withdrawal of reservation); 144 States parties);

(l) UNCITRAL Model Law on International Commercial Arbitration (1985),⁷¹ as amended in 2006⁷² (new legislation based on the Model Law as amended in 2006, has been adopted in Ireland (2010), Rwanda (2008) and, in the United States, in the State of Florida (2010));

(m) UNCITRAL Model Law on International Credit Transfers (1992);⁷³

(n) UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)⁷⁴ (new legislation based on the Model Law has been adopted in Armenia (2005) and Georgia (1999));

(o) UNCITRAL Model Law on Electronic Commerce (1996)⁷⁵ (new legislation based on the Model Law has been adopted in Iran (Islamic Republic of) (2004) and Jamaica (2006));

(p) UNCITRAL Model Law on Cross-Border Insolvency (1997)⁷⁶ (new legislation based on the Model Law has been adopted in Canada (2009) and Greece (2010));

(q) UNCITRAL Model Law on Electronic Signatures (2001)⁷⁷ (new legislation based on the Model Law has been adopted in Jamaica (2006); legislation influenced by the principles on which the Model Law is based has been adopted in India (2009));

(r) UNCITRAL Model Law on International Commercial Conciliation (2002)⁷⁸ (new legislation based on the Model Law has been adopted in Albania (2003) and Honduras (2000)).

295. During the session, Turkey deposited its instrument of accession to the United Nations Sales Convention. In a statement to the Commission, the representative of Turkey stated that the development of international trade on the basis of equality and mutual benefit was an important element in promoting friendly relations among States and that the improvement of the legal framework in which international trade operated was a fundamental aspect of such development process.

296. Following that, Singapore deposited its instrument of ratification to the United Nations Convention on the Use of Electronic Communications in International Contracts during the session. In a statement made by the representative of Singapore, it was noted that the Convention set a new global standard for national

⁷⁰ United Nations, *Treaty Series*, vol. 330, No. 4739.

⁷¹ United Nations publication, Sales No. E.95.V.18.

⁷² United Nations publication, Sales No. E.08.V.4.

⁷³ United Nations publication, Sales No. E.99.V.11.

⁷⁴ United Nations publication, Sales No. E.98.V.13.

⁷⁵ United Nations publication, Sales No. E.99.V.4.

⁷⁶ United Nations publication, Sales No. E.99.V.3.

⁷⁷ United Nations publication, Sales No. E.02.V.8.

⁷⁸ United Nations publication, Sales No. E.05.V.4.

e-commerce legislation. It was noted that Singapore had been among those States which had been at the forefront of implementing laws relating to e-commerce and information and communications technology. The representative of Singapore indicated that Singapore had enacted legislation to give effect to that Convention in its domestic laws. He noted that wider adoption of the Convention would be an important step towards harmonizing e-commerce legislation. The representative of Honduras, which had deposited its instrument of ratification of the Convention a few weeks before, also emphasized the role that the Convention could play in fostering regional development in the field of e-commerce. He encouraged States to adopt the Convention and promote it in their respective regions.

297. The Commission was informed that Australia had recently enacted legislation based on the UNCITRAL Model Law on Arbitration, as amended in 2006.

298. The Commission was informed, and noted with appreciation, that a number of States were in the process of becoming parties to or adopting various UNCITRAL instruments. Those States were urged to share such information with the Commission and the Secretariat when available.

XV. Working methods of UNCITRAL

299. The Commission recalled that, at the first part of its fortieth session (Vienna, 25 June-12 July 2007), it had had before it observations and proposals by France on the working methods of the Commission (A/CN.9/635) and had 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.⁷⁹ At its resumed fortieth session, the Commission had considered the issue of working methods on the basis of the observations and proposals by France on the working methods of the Commission (A/CN.9/635) and observations by the United States on the same topic (A/CN.9/639), as well as the requested note by the Secretariat on 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 had agreed that:

(a) 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, respectively), and the note by the Secretariat

⁷⁹ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, paras. 234-241.

(A/CN.9/638 and Add.1-6), which was considered to provide a particularly important historical overview of the establishment and evolution of UNCITRAL rules of procedure and methods of work;

(b) The Secretariat should be entrusted with the preparation of a working document describing current practices of the Commission with the application of rules of procedure and methods of work, in particular as regards decision-making and participation of non-state entities in the work of UNCITRAL, distilling the relevant information from its previous note (A/CN.9/638 and Add.1-6). That working document would serve 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 rules of procedure and methods of work for consideration by the Commission;

(c) The Secretariat should circulate the working document to all States for comment and subsequently compile any comments it might receive;

(d) Informal consultations among all interested States might be held, if possible, before the forty-first session of the Commission;

(e) The working document might be discussed already at the Commission's forty-first session, time permitting.⁸⁰

300. The Commission also recalled that, at its forty-first session, in 2008, it had had before it a note by the Secretariat describing current practices of the Commission as regards decision-making, status of observers in UNCITRAL, and preparatory work by the Secretariat (A/CN.9/653). At that session, the Commission had also had before it a note by the Secretariat compiling the comments received on the note by the Secretariat (A/CN.9/653) prior to the Commission's forty-first session (A/CN.9/660 and Add.1-5). The Commission requested the Secretariat to prepare a first draft of a reference document, based on the note by the Secretariat (A/CN.9/653), for use by chairpersons, delegates and observers and by the Secretariat 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 had 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.⁸¹

301. The Commission further recalled that, at its forty-second session, in 2009, it had had before it a note by the Secretariat containing a first draft of a reference document (A/CN.9/676), comments by States and interested international organizations (A/CN.9/676/Add.1-9) and a proposal by France (A/CN.9/680) for revisions to be made to the reference document A/CN.9/676. It was recalled that the

⁸⁰ Ibid., (A/62/17), part II, paras. 101-107.

⁸¹ Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 373-381.

Commission had devoted the first two days of that session to informal consultations on the topic of working methods and that the discussion in the plenary had been based on document A/CN.9/676. The Commission also recalled that after discussion in the plenary at that session it had agreed on some revisions to be made in the document, postponed the consideration of other proposed revisions on which the Commission was not able to reach a decision and also deferred the consideration of those parts of the document which the Commission was not able to consider at that session for lack of time.⁸²

302. At its forty-third session, the Commission had before a note by the Secretariat containing a proposed summary of conclusions on UNCITRAL rules of procedure and methods of work (A/CN.9/697). That summary of conclusions had resulted from intersessional consultations among interested delegations. The Commission also had before it a note reproducing comments of Burundi regarding UNCITRAL working methods (A/CN.9/697/Add.1). Those comments, based on document A/CN.9/676, had been received by the Secretariat after the Commission's forty-second session.

303. The Commission considered that document A/CN.9/697 was a suitable basis for continuation of the discussion. It was agreed that the summary of conclusions annexed to that note did not attempt to provide a complete set of rules but constituted the best possible rendition of the main characteristics of the methods of work of UNCITRAL. One delegation regretted that the preparation of a more detailed set of rules of procedure could not be achieved.

304. The Commission agreed that documents previously prepared by the Secretariat, in particular document A/CN.9/638 and Add.1-6, should remain available for future reference.

305. After discussion, the Commission unanimously adopted the summary of conclusions on UNCITRAL rules of procedure and methods of work, as reproduced in annex III to the present report.

306. With respect to the implementation of that text, it was emphasized that all chairpersons should adhere to the principles expressed in the summary of conclusions at future sessions. The Secretariat was requested to issue any reminder that might be necessary to ensure strict compliance with those principles. As to non-governmental organizations, whose contribution was generally recognized as welcome and essential to the work of the Commission and its Working Groups, it was emphasized that only those organizations which were expected to contribute positively to the advancement of a project should be invited to participate in a session.

XVI. Coordination and cooperation

A. General

307. The Commission had before it a note by the Secretariat (A/CN.9/707 and Add.1) providing a brief survey of the work of international organizations related to the harmonization of international trade law, focusing upon substantive legislative

⁸² Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 379-397.

work. The Commission commended the Secretariat for the preparation of the documents, recognizing their value to coordination of the activities of international organizations in the field of international trade law. The Commission recalled that, at its forty-first and forty-second sessions, in 2008 and 2009, the Secretariat had suggested that the timing of both its general annual report on the current activities of international organizations related to the harmonization and unification of international trade law, as well as its ongoing series of specialized reports on particular topics, would in the future not necessarily be published prior to the annual session of the Commission.⁸³ The Commission welcomed the information that, given the growing interest in insolvency issues that had been witnessed in the light of the ongoing global economic crisis, the Secretariat would soon publish a more detailed study on insolvency-related activities.

308. It was recalled that, at its thirty-seventh session, in 2004, the Commission had agreed that it should adopt a more proactive attitude, through its secretariat, in fulfilling the terms of its mandate as regards coordination activities.⁸⁴ Recalling General Assembly resolution 64/111 of 16 December 2009 (see paras. 340 and 341 below), in which the Assembly had endorsed the efforts and initiatives of the Commission towards coordination of activities of international organizations in the field of international trade law, the Commission noted with appreciation that the Secretariat was taking steps to engage in a dialogue, on both legislative and technical assistance activities, with a number of organizations, including the Hague Conference on Private International Law, the Organization for Economic Cooperation and Development, the Organization of American States, Unidroit, WIPO, the World Bank and other multilateral development banks, 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.

309. By way of example of current efforts at coordination, the Commission noted the coordination activities listed in documents A/CN.9/695, paragraphs 26-30, and A/CN.9/695/Add.1, paragraph 13, and in particular the meetings involving the Hague Conference on Private International Law and Unidroit.

B. Reports of other international organizations

310. The Commission took note of statements made on behalf of IATA and ITU.

311. The Commission heard a statement on behalf of IATA concerning its work on e-freight, aimed at taking the paper out of air cargo and replacing it with the exchange of electronic data and messages. Noting that e-freight was live in 24 locations in 2009, IATA was focusing on increasing that number, by the end of 2010, to include 44 e-freight locations and 76 major airports and the number of electronic messaging standards that replace paper documents from 16 to 20. With

⁸³ Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 382; and *ibid.*, *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 398.

⁸⁴ Ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 114.

respect to the latter, the Commission was advised that work was proceeding on development of the e-air waybill and that its use was live in more than 20 locations. In total, locations that accounted for more than 80 per cent of all international air freight would be e-freight-capable by the end of 2010.

312. The Commission also heard a statement on behalf of ITU concerning its work on issues of cybersecurity, including identity management, data privacy and security of electronic transactions. The Commission took note of the close cooperation between ITU and UNCITRAL in the formulation of legal standards related to those issues and encouraged further efforts in that direction.

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

313. The Commission recalled that this item had been on the agenda of the Commission since its resumed fortieth session (Vienna, 10-14 December 2007). It was further recalled that the decision to consider this item had been taken on the basis of General Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels.⁸⁵ In paragraph 3 of that resolution as well as paragraph 7 of resolution 63/128 of 11 December 2008, the General Assembly invited the Commission to comment in its report to the Assembly on its current role in promoting the rule of law. The Commission recalled that it had subsequently transmitted its comments, as requested, in its annual reports to the Assembly.⁸⁶

314. At its forty-third session, the Commission took note of General Assembly resolution 64/116 of 16 December 2009 on the rule of law at the national and international levels. The Commission noted in particular that in paragraphs 4 and 8 the General Assembly called upon the United Nations system to systematically address aspects of the rule of law in relevant activities, and encouraged the Secretary-General and the United Nations system to accord high priority to rule of law activities. The Commission further noted that the Assembly in paragraph 9 of that resolution had invited the Commission (together with the International Court of Justice and the International Law Commission) to continue to comment, in its reports to the Assembly, on its current role in promoting the rule of law.

315. The Commission also noted that in paragraph 12 of the same resolution, the General Assembly had decided that at its sixty-fifth session, in 2010, the debates in the Sixth Committee under the agenda item on the rule of law would be focused on the sub-topic "Laws and practices of Member States in implementing international law", without prejudice to the consideration of the item as a whole. The Commission noted that the Sixth Committee had reached the understanding that comments related to this sub-topic should address, among other things, laws and practices in the domestic implementation and interpretation of international law, strengthening and improving coordination and coherence of technical assistance and capacity-building in that area, mechanisms and criteria for evaluating the effectiveness of such assistance, ways and means of advancing donor coherence and

⁸⁵ Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part II, paras. 111-113.

⁸⁶ Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 386; and *ibid.*, *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 415-419.

perspectives of recipient States.⁸⁷ The Commission therefore decided that, at its current session, its comments to the General Assembly would focus on that sub-topic and the issues identified by the Sixth Committee, as envisaged from the perspective of the work of UNCITRAL.

316. The Commission held a panel discussion on the sub-topic. Opening remarks were delivered by the Deputy Secretary-General, who welcomed the panel discussion on the rule of law in trade and commerce and highlighted the relevance of that discussion (and of the work of UNCITRAL in general) for the United Nations entire rule of law agenda. The Deputy Secretary-General referred to the role of UNCITRAL in promoting the rule of law at the national and international levels, the impact of the work of UNCITRAL on economic and social development, including the achievement of the Millennium Development Goals, and in the context of post-conflict reconstruction. She also highlighted the mandate of UNCITRAL to coordinate activities of organizations active in the field of international commercial law and to encourage cooperation among them. The Deputy Secretary-General concluded her remarks by expressing the hope that better integration of the work of UNCITRAL into the United Nations joint rule of law programmes would be achieved. She saw the panel discussion as a welcome step in that direction. She encouraged all concerned to follow-up by raising awareness about the work of UNCITRAL across the United Nations and by promoting regular interaction between UNCITRAL and other relevant actors. To that end, she highlighted the role of the United Nations Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General.

317. A first round of discussion, with presentations by representatives of Ghana, Honduras and Slovenia, focused on the issues of “Laws and practices of States in the domestic implementation and interpretation of UNCITRAL texts: perspectives of recipient States on the work of UNCITRAL”. A second round, with presentations by the Director of the Rule of Law Unit of the Secretariat, the Legal Counsel of the World Bank and the Deputy General Counsel of EBRD, focused on the issues of “Coordination and coherence of technical assistance and capacity-building in the areas of UNCITRAL work, and mechanisms and criteria for evaluating the effectiveness of such assistance”.

318. In his introductory remarks, the Director of the Rule of Law Unit informed the Commission about the mandates of the Unit and the Rule of Law Group.

319. In the course of two rounds of discussion, speakers echoed the Secretary-General’s call for careful and context-specific analysis of the relationship between law and economics, and the impact the economic crisis has had on legal protection, justice and security for the most vulnerable and marginalized populations.⁸⁸ The positive correlation between advancement of democracy, legal reform and economic development was pointed out. The point was also made that laws and regulations governing finance and commerce were not purely technical matters, but embodied particular policy preferences. Their effectiveness should not be measured in isolation but in the context of the broader goals of sustainable, equitable and inclusive growth.

⁸⁷ See the note by the Chairman of the Sixth Committee (A/C.6/63/L.23), para. 3.

⁸⁸ See A/64/298, para. 78.

320. The Commission was also informed that, in a speech to the Security Council on 29 June 2010, the Under-Secretary-General for Legal Affairs, the Legal Counsel, had drawn the attention of the Council on the work of UNCITRAL and emphasized the supportive role played by effective commercial law in addressing root causes of many international problems, such as migration caused by impoverishment, inequality and internal conflicts, or inequitable access to shared resources. The Council had been informed that UNCITRAL would hold a panel discussion to analyse the impact of commercial law and commercial activities on the rule of law, in a debate that was described as rare in the United Nations, where the traditional focus in the context of the rule of law had been on human rights, criminal law and international public law.

A. Laws and practices of States in the domestic implementation and interpretation of UNCITRAL texts: perspectives of recipient States on the work of UNCITRAL

321. In her opening remarks, the Deputy Secretary-General noted that UNCITRAL, with its mandate to work in the interests of all peoples, and in particular those of developing countries, had continuously sought more effective ways to deliver, to build local capacities and to respond to needs “on the ground”. She noted that UNCITRAL promoted the rule of law in both national and cross-border contexts: by developing a modern commercial law framework; by assisting States to implement it; and by helping them to fulfil their international commitments, under the auspices of other international and regional organizations. She also remarked that UNCITRAL had less visible but no less important impacts in addressing the roots of economic tensions and problems, such as poverty and inequality, or disputes over access to shared resources. She also referred to the role of UNCITRAL in promoting regional and international integration, which could deter cross-border tensions from escalating into conflicts. The relevance of the work of UNCITRAL in the areas of arbitration and conciliation, public procurement, privately financed infrastructure projects and microfinance to the challenges of transitional justice and post-conflict reconstruction, such as the creation of jobs for ex-combatants and internally displaced persons, was also highlighted.

322. The Commission was informed that the Secretary-General had called for firmly grounding the United Nations rule of law work in the development agenda of the Organization. The crucial role of the work of UNCITRAL in facilitating economic and social development, including through the achievement of the Millennium Development Goals, was emphasized in that context. Specific reference was made to Goal 8, on the promotion of an open, rule-based, predictable, non-discriminatory trading and financial system. The contribution of UNCITRAL to other Goals in many other ways, direct and indirect, including by the creation of legal frameworks to mobilize resources, was also emphasized.

323. Other speakers elaborated on the above points by illustrating, with practical examples, the impact of UNCITRAL on the promotion of the rule of law in their jurisdictions and in their regions or subregions. They referred to various UNCITRAL instruments (conventions, model laws and legislative guides) as representing globally recognized best practices and balancing the interests of various stakeholders. Organizations that partnered with UNCITRAL in their

activities reported that UNCITRAL texts were used by them as a benchmark in assessing the need for legal reforms in countries where they operated.

324. In the context of the promotion of good governance, specific reference was made by speakers to the 1994 Model Procurement Law, which touched upon such issues as anti-corruption, accountability and transparency in public administration. In the context of promotion of access to justice and culture of the rule of law in the society as a whole, speakers referred to UNCITRAL instruments in the area of commercial dispute resolution. The role of texts produced by UNCITRAL in the area of insolvency, especially at the time of economic crisis, was also highlighted, as providing for rule-based resolution of financial difficulties, exit mechanisms and distribution of assets. The impact of UNCITRAL texts, in particular in the areas of sale of goods and e-commerce, on economic development and modernization of business practices was also underscored. The point was also made that possible future work by UNCITRAL in the area of microfinance could contribute to the achievement of the Millennium Development Goals.

325. The Commission heard that in some countries UNCITRAL texts had facilitated regional integration and that some States used UNCITRAL texts in their bilateral programmes of technical assistance with commercial law reforms, judicial training and promotion of cross-border judicial cooperation.

326. It was reported that, in some States, the policymaking, monitoring, coordination and enforcement mechanisms in relation to international legal standards had not kept pace with the international development of finance and commerce. Another speaker referred to the gap between the quality of such international legal standards and the quality of their implementation in some States. The point was made that good laws denied economic potential if not or not properly implemented and that confidence in the rule of law would inevitably be undermined if the expectation existed that the law would not be enforced.

327. In that context, speakers were unanimous in commending efforts of UNCITRAL aimed at ensuring effective implementation and uniform interpretation of international commercial standards through technical assistance with law reform in the field of commercial law. The importance of the CLOUT system was also emphasized. Speakers expressed the need to secure sufficient resources to sustain and expand the work of UNCITRAL in those areas, which were considered vital for States with limited capacity in the field of commercial law.

328. Concern was expressed about the low representation of developing countries at the sessions of UNCITRAL. It was pointed out that addressing the needs of the global economy required the active participation of developing countries. A participatory and inclusive legislative process was considered critical to the development of well-balanced legislation and essential to ensuring that its legitimacy would be recognized worldwide. The Commission and its secretariat were requested to find ways to increase outreach to developing countries, including through regional and subregional organizations established by those countries.

B. Coordination and coherence of technical assistance and capacity-building in the areas of UNCITRAL work, and mechanisms and criteria for evaluating the effectiveness of such assistance

329. In her opening remarks, the Deputy Secretary-General highlighted the challenges that the United Nations faced in promoting the rule of law, including being more responsive to the needs of Member States; empowering national stakeholders; mobilizing local knowledge and resources; and constantly monitoring and evaluating the impact of work. She emphasized that those challenges and the range of issues related to the rule of law could only be addressed collectively — by the whole United Nations system in close cooperation and coordination with outside actors. In that context, she referred to the special role played by UNCITRAL as the core United Nations legal body in the field of international commercial law with the specific mandate to coordinate activities of organizations active in that field.

330. Coordination was considered by speakers to be essential in achieving coherence, efficient use of scarce resources and for sharing and widely disseminating knowledge and best practices. Coordination with other aid providers, it was pointed out, was often one of the criteria used for evaluating the effectiveness of technical assistance and capacity-building.

331. The need to adjust the approach of the international community to the rule of law in the light of the lessons learned from the most recent economic crisis was emphasized. Particular reference in that regard was made to the need to ensure country-led reform and country-level coordination.

332. It was acknowledged that UNCITRAL played a commendable role in fostering cooperation and coordination in the field of international commercial law. However, practical difficulties faced by UNCITRAL and its secretariat in ensuring better coordination were recognized. The potential facilitating role of the Rule of Law Group and the Rule of Law Unit in that respect was emphasized.

333. The Director of the Rule of Law Unit briefed the Commission about the current work and future plans of the Group and the Unit in achieving coordination and coherence of United Nations rule of law activities. In the Unit's view, it was important to achieve better integration of the expertise of UNCITRAL into the United Nations joint rule of law activities. Although it was recognized that the United Nations engagement often took place in a volatile environment where the dominant concerns were peace and security, it was acknowledged that taking other measures to enable or promote long-term economic and social development was necessary. The Unit would find it helpful to receive from UNCITRAL any reference materials, such as a summary of lessons learned and good practices collected as a result of UNCITRAL technical cooperation and assistance activities, that would facilitate better understanding and integration by the United Nations system of the work of UNCITRAL into the United Nations joint rule of law activities.

C. Decisions by the Commission

334. At the end of the panel discussion, the Commission reiterated its conviction that the 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 Group supported by the Rule of Law Unit. The Commission looked forward to being part of strengthened and coordinated rule of law activities of the Organization.

335. The Commission considered it essential to keep a regular dialogue with the Rule of Law Group through the Rule of Law Unit and to keep abreast of progress made in the integration of the work of UNCITRAL into the United Nations joint rule of law activities. To that end, it requested the Secretariat to organize briefings by the Rule of Law Unit biannually, when sessions of the Commission were held in New York.

336. The Commission requested the Secretariat to initiate surveys and studies of the impact of the standards and activities of UNCITRAL on the rule of law and development, in cooperation with the World Bank and other partner organizations that would have the required research capacities in those areas. The Commission also requested the Secretariat to review its experience with the operation of the technical cooperation and assistance programme conducted on behalf of the Commission, with a view to identifying lessons learned, best practices and major problems encountered, and to suggesting ways of enhancing technical cooperation and assistance and capacity-building in the field of commercial law and mechanisms for evaluating their effectiveness. The Commission also requested the Secretariat to consider ways of better integrating its technical cooperation and assistance activities into activities conducted on the ground by the United Nations in particular through United Nations Development Programme or other country offices of the United Nations.

XVIII. International commercial arbitration moot competitions

A. Willem C. Vis International Commercial Arbitration Moot 2010

337. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Seventeenth Moot. The oral arguments phase had taken place in Vienna from 26 March to 1 April 2010. 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 Seventeenth Moot had been based on the United Nations Sales Convention. A total of 252 teams from law schools in 62 countries had participated in the Seventeenth Moot. The best team in oral arguments was that of King's College London. The oral arguments of the Eighteenth Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 15 to 21 April 2011.

338. It was also noted that the Seventh Willem C. Vis (East) International Commercial Arbitration Moot had been organized by the Chartered Institute of Arbitrators, East Asia Branch, and also co-sponsored by the Commission. The final phase had been organized in Hong Kong Special Administrative Region of China

from 15 to 21 March 2010. A total of 75 teams from 18 countries had taken part in the Seventh (East) Moot. The winning team in the oral arguments was from the University of Freiburg, Germany. The Eighth (East) Moot would be held in Hong Kong SAR from 4 to 10 April 2011.

B. Madrid Commercial Arbitration Moot 2010

339. It was noted that the Carlos III University of Madrid had organized the Second International Commercial Arbitration Competition in Madrid from 28 June to 2 July 2010. The Madrid Moot had also been co-sponsored by the Commission. The legal issues involved in the competition were the Model Law on Arbitration, with amendments as adopted in 2006, the United Nations Sales Convention, the New York Convention, the Unidroit Model Law on Leasing⁸⁹ and the Unidroit Convention on International Financial Leasing (1988).⁹⁰ A total of 18 teams from law schools or master programmes in seven countries had participated in the Madrid Moot in Spanish. The best team in oral arguments was from the University of Zaragoza, Spain. The Third Madrid Moot would be held in 2011 on dates yet to be confirmed. It was also noted that the Centre for the Study of Law, Economics and Politics (CEDEP) had organized a Moot competition in Asunción on 12 June 2010. Legal issues involved in the competition were similar to those of the Madrid Moot. Teams from law schools in three different countries (Argentina, Colombia and Paraguay) participated in the Moot in Asunción. The winning team in oral arguments was from the Universidad Católica “Nuestra Señora de la Asunción”.

XIX. Relevant General Assembly resolutions

340. The Commission took note with appreciation of two General Assembly resolutions related to the work of UNCITRAL, adopted at the sixty-fourth session on the recommendation of the Sixth Committee: resolution 64/111, on the report of UNCITRAL on the work of its forty-second session; and resolution 64/112, on the Practice Guide on Cross-Border Insolvency Cooperation of UNCITRAL, both of 16 December 2009.

341. The Commission noted that, in its resolution 64/111, the General Assembly, *inter alia*:

(a) Commended the completion of the Commission’s project in the area of insolvency law, and welcomed the comprehensive review by the Commission of its working methods, the continuing discussion of its role in promoting the rule of law at the national and international levels, and the progress made in other areas, including public procurement and arbitration, and as regards publication of digests of case law and maintenance of the UNCITRAL website;

(b) Noted with appreciation the Commission’s decisions as regards:
(i) holding colloquiums on electronic commerce and security interests;

⁸⁹ Available at the date of this report from www.unidroit.org/english/documents/2008/study59a/s-59a-17-e.pdf.

⁹⁰ Available at the date of this report from www.unidroit.org/english/conventions/1988leasing/1988leasing-e.htm.

(ii) publication of various texts on security interests prepared by the Commission and its secretariat; and (iii) commending the use of the 2007 revision of the Uniform Customs and Practice for Documentary Credits in transactions involving the establishment of a documentary credit;

(c) Endorsed the efforts and initiatives of the Commission towards implementation of the Commission's programmes of technical assistance, and coordination and cooperation, and in that context: (i) reiterated its appeal to relevant organizations for further cooperation and coordination of their activities with those of the Commission; (ii) encouraged the Commission to explore different approaches to the use of partnerships with non-state actors; (iii) called for contributions to the UNCITRAL trust funds; (iv) noted the Commission's request to the Secretariat to explore the possibility of establishing an UNCITRAL presence in regions or specific countries with a view to facilitating the provision of technical assistance with respect to the use and adoption of UNCITRAL texts; and (v) took note the Commission's comments made in the context of its consideration of the proposed strategic framework for the period 2010-2011 that additional resources were required to be allotted to the Secretariat in particular to meet the increased demand for technical assistance;

(d) Requested the Secretary-General to explore options for the timely publication of the UNCITRAL *Yearbook*, to continue providing summary records of the Commission's meetings relating to the formulation of normative texts, and 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.

342. The Commission noted that, in its resolution 64/112, the General Assembly requested the Secretary-General to publish, including electronically, the text of the Practice Guide on Cross-Border Insolvency Cooperation, and to transmit it to Governments with the request that the text be made available to relevant authorities so that it becomes widely known and available. The Commission also noted that the Assembly recommended that the Practice Guide be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings, and that all States continue to consider implementation of the UNCITRAL Model Insolvency Law.

XX. Other business

A. Internship programme

343. An oral report was presented on the internship programme at the UNCITRAL secretariat. In particular, it was noted that, since the Secretariat's oral report to the Commission at its forty-second session, in July 2009, 26 new interns had undertaken internship with the UNCITRAL secretariat.

344. The Commission noted that the Secretariat, in selecting interns from the Interns Roster maintained and administered by the United Nations Office at Vienna, kept in mind the needs of UNCITRAL and its secretariat at any given period of time, in particular the need to maintain the UNCITRAL website in six official languages of the United Nations. From that perspective, the Commission noted with

regret that during the period under review only a few candidates from Arabic-speaking countries and China had been available for selection from the Interns Roster. The Commission further took note that when a sufficient pool of qualified candidates was available the Secretariat tried to ensure a balanced gender representation and representation of interns from various geographical regions, paying special regard to the needs of developing countries and countries with economies in transition. During the period under review, the secretariat had been able to select 10 female interns and 12 interns from developing countries and countries with economies in transition.

B. Strategic framework for the biennium 2012-2013

345. The Commission had before it the proposed strategic framework for the period 2012-2013 (A/65/6 (Prog. 6)) and was invited to review the proposed biennial programme plan for subprogramme 5 (Progressive harmonization, modernization and unification of the law of international trade) of programme 6 (Legal affairs). The Commission noted that the proposed framework had been reviewed by the Committee for Programme and Coordination at its fiftieth session (7 June-2 July 2010) and would be transmitted to the General Assembly at its sixty-fifth session.

346. Concerns were expressed that the resources allotted to the Secretariat under subprogramme 5 were insufficient for it to meet the increased and pressing demands from developing countries and countries with economies in transition for technical assistance with 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.

347. The Commission was informed that the Secretariat was exploring various means of responding to the growing need for uniform interpretation of UNCITRAL texts. Such uniform interpretation was considered indispensable for the effective implementation of UNCITRAL texts. It was noted that some instruments emanated from the work of UNCITRAL explicitly prescribed that, in their interpretation, regard should be had to their international character and to the need to promote uniformity in their application and the observance of good faith in international trade. Continuing work of the Secretariat on the CLOUT system as a means to comply with such a requirement was considered vital. Concern over the lack of sufficient resources in the Secretariat to sustain and expand such work was noted. Building partnerships with interested institutions and exploring various other means, besides seeking additional resources from the regular budget, were mentioned as possible ways to address that concern. The Commission also took note of the desirability of establishing within its secretariat a third pillar concentrating on the promotion of ways and means of encouraging uniform interpretation of UNCITRAL texts.

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

348. It was recalled that, as indicated to the Commission at its fortieth session, in 2007,⁹¹ 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).⁹² The Commission agreed to provide feedback to the Secretariat. It was recalled that a similar question regarding the level of satisfaction of UNCITRAL with the services provided by the Secretariat had been asked at the close of the forty-second session of the Commission.⁹³ It was further recalled that, at that session, the question had elicited replies from 15 delegations, with an average rating of 4.66.

349. Appreciation was expressed for efforts by the Secretariat in various fields related to the work of UNCITRAL, including in rendering assistance to various stakeholders in implementing projects aimed at dissemination of information about UNCITRAL texts, such as in organizing international commercial arbitration moot competitions. Satisfaction was expressed for the generally excellent quality of work delivered to UNCITRAL by its secretariat.

XXI. Date and place of future meetings

A. Forty-fourth session of the Commission

350. The Commission approved the holding of its forty-fourth session in Vienna from 27 June to 15 July 2011. The Secretariat was requested to consider shortening the duration of the session by one week if the expected workload of the session would justify doing so.

B. Sessions of working groups

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

⁹¹ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 243.

⁹² A/62/6 (Sect. 8) and Corr.1, table 8.19 (d).

⁹³ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 434.

that working group regarding the reasons for which a change in the meeting pattern was needed.⁹⁴

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

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

(a) Working Group I (Procurement) would hold its nineteenth session in Vienna from 1 to 5 November 2010 and its twentieth session in New York from 11 to 15 April 2011;

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-third session in Vienna from 4 to 8 October 2010 and its fifty-fourth session in New York from 7 to 11 February 2011;

(c) Working Group III (Online Dispute Resolution) would hold its twenty-second session in Vienna from 11 to 15 October 2010 and its twenty-third session in New York from 14 to 18 March 2011;

(d) Working Group V (Insolvency Law) would hold its thirty-ninth session in Vienna from 6 to 10 December 2010 and its fortieth session in New York from 16 to 20 May 2011;

(e) Working Group VI (Security Interests) would hold its eighteenth session in Vienna from 8 to 12 November 2010 and its nineteenth session in New York from 14 to 18 February 2011.

353. The Commission authorized the Secretariat to adjust the schedule of working group meetings according to the needs of the working groups and the need to hold a colloquium on e-commerce (see para. 250 above) and a colloquium on microfinance (see para. 280 above). The Secretariat was requested to post on the UNCITRAL website the final schedule of the working group meetings once the dates of the meetings had been confirmed.

Additional time

354. Tentative arrangements were made for a session to be held in New York from 23 to 27 May 2011. That time could be used to accommodate the need for a session of a working group or for holding a colloquium, depending on the needs of the working groups and subject to consultation with States.

2. Sessions of working groups in 2011 after the forty-fourth session of the Commission

355. The Commission noted that tentative arrangements had been made for working group meetings in 2011 after its forty-fourth session (the arrangements were subject to the approval of the Commission at its forty-fourth session):

(a) Working Group I (Procurement) would hold its twenty-first session in Vienna from 17 to 21 October 2011;

⁹⁴ Ibid., *Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 275.

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-fifth session in Vienna from 5 to 9 September 2011;

(c) Working Group III (Online Dispute Resolution) would hold its twenty-fourth session in Vienna from 12 to 16 December 2011;

(d) Working Group IV (Electronic Commerce) would hold its forty-fifth session in Vienna from 10 to 14 October 2011;

(e) Working Group V (Insolvency Law) would hold its forty-first session in Vienna from 31 October to 4 November 2011;

(f) Working Group VI (Security Interests) would hold its twentieth session in Vienna from 12 to 16 September 2011.

Annex I

UNCITRAL Arbitration Rules

(as revised in 2010)

Section I. Introductory rules

Scope of application*

Article 1

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.

2. The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.

3. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Notice and calculation of periods of time

Article 2

1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows for a record of its transmission.

2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or e-mail may only be made to an address so designated or authorized.

3. In the absence of such designation or authorization, a notice is:

- (a) Received if it is physically delivered to the addressee; or
- (b) Deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by

* A model arbitration clause for contracts can be found in the annex to the Rules.

registered letter or any other means that provides a record of delivery or of attempted delivery.

5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address.

6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice 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.

Notice of arbitration

Article 3

1. The party or parties initiating recourse to arbitration (hereinafter called the "claimant") shall communicate to the other party or parties (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

- (a) A demand that the dispute be referred to arbitration;
- (b) The names and contact details of the parties;
- (c) Identification of the arbitration agreement that is invoked;
- (d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;
- (e) A brief description of the claim and an indication of the amount involved, if any;
- (f) The relief or remedy sought;
- (g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.

4. The notice of arbitration may also include:

- (a) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;
- (b) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;
- (c) Notification of the appointment of an arbitrator referred to in article 9 or 10.

5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Response to the notice of arbitration

Article 4

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:

- (a) The name and contact details of each respondent;
- (b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g).

2. The response to the notice of arbitration may also include:

- (a) Any plea that an arbitral tribunal to be constituted under these Rules lacks jurisdiction;
- (b) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;
- (c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;
- (d) Notification of the appointment of an arbitrator referred to in article 9 or 10;
- (e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought;
- (f) A notice of arbitration in accordance with article 3 in case the respondent formulates a claim against a party to the arbitration agreement other than the claimant.

3. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent's failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Representation and assistance

Article 5

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

Designating and appointing authorities

Article 6

1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the “PCA”), one of whom would serve as appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. Where these Rules provide for a period of time within which a party must refer a matter to an appointing authority and no appointing authority has been agreed on or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation.

4. Except as referred to in article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party’s request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party’s request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority.

5. In exercising their functions under these Rules, the appointing authority and the Secretary-General of the PCA may require from any party and the arbitrators the information they deem necessary and they shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner they consider appropriate. All such communications to and from the appointing authority and the Secretary-General of the PCA shall also be provided by the sender to all other parties.

6. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

7. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Section II. Composition of the arbitral tribunal

Number of arbitrators

Article 7

1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration

the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

2. Notwithstanding paragraph 1, if no other parties have responded to a party's proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8, paragraph 2, if it determines that, in view of the circumstances of the case, this is more appropriate.

Appointment of arbitrators (articles 8 to 10)

Article 8

1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the

presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8.

Article 10

1. For the purposes of article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.

2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.

3. In the event of any failure to constitute the arbitral tribunal under these Rules, 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.

Disclosures by and challenge of arbitrators (articles 11 to 13)**

Article 11

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

Article 12

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.

3. In the event that an arbitrator 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 of an arbitrator as provided in article 13 shall apply.

Article 13

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.

** Model statements of independence pursuant to article 11 can be found in the annex to the Rules.

2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.

3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.

Replacement of an arbitrator

Article 14

1. Subject to paragraph 2, in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

2. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and the remaining arbitrators to express their views: (a) appoint the substitute arbitrator; or (b) after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Repetition of hearings in the event of the replacement of an arbitrator

Article 15

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

Exclusion of liability

Article 16

Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

Section III. Arbitral proceedings

General provisions

Article 17

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.

3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

4. All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Such communications shall be made at the same time, except as otherwise permitted by the arbitral tribunal if it may do so under applicable law.

5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Place of arbitration

Article 18

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.

2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

Language*Article 19*

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.

2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Statement of claim*Article 20*

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration referred to in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.

2. The statement of claim shall include the following particulars:

- (a) The names and contact details of the parties;
- (b) A statement of the facts supporting the claim;
- (c) The points at issue;
- (d) The relief or remedy sought;
- (e) The legal grounds or arguments supporting the claim.

3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.

4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

Statement of defence*Article 21*

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration referred to in article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article.

2. The statement of defence shall reply to the particulars (b) to (e) of the statement of claim (art. 20, para. 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

4. The provisions of article 20, paragraphs 2 to 4, shall apply to a counterclaim, a claim under article 4, paragraph 2 (f), and a claim relied on for the purpose of a set-off.

Amendments to the claim or defence

Article 22

During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Pleas as to the jurisdiction of the arbitral tribunal

Article 23

1. The arbitral tribunal shall have the power to 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 that 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 shall not entail automatically the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

Further written statements*Article 24*

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.

Periods of time*Article 25*

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.

Interim measures*Article 26*

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, for example and without limitation, 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, (i) current or imminent harm or (ii) 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 paragraphs 2 (a) to (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 paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.

8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

9. A request for interim measures 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.

Evidence

Article 27

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.

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 arbitral tribunal shall determine.

4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Hearings

Article 28

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.

2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.

3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a

witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.

4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

Experts appointed by the arbitral tribunal

Article 29

1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the arbitral tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert's qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert's appointment, a party may object to the expert's qualifications, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.

3. 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.

4. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his or her report.

5. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 shall be applicable to such proceedings.

Default

Article 30

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:

(a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;

(b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Closure of hearings

Article 31

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 initiative or upon application of a party, to reopen the hearings at any time before the award is made.

Waiver of right to object

Article 32

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

Section IV. The award

Decisions

Article 33

1. When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Form and effect of the award*Article 34*

1. The arbitral tribunal may make separate awards on different issues at different times.
2. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.
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 the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.
5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.
6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

Applicable law, *amiable compositeur**Article 35*

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law 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.
3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

Settlement or other grounds for termination*Article 36*

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitral 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 there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so.

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 34, paragraphs 2, 4 and 5, shall apply.

Interpretation of the award

Article 37

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.

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 34, paragraphs 2 to 6, shall apply.

Correction of the award

Article 38

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request.

2. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.

3. Such corrections shall be in writing and shall form part of the award. The provisions of article 34, paragraphs 2 to 6, shall apply.

Additional award

Article 39

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.

2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or 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 the award.

3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

Definition of costs

Article 40

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

2. The term “costs” includes only:
 - (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
 - (b) The reasonable travel and other expenses incurred by the arbitrators;
 - (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
 - (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
 - (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
 - (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.
3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

Fees and expenses of arbitrators

Article 41

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.
2. If there is an appointing authority and it applies or has stated that it will apply a schedule or particular method for determining the fees for arbitrators in international cases, the arbitral tribunal in fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case.
3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.
4.
 - (a) When informing the parties of the arbitrators’ fees and expenses that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;
 - (b) Within 15 days of receiving the arbitral tribunal’s determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA;

(c) If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal's determination is inconsistent with the arbitral tribunal's proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any adjustments to the arbitral tribunal's determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;

(d) Any such adjustments shall either be included by the arbitral tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of article 38, paragraph 3, shall apply.

5. Throughout the procedure under paragraphs 3 and 4, the arbitral tribunal shall proceed with the arbitration, in accordance with article 17, paragraph 1.

6. A referral under paragraph 4 shall not affect any determination in the award other than the arbitral tribunal's fees and expenses; nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal's fees and expenses.

Allocation of costs

Article 42

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

Deposit of costs

Article 43

1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 40, paragraphs 2 (a) to (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon or designated, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal that it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After a termination order or final award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Annex

Model arbitration clause for contracts

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note. Parties should consider adding:

- (a) The appointing authority shall be ... [name of institution or person];
- (b) The number of arbitrators shall be ... [one or three];
- (c) The place of arbitration shall be ... [town and country];
- (d) The language to be used in the arbitral proceedings shall be

Possible waiver statement

Note. If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding a provision to that effect as suggested below, considering, however, that the effectiveness and conditions of such an exclusion depend on the applicable law.

Waiver

The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.

Model statements of independence pursuant to article 11 of the Rules

No circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I shall promptly notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose

I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement.] I confirm that those circumstances do not affect my independence and impartiality. I shall promptly notify the parties

and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

Note. Any party may consider requesting from the arbitrator the following addition to the statement of independence:

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.

Annex II

Terminology and recommendations of the UNCITRAL Legislative Guide on Secured Transactions. Supplement on Security Rights in Intellectual Property

A. Terminology

“Acquisition security right” includes a security right in intellectual property or a licence of intellectual property, provided that the security right secures the obligation to pay any unpaid portion of the acquisition price of the encumbered asset or an obligation incurred or credit otherwise provided to enable the grantor to acquire the encumbered asset.

“Consumer goods” includes intellectual property or a licence of intellectual property used or intended to be used by the grantor for personal, family or household purposes.

“Inventory” includes intellectual property or a licence of intellectual property held by the grantor for sale or licence in the ordinary course of the grantor’s business.

B. Recommendations 243-248

Security rights in tangible assets with respect to which intellectual property is used

243. The law should provide that, in the case of a tangible asset with respect to which intellectual property is used, a security right in the tangible asset does not extend to the intellectual property and a security right in the intellectual property does not extend to the tangible asset.

Impact of a transfer of encumbered intellectual property on the effectiveness of the registration

244. The law should provide that the registration of a notice of a security right in intellectual property in the general security rights registry remains effective notwithstanding a transfer of the encumbered intellectual property.

Priority of rights of certain licensees of intellectual property

245. The law should provide that the rule in recommendation 81, subparagraph (c), applies to the rights of a secured creditor under this law and does not affect the rights the secured creditor may have under the law relating to intellectual property.

Right of the secured creditor to preserve the encumbered intellectual property

246. The law should provide that the grantor and the secured creditor may agree that the secured creditor is entitled to take steps to preserve the encumbered intellectual property.

Application of acquisition security right provisions to security rights in intellectual property

247. The law should provide that the provisions on an acquisition security right in a tangible asset also apply to an acquisition security right in intellectual property or a licence of intellectual property. For the purpose of applying these provisions:

- (a) Intellectual property or a licence of intellectual property:
 - (i) Held by the grantor for sale or licence in the ordinary course of the grantor's business is treated as inventory; and
 - (ii) Used or intended to be used by the grantor for personal, family or household purposes is treated as consumer goods; and
- (b) Any reference to:
 - (i) Possession of the encumbered asset by the secured creditor does not apply;
 - (ii) The time of possession of the encumbered asset by the grantor refers to the time the grantor acquires the encumbered intellectual property or licence of intellectual property; and
 - (iii) The time of the delivery of the encumbered asset to the grantor refers to the time the grantor acquires the encumbered intellectual property or licence of intellectual property.

Law applicable to a security right in intellectual property

248. The law should provide that:

- (a) The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected;
- (b) A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee; and
- (c) The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located.

Annex III

UNCITRAL rules of procedure and methods of work

Summary of conclusions

As decided by the Commission at its first session, rules relating to the procedure of committees of the General Assembly, as well as rules 45 and 60, shall apply to the procedure of the Commission. As the Commission has further decided, on matters not covered by these rules, the Commission shall be guided by the general principle that the rules of procedure of the General Assembly should apply, *mutatis mutandis*, to the Commission as may be appropriate for the performance of its functions.

Decision-taking

1. Decisions in the Commission are taken by member States of the Commission. The views of non-member States and observer organizations are for the benefit of member States who may take such views into account in determining their positions on the issue to be decided upon.
2. The practice in the Commission as reflected by existing procedures long used by the Commission is to reach decisions by consensus. The Commission has decided that Commission decisions should be reached by consensus as far as possible; in the absence of a consensus, decisions are to be taken by voting as provided for in the relevant rules of procedure of the General Assembly.
3. States are entitled to make explanations of vote and explanations of position and to have those statements reflected in the report, consistent with the rules of procedure of the General Assembly.
4. Voting is to be regarded as an exceptional procedure. It should be noted that voting in the Commission took place only once on a procedural matter.

Status of non-member States and observer organizations

5. Non-member States are entitled, when they so request, to attend the sessions of the Commission and its working groups as observers and may participate in the collective effort to achieve a generally acceptable text. However, they cannot object to a decision being recorded.
6. As regards observer organizations, sessions of the Commission and its subsidiary organs are open to representatives of international governmental and non-governmental organizations invited by the Commission, as discussed in paragraphs 8 to 10 below.
7. Observers, in particular non-governmental organizations, do not participate in the decision-taking.
8. United Nations organs and specialized agencies brought into relationship with the United Nations are permitted to participate in the sessions and the work of the Commission and its subsidiary organs.

9. The Commission shall draw up, and shall update as necessary, a list of other international organizations and of non-governmental organizations with which UNCITRAL entertains a long-standing cooperation and which have been invited to Commission sessions.

10. In addition, the Secretariat may be requested by the Commission or its subsidiary organs to invite a specific organization to the relevant session. It may also receive a request from an organization to be invited to a session, or it may itself take the initiative to invite an organization on the basis of its assessment of the relevance and potential contribution of the organization concerned to the proceedings of the relevant session. In such cases, the Secretariat shall inform the member States of the Commission. Where an objection is raised, the decision will be taken by the Commission.

Working methods of the UNCITRAL secretariat

11. The Secretariat may make either oral or written statements at any time to the Commission or its subsidiary organs concerning any question under consideration. Within the limits of its available resources, the Secretariat may have recourse to the assistance of outside experts from different legal traditions and affiliations. The Secretariat shall decide on the appropriate form that the assistance of outside experts may take depending on the needs of the Secretariat.

12. The Secretariat is not bound by the advice of such experts. It formulates its proposals to the Commission or its subsidiary organs under its own responsibility and in accordance with specific instructions received from the Commission or its subsidiary organs, if any, also bearing in mind the policies expressed in relevant General Assembly resolutions and decisions adopted previously by the Commission.

13. The Secretariat shall inform member States of the expert group meetings it holds as requested.

14. The UNCITRAL secretariat is committed to endeavour, resources permitting, to provide at such meetings translation and interpretation in as many official languages as appropriate.

15. Colloquiums organized or co-organized by the Secretariat shall be widely advertised, particularly by posting relevant information concerning such events on the UNCITRAL website. Their results shall be reported to the Commission or, as appropriate, to the working groups.

Annex IV

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

<i>Symbol</i>	<i>Title or description</i>
A/CN.9/683 and Corr.1	Provisional agenda, annotations thereto and scheduling of meetings of the forty-third session
A/CN.9/684	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-first session (Vienna, 14-18 September 2009)
A/CN.9/685	Report of Working Group VI (Security Interests) on the work of its sixteenth session (Vienna, 2-6 November 2009)
A/CN.9/686	Report of Working Group V (Insolvency Law) on the work of its thirty-seventh session (Vienna, 9-13 November 2009)
A/CN.9/687	Report of Working Group I (Procurement) on the work of its seventeenth session (Vienna, 7-11 December 2009)
A/CN.9/688	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-second session (New York, 1-5 February 2010)
A/CN.9/689	Report of Working Group VI (Security Interests) on the work of its seventeenth session (New York, 8-12 February 2010)
A/CN.9/690	Report of Working Group I (Procurement) on the work of its eighteenth session (New York, 12-16 April 2010)
A/CN.9/691	Report of Working Group V (Insolvency Law) on the work of its thirty-eighth session (New York, 19-23 April 2010)
A/CN.9/692	Note by the Secretariat on present and possible future work on electronic commerce
A/CN.9/693	Note by the Secretariat on a bibliography of recent writings related to the work of UNCITRAL
A/CN.9/694	Note by the Secretariat on the status of conventions and model laws
A/CN.9/695 and Add.1	Note by the Secretariat on technical cooperation and assistance, including transport law
A/CN.9/696	Note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/697 and Add.1	Note by the Secretariat on the UNCITRAL rules of procedure and methods of work; comments received from Member States and interested international organizations
A/CN.9/698	Note by the Secretariat on microfinance in the context of international economic development
A/CN.9/699 and Add.1-4	<i>UNCITRAL Legislative Guide on Insolvency Law</i> : draft part three; compilation of comments by Governments and international organizations
A/CN.9/700 and Add.1-7	Note by the Secretariat on the draft supplement to the <i>UNCITRAL Legislative Guide on Secured Transactions</i> dealing with security rights in intellectual property
A/CN.9/701	Note by the Secretariat on the draft supplement to the <i>UNCITRAL Legislative Guide on Secured Transactions</i> dealing with security rights in intellectual property; compilation of comments by Governments and international organizations

<i>Symbol</i>	<i>Title or description</i>
A/CN.9/702 and Add.1	Note by the Secretariat on possible future work on security interests
A/CN.9/703 and Add.1	Note by the Secretariat on the settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules
A/CN.9/704 and Add.1-10	Note by the Secretariat on the settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules; compilation of comments by Governments and international organizations
A/CN.9/705	Note by the Secretariat on the settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules
A/CN.9/706	Note by the Secretariat on possible future work on online dispute resolution in cross-border electronic commerce transactions
A/CN.9/707 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.9/708	Note by the Secretariat: revisions to A/CN.9/WG.V/WP.92 and Add.1; <i>UNCITRAL Legislative Guide on Insolvency Law</i> : part three: treatment of enterprise groups in insolvency
A/CN.9/709	Note by the Secretariat on insolvency law: possible future work; further proposal by the delegation of Switzerland for preparation by the UNCITRAL secretariat of a study on the feasibility and possible scope of an instrument regarding the cross-border resolution of large and complex financial institutions
A/CN.9/710	Note supporting the possible future work on online dispute resolution by UNCITRAL, submitted by the Institute of International Commercial Law: possible future work on online dispute resolution in cross-border electronic commerce transactions

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

(TD/B/57/8)

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

At its 1055th plenary meeting, on 20 September 2010, the Board took note of the report of UNCITRAL on its forty-third session (A/65/17).

**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-third session
(A/65/465)**

[Original: English]

Rapporteur: Mrs. Glenna **Cabello de Daboin** (Bolivarian Republic of Venezuela)

I. Introduction

1. At its 2nd plenary meeting, on 17 September 2010, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its sixty-fifth session the item entitled “Report of the United Nations Commission on International Trade Law on the work of its forty-third session” and to allocate it to the Sixth Committee.
2. The Sixth Committee considered the item at its 7th, 25th and 27th meetings, on 11 and 29 October and on 5 November 2010. The views of the representatives who spoke during the Committee’s consideration of the item are reflected in the relevant summary records (A/C.6/65/SR.7, 25 and 27).
3. For its consideration of the item, the Committee had before it the report of the United Nations Commission on International Trade Law on the work of its forty-third session.¹
4. At the 7th meeting, on 11 October, the Chair of the United Nations Commission on International Trade Law at its forty-third session introduced the report of the Commission on the work of its forty-third session.

II. Consideration of proposals

A. Draft resolution A/C.6/65/L.4

5. At the 25th meeting, on 29 October, the representative of Austria, on behalf of Albania, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Fiji, Finland, France, Germany, Greece, Guatemala, Hungary, India, Ireland, Israel, Italy, Japan, Jordan, Liechtenstein, Luxembourg, Malawi, Malaysia, Malta, Mexico, Montenegro, the Netherlands, New Zealand, Norway, Paraguay, the Philippines, Portugal, the Republic of Korea, Romania, the Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Uganda, Ukraine, the United Kingdom of Great Britain and Northern Ireland and Venezuela (Bolivarian Republic of), subsequently joined by Armenia, Lithuania, Madagascar, Poland and the Republic of Moldova, introduced a draft resolution entitled “Report

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17).*

of the United Nations Commission on International Trade Law on the work of its forty-third session” (A/C.6/65/L.4).

6. At its 27th meeting, on 5 November, the Committee adopted draft resolution A/C.6/65/L.4 without a vote (see para. 13, draft resolution I).

B. Draft resolution A/C.6/65/L.5

7. At the 25th meeting, on 29 October, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “UNCITRAL Arbitration Rules as revised in 2010” (A/C.6/65/L.5).

8. At its 27th meeting, on 5 November, the Committee adopted draft resolution A/C.6/65/L.5 without a vote (see para. 13, draft resolution II).

C. Draft resolution A/C.6/65/L.6

9. At the 25th meeting, on 29 October, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property” (A/C.6/65/L.6).

10. At its 27th meeting, on 5 November, the Committee adopted draft resolution A/C.6/65/L.6 without a vote (see para. 13, draft resolution III).

D. Draft resolution A/C.6/65/L.7

11. At the 25th meeting, on 29 October, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “Part three of the UNCITRAL Legislative Guide on Insolvency Law” (A/C.6/65/L.7).

12. At its 27th meeting, on 5 November, the Committee adopted draft resolution A/C.6/65/L.7 without a vote (see para. 13, draft resolution IV).

III. Recommendations of the Sixth Committee

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

Draft resolution I

Report of the United Nations Commission on International Trade Law on the work of its forty-third session

The General Assembly,

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

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

Having considered the report of the Commission on the work of its forty-third session,¹

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

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

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

2. *Commends* the Commission for the finalization and adoption of three new international commercial law standards as follows: the UNCITRAL Arbitration Rules as revised in 2010;² the UNCITRAL Legislative Guide on Secured

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17).*

² *Ibid.*, chap. III and annex I.

Transactions: Supplement on Security Rights in Intellectual Property;³ and part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency;⁴

3. *Encourages* the Commission to finalize its work on a revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services⁵ at its forty-fourth session, in 2011;

4. *Welcomes* the decision of the Commission to take up new topics in the areas of settlement of commercial disputes, security interests and insolvency law and undertake work in the area of online dispute resolution;

5. *Also welcomes* the decision of the Commission to hold international colloquiums in order to facilitate identification of a road map for future work by the Commission in the area of electronic commerce and in order to explore the legal and regulatory issues surrounding microfinance that fell within the mandate of the Commission;

6. *Further welcomes* the progress made in the ongoing project of the Commission on monitoring the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958,⁶ and requests the Secretariat to pursue its efforts towards the preparation of a draft guide on the enactment of the Convention to promote a uniform interpretation and application of the Convention;

7. *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 and at 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;

8. *Reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with technical cooperation and assistance 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 cooperation and assistance 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 cooperation and assistance activities, including at the country, subregional and regional levels, and for providing assistance with legislative drafting in the field of

³ Ibid., chap. IV.

⁴ Ibid., chap. V.

⁵ Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

⁶ United Nations, *Treaty Series*, vol. 330, No. 4739.

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 cooperation and assistance activities, 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, for the financing of special projects, and otherwise to assist the secretariat of the Commission in carrying out technical cooperation and 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 cooperation and 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 the promotion of the rule of law at the national and international levels and for the implementation of the United Nations development agenda, including the achievement of the Millennium Development Goals;

(e) Welcomes the Commission's request that the Secretariat consider ways of better integrating its technical cooperation and assistance activities in activities conducted on the ground by the United Nations, in particular through the United Nations Development Programme or other country offices of the United Nations;

9. *Appeals* to Governments, 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 are members of the Commission, at their request and in consultation with the Secretary-General, in order to enable renewal of the provision of that assistance and 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 in order to facilitate the development of international trade and the promotion of foreign investment;

10. *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-fifth session of the General Assembly, its consideration of the granting of travel assistance to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General;

11. *Welcomes* the adoption by the Commission of a summary of conclusions on the topic of the Commission's rules of procedure and methods of work,⁷ after the comprehensive review of its working methods undertaken by the Commission from its fortieth to forty-second sessions, in the light of the recent increase in membership of the Commission and the number of topics being dealt with by the Commission, and calls upon Member States, non-member States, observer

⁷ See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 305 and annex III.

organizations and the Secretariat to apply the rules of procedure and methods of work, 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;

12. *Endorses* 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 the 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;

13. *Welcomes* the panel discussion on the rule of law in trade and commerce, held during the forty-third session of the Commission, and takes note with appreciation of the opening remarks delivered by the Deputy Secretary-General and statements made by representatives of States and multilateral development banks and by the Director of the United Nations Rule of Law Unit, reiterating the role of the Commission in promoting the rule of law at the national and international levels and the impact of the work of the Commission on economic and social development, including the achievement of the Millennium Development Goals, on the promotion of coordination and coherence of technical assistance and capacity-building in the field of international commercial law and in the context of post-conflict reconstruction;⁸

14. *Takes note* of the decisions taken by the Commission at the end of the panel discussion, and in particular welcomes those improving the integration of the work of the Commission into the United Nations joint rule of law programmes, in particular by raising awareness about the work of the Commission across the United Nations and by promoting regular dialogue between the Commission and the Rule of Law Coordination and Resource Group;⁹

15. *Welcomes* the review by the Commission of the proposed biennial programme plan for subprogramme 5 (Progressive harmonization, modernization and unification of the law of international trade) of programme 6 (Legal affairs) in the context of its consideration of the proposed strategic framework for the period 2012-2013,¹⁰ takes note that the Commission also expressed concern that the resources allotted to the Secretariat under subprogramme 5 were insufficient for it to meet the increased demand from developing countries and countries with economies in transition for technical assistance with law reform in the field of commercial law, and also takes note that 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 are made available promptly;¹¹

16. *Takes note* of the concern expressed by the Commission over the lack of sufficient resources in its secretariat for responding to the growing need for uniform interpretation of Commission texts, which is considered indispensable for their effective

⁸ Ibid., chap. XVII.

⁹ Ibid., paras. 334-336.

¹⁰ A/65/6 (Prog. 6).

¹¹ See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 346.

implementation, and that the Commission encouraged the Secretariat to explore various means to address this concern, inter alia, by building partnerships with interested institutions and establishing within the Commission's secretariat a pillar concentrating on the promotion of ways and means of uniform interpretation of Commission texts, in particular by sustaining and expanding the system for the collection and dissemination of case law on Commission texts (the CLOUT system);¹²

17. *Recalls* its resolutions on partnerships between the United Nations and non-State actors, in particular the private sector,¹³ 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;¹⁴

18. *Reiterates its request* to the Secretary-General, in conformity with its resolutions on documentation-related matters,¹⁵ 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;

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

20. *Recalls* its resolution in which it approved 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,¹⁶ 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;

21. *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;

22. *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 Goods¹⁷ and a digest of case law relating to the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law,¹⁸ with the aim of assisting in the dissemination of information on those texts and promoting their use, enactment and uniform interpretation.

¹² Ibid., para. 347.

¹³ Resolutions 55/215, 56/76, 58/129, 60/215, 62/211 and 64/223.

¹⁴ Resolutions 59/39, 60/20 and 61/32.

¹⁵ Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

¹⁶ See resolution 2502 (XXIV).

¹⁷ United Nations, *Treaty Series*, vol. 1489, No. 25567.

¹⁸ See *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I; and *ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I.

Draft resolution II

UNCITRAL Arbitration Rules as revised in 2010

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Also recalling its resolution 31/98 of 15 December 1976 recommending the use of the Arbitration Rules of the United Nations Commission on International Trade Law,¹

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

Noting that the Arbitration Rules are recognized as a very successful text and are used in a wide variety of circumstances covering a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions, in all parts of the world,

Recognizing the need for revising the Arbitration Rules to conform to current practices in international trade and to meet changes that have taken place over the last thirty years in arbitral practice,

Believing that the Arbitration Rules as revised in 2010 to reflect current practices will significantly enhance the efficiency of arbitration under the Rules,

Convinced that the revision of the Arbitration Rules in a manner that is acceptable to countries with different legal, social and economic systems can significantly contribute to the development of harmonious international economic relations and to the continuous strengthening of the rule of law,

Noting that the preparation of the Arbitration Rules as revised in 2010 was the subject of due deliberation and extensive consultations with Governments and interested circles and that the revised text can be expected to contribute significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of international commercial disputes,

Also noting that the Arbitration Rules as revised in 2010 were adopted by the United Nations Commission on International Trade Law at its forty-third session after due deliberation,²

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for having formulated and adopted the revised provisions of the Arbitration Rules, the text of which is contained in an annex to the report of

¹ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), chap. V, sect. C.*

² *Ibid., Sixty-fifth Session, Supplement No. 17 (A/65/17), chap. III.*

the United Nations Commission on International Trade Law on the work of its forty-third session;³

2. *Recommends* the use of the Arbitration Rules as revised in 2010 in the settlement of disputes arising in the context of international commercial relations;

3. *Requests* the Secretary-General to make all efforts to ensure that the Arbitration Rules as revised in 2010 become generally known and available.

³ Ibid., annex I.

Draft resolution III

UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property

The General Assembly,

Recognizing the importance to all States of efficient secured transactions regimes in promoting access to secured credit,

Recognizing also the need to make secured credit more available and at lower cost to intellectual property owners and other intellectual property right holders, and thus the need to enhance the value of intellectual property rights as security for credit,

Noting that the *UNCITRAL Legislative Guide on Secured Transactions*¹ generally applies to security rights in intellectual property, without inadvertently interfering with the basic rules and objectives of law relating to intellectual property,

Taking into account the need to address the interaction between secured transactions law and law relating to intellectual property at both the national and the international levels,

Recognizing that States would need guidance as to how the recommendations contained in the *UNCITRAL Legislative Guide on Secured Transactions* would apply in an intellectual property context and as to the adjustments that need to be made to their laws to avoid inconsistencies between secured transactions law and law relating to intellectual property,

Noting the importance of balancing the interests of all stakeholders, including grantors, whether they are owners, licensors or licensees of intellectual property, and secured creditors,

Expressing its appreciation to intergovernmental and international non-governmental organizations active in the fields of secured financing and intellectual property, in particular the World Intellectual Property Organization and the Hague Conference on Private International Law, for their participation in and support for the development of the *UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property*,²

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption of the *UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property*;²

2. *Requests* the Secretary-General to disseminate broadly, including through electronic means, the text of the Supplement and to transmit it to Governments and other interested bodies;

¹ United Nations publication, Sales No. E.09.V.12.

² See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, chap. IV.

3. *Recommends* that all States utilize the Supplement to assess the economic efficiency of their intellectual property financing and give favourable consideration to the Supplement when revising or adopting their relevant legislation, and invites States that have done so to advise the Commission accordingly;

4. *Also recommends* that all States continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade³ and implementing the recommendations contained in the *UNCITRAL Legislative Guide on Secured Transactions*.¹

³ Resolution 56/81, annex.

Draft resolution IV

Part three of the UNCITRAL Legislative Guide on Insolvency Law

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 the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Recalling also its resolution 59/40 of 2 December 2004 recommending the use of the *UNCITRAL Legislative Guide on Insolvency Law*,¹

Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as fostering entrepreneurial activity and preserving employment,

Noting that because the business of corporations is increasingly conducted, both domestically and internationally, through enterprise groups, the formation of enterprise groups is a feature of the increasingly globalized world economy and thus significant to international trade and commerce,

Recognizing that where the business of an enterprise group fails, it is important not only to know how the group will be treated in insolvency proceedings, but also to ensure that that treatment facilitates, rather than hinders, the fast and efficient conduct of the insolvency proceedings,

Being aware that very few States recognize an enterprise group as a legal entity, except in limited ways for specific purposes, and that very few, if any, have a comprehensive regime for the treatment of enterprise groups in insolvency,

Noting that the *UNCITRAL Legislative Guide on Insolvency Law*, while providing a sound basis for the unification of insolvency law and forming key elements of a modern commercial law framework, does not address the insolvency of enterprise groups,

Appreciating the support for and the participation of international intergovernmental and non-governmental organizations active in the field of insolvency law reform in the development of an additional part of the *UNCITRAL Legislative Guide on Insolvency Law* addressing the treatment of enterprise groups in insolvency,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for developing and adopting part three of the *UNCITRAL Legislative Guide on Insolvency Law*¹ on the treatment of enterprise groups in insolvency;²

2. *Requests* the Secretary-General to transmit the text of part three of the *UNCITRAL Legislative Guide on Insolvency Law* to Governments and other interested bodies;

¹ United Nations publication, Sales No. E.05.V.10.

² See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, chap. V.

3. *Recommends* that all States utilize the *UNCITRAL Legislative Guide on Insolvency Law* to assess the economic efficiency of their insolvency law regimes and give favourable consideration to the Guide when revising or adopting legislation relevant to insolvency, and invites States that have used the *Guide* to advise the Commission accordingly;

4. *Also recommends* that all States continue to consider implementation of the *UNCITRAL Model Law on Cross-Border Insolvency*;³

5. *Further recommends* that the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* continue to be given due consideration by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings.

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

D. General Assembly resolutions 65/21, 65/22, 65/23, 65/24 and 65/32**Resolutions adopted by the General Assembly on the report of the Sixth Committee (A/65/465)****65/21. Report of the United Nations Commission on International Trade Law on the work of its forty-third session**

The General Assembly,

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

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

Having considered the report of the Commission on the work of its forty-third session,¹

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

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

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

2. *Commends* the Commission for the finalization and adoption of three new international commercial law standards as follows: the UNCITRAL Arbitration Rules as revised in 2010;² the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property;³ and

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17).*

² *Ibid.*, chap. III and annex I.

³ *Ibid.*, chap. IV.

part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency;⁴

3. *Encourages* the Commission to finalize its work on a revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services⁵ at its forty-fourth session, in 2011;

4. *Welcomes* the decision of the Commission to take up new topics in the areas of settlement of commercial disputes, security interests and insolvency law and undertake work in the area of online dispute resolution;

5. *Also welcomes* the decision of the Commission to hold international colloquiums in order to facilitate identification of a road map for future work by the Commission in the area of electronic commerce and in order to explore the legal and regulatory issues surrounding microfinance that fell within the mandate of the Commission;

6. *Further welcomes* the progress made in the ongoing project of the Commission on monitoring the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958,⁶ and requests the Secretariat to pursue its efforts towards the preparation of a draft guide on the enactment of the Convention to promote a uniform interpretation and application of the Convention;

7. *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 and at 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;

8. *Reaffirms* the importance, in particular for developing countries, of the work of the Commission concerned with technical cooperation and assistance 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 cooperation and assistance 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 cooperation and assistance 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;

⁴ Ibid., chap. V.

⁵ Ibid., *Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I.

⁶ United Nations, *Treaty Series*, vol. 330, No. 4739.

(c) Expresses its appreciation to the Governments whose contributions enabled the technical cooperation and assistance activities, 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, for the financing of special projects, and otherwise to assist the secretariat of the Commission in carrying out technical cooperation and 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 cooperation and 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 the promotion of the rule of law at the national and international levels and for the implementation of the United Nations development agenda, including the achievement of the Millennium Development Goals;

(e) Welcomes the Commission's request that the Secretariat consider ways of better integrating its technical cooperation and assistance activities in activities conducted on the ground by the United Nations, in particular through the United Nations Development Programme or other country offices of the United Nations;

9. *Appeals* to Governments, 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 are members of the Commission, at their request and in consultation with the Secretary-General, in order to enable renewal of the provision of that assistance and 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 in order to facilitate the development of international trade and the promotion of foreign investment;

10. *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-fifth session of the General Assembly, its consideration of the granting of travel assistance to the least developed countries that are members of the Commission, at their request and in consultation with the Secretary-General;

11. *Welcomes* the adoption by the Commission of a summary of conclusions on the topic of the Commission's rules of procedure and methods of work,⁷ after the comprehensive review of its working methods undertaken by the Commission from its fortieth to forty-second sessions, in the light of the recent increase in membership of the Commission and the number of topics being dealt with by the Commission, and calls upon Member States, non-member States, observer

⁷ See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 305 and annex III.

organizations and the Secretariat to apply the rules of procedure and methods of work, 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;

12. *Endorses* 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 the 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;

13. *Welcomes* the panel discussion on the rule of law in trade and commerce, held during the forty-third session of the Commission, and takes note with appreciation of the opening remarks delivered by the Deputy Secretary-General and statements made by representatives of States and multilateral development banks and by the Director of the United Nations Rule of Law Unit, reiterating the role of the Commission in promoting the rule of law at the national and international levels and the impact of the work of the Commission on economic and social development, including the achievement of the Millennium Development Goals, on the promotion of coordination and coherence of technical assistance and capacity-building in the field of international commercial law and in the context of post-conflict reconstruction;⁸

14. *Takes note* of the decisions taken by the Commission at the end of the panel discussion, and in particular welcomes those improving the integration of the work of the Commission into the United Nations joint rule of law programmes, in particular by raising awareness about the work of the Commission across the United Nations and by promoting regular dialogue between the Commission and the Rule of Law Coordination and Resource Group;⁹

15. *Welcomes* the review by the Commission of the proposed biennial programme plan for subprogramme 5 (Progressive harmonization, modernization and unification of the law of international trade) of programme 6 (Legal affairs) in the context of its consideration of the proposed strategic framework for the period 2012-2013,¹⁰ takes note that the Commission also expressed concern that the resources allotted to the Secretariat under subprogramme 5 were insufficient for it to meet the increased demand from developing countries and countries with economies in transition for technical assistance with law reform in the field of commercial law, and also takes note that 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 are made available promptly;¹¹

16. *Takes note* of the concern expressed by the Commission over the lack of sufficient resources in its secretariat for responding to the growing need for uniform

⁸ Ibid., chap. XVII.

⁹ Ibid., paras. 334-336.

¹⁰ A/65/6 (Prog. 6).

¹¹ See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 346.

interpretation of Commission texts, which is considered indispensable for their effective implementation, and that the Commission encouraged the Secretariat to explore various means to address this concern, inter alia, by building partnerships with interested institutions and establishing within the Commission's secretariat a pillar concentrating on the promotion of ways and means of uniform interpretation of Commission texts, in particular by sustaining and expanding the system for the collection and dissemination of case law on Commission texts (the CLOUT system);¹²

17. *Recalls* its resolutions on partnerships between the United Nations and non-State actors, in particular the private sector,¹³ 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;¹⁴

18. *Reiterates its request* to the Secretary-General, in conformity with its resolutions on documentation-related matters,¹⁵ 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;

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

20. *Recalls* its resolution in which it approved 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,¹⁶ 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;

21. *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;

22. *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 Goods¹⁷ and a digest of case law relating to the Model Law on International Commercial Arbitration of the United Nations Commission

¹² Ibid., para. 347.

¹³ Resolutions 55/215, 56/76, 58/129, 60/215, 62/211 and 64/223.

¹⁴ Resolutions 59/39, 60/20 and 61/32.

¹⁵ Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

¹⁶ See resolution 2502 (XXIV).

¹⁷ United Nations, *Treaty Series*, vol. 1489, No. 25567.

on International Trade Law,¹⁸ with the aim of assisting in the dissemination of information on those texts and promoting their use, enactment and uniform interpretation.

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¹⁸ See *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I; and *ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I.

65/22. UNCITRAL Arbitration Rules as revised in 2010

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law with the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Recalling also its resolution 31/98 of 15 December 1976 recommending the use of the Arbitration Rules of the United Nations Commission on International Trade Law,¹

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

Noting that the Arbitration Rules are recognized as a very successful text and are used in a wide variety of circumstances covering a broad range of disputes, including disputes between private commercial parties, investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions, in all parts of the world,

Recognizing the need for revising the Arbitration Rules to conform to current practices in international trade and to meet changes that have taken place over the last thirty years in arbitral practice,

Believing that the Arbitration Rules as revised in 2010 to reflect current practices will significantly enhance the efficiency of arbitration under the Rules,

Convinced that the revision of the Arbitration Rules in a manner that is acceptable to countries with different legal, social and economic systems can significantly contribute to the development of harmonious international economic relations and to the continuous strengthening of the rule of law,

Noting that the preparation of the Arbitration Rules as revised in 2010 was the subject of due deliberation and extensive consultations with Governments and interested circles and that the revised text can be expected to contribute significantly to the establishment of a harmonized legal framework for the fair and efficient settlement of international commercial disputes,

Noting also that the Arbitration Rules as revised in 2010 were adopted by the United Nations Commission on International Trade Law at its forty-third session after due deliberation,²

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for having formulated and adopted the revised provisions of the Arbitration Rules, the text of which is contained in an annex to the report of the United Nations Commission on International Trade Law on the work of its forty-third session;³

¹ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), chap. V, sect. C.*

² *Ibid., Sixty-fifth Session, Supplement No. 17 (A/65/17), chap. III.*

³ *Ibid., annex I.*

2. *Recommends* the use of the Arbitration Rules as revised in 2010 in the settlement of disputes arising in the context of international commercial relations;
3. *Requests* the Secretary-General to make all efforts to ensure that the Arbitration Rules as revised in 2010 become generally known and available.

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65/23. UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property

The General Assembly,

Recognizing the importance to all States of efficient secured transactions regimes in promoting access to secured credit,

Recognizing also the need to make secured credit more available and at lower cost to intellectual property owners and other intellectual property right holders, and thus the need to enhance the value of intellectual property rights as security for credit,

Noting that the *UNCITRAL Legislative Guide on Secured Transactions*¹ generally applies to security rights in intellectual property, without inadvertently interfering with the basic rules and objectives of law relating to intellectual property,

Taking into account the need to address the interaction between secured transactions law and law relating to intellectual property at both the national and the international levels,

Recognizing that States would need guidance as to how the recommendations contained in the *UNCITRAL Legislative Guide on Secured Transactions* would apply in an intellectual property context and as to the adjustments that need to be made to their laws to avoid inconsistencies between secured transactions law and law relating to intellectual property,

Noting the importance of balancing the interests of all stakeholders, including grantors, whether they are owners, licensors or licensees of intellectual property, and secured creditors,

Expressing its appreciation to intergovernmental and international non-governmental organizations active in the fields of secured financing and intellectual property, in particular the World Intellectual Property Organization and the Hague Conference on Private International Law, for their participation in and support for the development of the *UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property*,²

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption of the *UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property*;²

2. *Requests* the Secretary-General to disseminate broadly, including through electronic means, the text of the Supplement and to transmit it to Governments and other interested bodies;

3. *Recommends* that all States utilize the Supplement to assess the economic efficiency of their intellectual property financing and give favourable consideration to the Supplement when revising or adopting their relevant legislation, and invites States that have done so to advise the Commission accordingly;

¹ United Nations publication, Sales No. E.09.V.12.

² See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, chap. IV.

4. *Also recommends* that all States continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade³ and implementing the recommendations contained in the *UNCITRAL Legislative Guide on Secured Transactions*.¹

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³ Resolution 56/81, annex.

65/24. Part three of the UNCITRAL Legislative Guide on Insolvency Law

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 the purpose of furthering the progressive harmonization and unification of the law of international trade in the interests of all peoples, in particular those of developing countries,

Recalling also its resolution 59/40 of 2 December 2004 recommending the use of the *UNCITRAL Legislative Guide on Insolvency Law*,¹

Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as fostering entrepreneurial activity and preserving employment,

Noting that because the business of corporations is increasingly conducted, both domestically and internationally, through enterprise groups, the formation of enterprise groups is a feature of the increasingly globalized world economy and thus significant to international trade and commerce,

Recognizing that where the business of an enterprise group fails, it is important not only to know how the group will be treated in insolvency proceedings, but also to ensure that that treatment facilitates, rather than hinders, the fast and efficient conduct of the insolvency proceedings,

Being aware that very few States recognize an enterprise group as a legal entity, except in limited ways for specific purposes, and that very few, if any, have a comprehensive regime for the treatment of enterprise groups in insolvency,

Noting that the *UNCITRAL Legislative Guide on Insolvency Law*, while providing a sound basis for the unification of insolvency law and forming key elements of a modern commercial law framework, does not address the insolvency of enterprise groups,

Appreciating the support for and the participation of international intergovernmental and non-governmental organizations active in the field of insolvency law reform in the development of an additional part of the *UNCITRAL Legislative Guide on Insolvency Law* addressing the treatment of enterprise groups in insolvency,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for developing and adopting part three of the *UNCITRAL Legislative Guide on Insolvency Law*¹ on the treatment of enterprise groups in insolvency;²

2. *Requests* the Secretary-General to transmit the text of part three of the *UNCITRAL Legislative Guide on Insolvency Law* to Governments and other interested bodies;

3. *Recommends* that all States utilize the *UNCITRAL Legislative Guide on Insolvency Law* to assess the economic efficiency of their insolvency law regimes

¹ United Nations publication, Sales No. E.05.V.10.

² See *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, chap. V.

and give favourable consideration to the Guide when revising or adopting legislation relevant to insolvency, and invites States that have used the *Guide* to advise the Commission accordingly;

4. *Also recommends* that all States continue to consider implementation of the *UNCITRAL Model Law on Cross-Border Insolvency*;³

5. *Further recommends* that the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* continue to be given due consideration by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings.

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

65/32. The rule of law at the national and international levels

The General Assembly,

Recalling its resolution 64/116 of 16 December 2009,

Reaffirming its commitment to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterating its determination to foster strict respect for them and to establish a just and lasting peace all over the world,

Reaffirming that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations,

Reaffirming also the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States,

Convinced that the advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms, and acknowledging that collective security depends on effective cooperation, in accordance with the Charter and international law, against transnational threats,

Reaffirming the duty of all States to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations and to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered, in accordance with Chapter VI of the Charter, and calling upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute,

Convinced that the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and of its Member States,

Recalling paragraph 134 (e) of the 2005 World Summit Outcome,¹

1. *Takes note* of the annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;²

2. *Reaffirms* the role of the General Assembly in encouraging the progressive development of international law and its codification, and reaffirms further that States shall abide by all their obligations under international law;

3. *Stresses* the importance of adherence to the rule of law at the national level and the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building, based on greater coordination

¹ See resolution 60/1.

² A/65/318.

and coherence within the United Nations system and among donors, and reiterates its call for greater evaluation of the effectiveness of such activities;

4. *Calls*, in this context, for dialogue to be enhanced among all stakeholders with a view to placing national perspectives at the centre of rule of law assistance in order to strengthen national ownership;

5. *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;

6. *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;

7. *Requests* the Secretary-General to submit, in a timely manner, his next annual report on United Nations rule of law activities, in accordance with paragraph 5 of its resolution 63/128 of 11 December 2008;

8. *Welcomes* the dialogue initiated by the Rule of Law Coordination and Resource Group and the Rule of Law Unit with Member States on the topic “Promoting the rule of law at the international level”, and calls for the continuation of this dialogue with a view to fostering the rule of law at the international level;

9. *Encourages* the Secretary-General and the United Nations system to accord high priority to rule of law activities;

10. *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;

11. *Invites* the Rule of Law Coordination and Resource Group and the Rule of Law Unit to continue to interact with Member States on a regular basis, in particular in informal briefings;

12. *Stresses* the need to provide the Rule of Law Unit with the necessary funding and staff in order to enable it to carry out its tasks in an effective and sustainable manner, and urges the Secretary-General and Member States to continue to support the functioning of the Unit;

13. *Decides* to convene a high-level meeting of the General Assembly on the rule of law at the national and international levels during the high-level segment of its sixty-seventh session, the modalities of which will be finalized during its sixty-sixth session;

14. *Also decides* to include in the provisional agenda of its sixty-sixth session the item entitled “The rule of law at the national and international levels”, invites Member States to focus their comments in the upcoming Sixth Committee debate on the sub-topic “Rule of law and transitional justice in conflict and post-conflict situations”,³ without prejudice to the

³ See the note by the Chairman of the Sixth Committee (A/C.6/63/L.23).

consideration of the item as a whole, and invites the Secretary-General, after seeking the views of Member States, to provide information on this sub-topic in his report.

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Part Two

STUDIES AND REPORTS ON SPECIFIC SUBJECTS

I. ARBITRATION AND CONCILIATION

A. Report of the Working Group on Arbitration and Conciliation on the work of its fifty-first session (Vienna, 14-18 September 2009) (A/CN.9/684)

[Original: English]

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I. Introduction

1. At its thirty-first session (New York, 1-12 June 1998), the Commission, with reference to discussions at the special commemorative New York Convention Day held in June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“the New York Convention”), considered that it would be useful to engage in a discussion of possible future work in the area of arbitration. It requested the Secretariat to prepare a note that would serve as a basis for the consideration of the Commission at its next session.¹

2. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission had before it a note entitled “Possible future work in the area of international commercial arbitration” (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) (“the Model Law”), as well as the use of the UNCITRAL Arbitration Rules (“the UNCITRAL Arbitration Rules” or “the Rules”) and the UNCITRAL Conciliation Rules, and to evaluate, in the universal forum of the Commission, the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.² When the Commission discussed that topic, it left open the question of what form its

¹ *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 235.

² *Ibid.*, *Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 337.

future work might take. It was agreed that decisions on the matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide).³

3. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments elaborated by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were recognized as a very successful text, adopted by many arbitration centres and used in many different instances, such as, for example, in investor-State disputes. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit, its drafting style, and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to carefully define the list of topics which might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.⁴

4. The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to define whether arbitral 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 arbitral. 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 arbitral matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.⁵

5. Other topics mentioned for possible inclusion in the future work of the Working Group included issues raised by online dispute resolution. It was suggested that the UNCITRAL Arbitration Rules, when read in conjunction with other instruments, such as the UNCITRAL Model Law on Electronic Commerce and the United Nations Convention on the Use of Electronic Communications in International Contracts, already accommodated a number of issues arising in the online context. Another topic for future work 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

³ Ibid., para. 338.

⁴ Ibid., *Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 184.

⁵ Ibid., para. 185.

Commission also heard with interest a statement made on behalf of the International Cotton Advisory Committee suggesting that work could be undertaken by the Commission to promote contract discipline, effectiveness of arbitration agreements and enforcement of awards in that industry.⁶

6. After discussion, the Commission was generally of the view that several matters could be dealt with by the Working Group in parallel. The Commission agreed that the Working Group should resume its work on the question of a revision of the UNCITRAL Arbitration Rules. It was also agreed that the issue of arbitrability was a topic which the Working Group should also consider. As to the issue of online dispute resolution, it was agreed that the Working Group should place the topic on its agenda but, at least in an initial phase, deal with the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.⁷

7. At its fortieth session (Vienna, 25 June-12 July 2007), the Commission noted that the UNCITRAL Arbitration Rules had not been amended since their adoption in 1976 and that the review should seek to modernize the Rules and to promote greater efficiency in arbitral proceedings. The Commission generally agreed that the mandate of the Working Group to maintain the original structure and spirit of the UNCITRAL Arbitration Rules had provided useful guidance to the Working Group in its deliberations to date and should continue to be a guiding principle for its work.⁸ The Commission noted that broad support had been expressed in the Working Group for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. However, the Commission noted that the extent to which the revised UNCITRAL Arbitration Rules should take account of investor-State dispute settlement or administered arbitration remained to be considered by the Working Group at future sessions.⁹

8. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted that the Working Group had decided to proceed with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take.¹⁰ After discussion, the Commission agreed that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes which the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty-based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution. The

⁶ Ibid., para. 186.

⁷ Ibid., para. 187.

⁸ Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 174.

⁹ Ibid., para. 175.

¹⁰ Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 313.

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.¹¹

9. At its forty-second session (Vienna, 29 June-17 July 2009), the Commission noted that the Working Group had discussed at its forty-ninth session a proposal aimed at expanding the role of the Secretary-General of the Permanent Court of Arbitration at The Hague (“the PCA”) under the UNCITRAL Arbitration Rules (A/CN.9/665, paras. 47-50).¹² After discussion, the Commission agreed that the existing mechanism on designating and appointing authorities, as designed under the 1976 version of the Rules, should not be changed.¹³ It was emphasized that the UNCITRAL Arbitration Rules should not contain a default rule, to the effect that one institution would be singled out as the default appointing authority and be identified in the Rules as a provider of direct assistance to the parties.¹⁴

10. The Commission further noted that the Working Group, at its fiftieth session, agreed to request the Commission for sufficient time to complete its work on the UNCITRAL Arbitration Rules in order to bring the draft text of revised Rules to the level of maturity and quality required (A/CN.9/669, para. 120). The Commission agreed that the time required should be taken for meeting the high standard of UNCITRAL, taking account of the international impact of the Rules, and expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-third session of the Commission, in 2010.¹⁵

II. Organization of the session

11. The Working Group, which was composed of all States members of the Commission, held its fifty-first session in Vienna, from 14 to 18 September 2009. The session was attended by the following States members of the Working Group: Algeria, Armenia, Australia, Austria, Bahrain, Belarus, Bolivia (Plurinational State of), Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, El Salvador, France, Germany, Greece, Iran (Islamic Republic of), Italy, Japan, Kenya, Lebanon, Malaysia, Mexico, Norway, Pakistan, Paraguay, Poland, Republic

¹¹ *Ibid.*, para. 314.

¹² Report of the United Nations Commission on International Trade Law, Forty-second session (A/64/17), para. 292.

¹³ *Ibid.*, para. 293.

¹⁴ *Ibid.*, para. 297.

¹⁵ *Ibid.*, para. 298.

of Korea, Russian Federation, Senegal, Singapore, South Africa, Spain, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Zimbabwe.

12. The session was attended by observers from the following States: Argentina, Belgium, Brazil, Burundi, Croatia, Dominican Republic, Finland, Hungary, Indonesia, Iraq, Lithuania, Mauritius, Netherlands, Oman, Peru, Philippines, Portugal, Romania, Slovakia, Sudan, Sweden, Tajikistan, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, United Republic of Tanzania and Yemen.

13. The session was attended by observers from the following organization of the United Nations System: the United Nations Office of Legal Affairs.

14. The session was attended by observers from the following international intergovernmental organizations invited by the Commission: Asian-African Legal Consultative Organization (AALCO), MERCOSUR and Permanent Court of Arbitration (PCA).

15. The session was also attended by observers from the following international non-governmental organizations invited by the Commission: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association (AAA), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Asia Pacific Regional Arbitration Group (APRAG), Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Legal Studies (CILS), *Centre pour l'Étude et la Pratique de l'Arbitrage National et International* (CEPANI), Construction Industry Arbitration Council — Singapore International Arbitration Centre (CIAC-SIAC), Council of Bars and Law Societies of Europe (CCBE), European Company Lawyers Association (ECLA), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), ICC International Court of Arbitration, Inter-American Bar Association (IABA), International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Milan Club of Arbitrators, Regional Centre for International Commercial Arbitration — Lagos (RCICAL), School of International Arbitration of the Queen Mary University of London, Swiss Arbitration Association (ASA) and *Union Internationale des Avocats* (UIA).

16. The Working Group elected the following officers:

Chairman: Mr. Michael E. Schneider (Switzerland);

Rapporteur: Mr. Iftikharuddin Riaz (Pakistan)

17. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.155); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules (A/CN.9/WG.II/WP.151/Add.1, A/CN.9/WG.II/WP.154 and A/CN.9/WG.II/WP.154/Add.1).

18. 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

19. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.151/Add.1, A/CN.9/WG.II/WP.154 and A/CN.9/WG.II/WP.154/Add.1). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Secretariat was requested to prepare a draft of revised UNCITRAL Arbitration Rules, based on the deliberations and decisions of the Working Group.

IV. Revision of the UNCITRAL Arbitration Rules

20. The Working Group recalled that it had concluded a second reading of articles 18 to 26 of the draft revised Rules at its fiftieth session (A/CN.9/669) and agreed to resume discussions on the revision of the Rules on the basis of document A/CN.9/WG.II/WP.151/Add.1 and the proposed revisions contained therein (to be complemented, as appropriate, by document A/CN.9/WG.II/WP.154 and A/CN.9/WG.II/WP.154/Add.1).

Section III. Arbitral proceedings

Experts appointed by the arbitral tribunal

Article 27

21. The Working Group decided that the substance of article 27, as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable. The Working Group took note that one delegation would make a proposal concerning article 27 with respect to challenge of experts at a future session.

Default

Article 28

Paragraph (1) (a)

22. The view was expressed that article 28, paragraph (1) (a), as contained in document A/CN.9/WG.II/WP.151/Add.1, which provided for an automatic termination of the proceedings in case of failure of a claimant to communicate its statement of claim, “unless the respondent has submitted a counterclaim”, was too limited, as it failed to cover situations where, despite the failure to submit a statement of claim, the issues in dispute might still require a decision to be made by the arbitral tribunal, in particular in view of the interests of the other parties involved. It was also suggested that an arbitral tribunal might need to make a

decision carrying value as *res judicata*, to take care of the fact that arbitration practice had shown that occasionally claimants made harassing claims. It was also pointed out that the reference contained in paragraph (1) (a) to a counterclaim “submitted” by the respondent might not be wide enough, and it should be clarified that a counterclaim mentioned in the response to the notice of arbitration might constitute a sufficient submission for the purpose of article 28, paragraph (1) (a). In that respect, it was proposed to replace the word “submitted” by the word “made”. It was further suggested to add at the end of paragraph (1) (a) the words “or the respondent asks that the tribunal determine the claimant’s claim on the merits and the tribunal determines that it is appropriate to do so under the current circumstances”.

23. Concerns were expressed that a decision of the arbitral tribunal on the merits would be difficult to achieve, if no statement of claim had been submitted as stated in article 28, paragraph (1) (a). Further concerns were expressed that under some jurisdictions, a dismissal with prejudice where no statement of claim had been filed, would be subject to annulment. In response, it was explained that the submissions already made by the parties might be sufficient to allow the arbitral tribunal to decide certain issues, such as matters of jurisdiction or costs.

24. Various proposals were made to broaden article 28, paragraph (1) (a). It was suggested to broaden the mandatory contents of the notice of arbitration, so that a decision on the merits could be made by the arbitral tribunal even in the absence of a statement of claim. Another proposal was made to replace the words “unless the respondent has submitted a counterclaim” by the words “unless there remain other issues to be decided”. It was suggested to clarify that the arbitral tribunal would have the power to continue the arbitral proceedings only upon the request of the respondent, along the lines of “unless the respondent needs other issues to be considered” or “unless the respondent needs matters to be decided”. In response, it was observed that that proposal excluded requests which could be brought by co-claimants and other interested parties and that it might be preferable to adopt wording preserving the flexibility of the provision. In that regard, it was proposed to insert words along the lines of “unless any party to the proceedings requests otherwise” or “unless there are any matters raised by the parties which may be decided.” It was also suggested that the words “other issues” or “other matters” used in some of the above proposals might be too vague, and it was proposed to refer instead to wording along the lines of “with such *res judicata* effect as the tribunal may consider or other issues already joined”.

25. Another proposal was made to leave discretion to the arbitral tribunal to decide whether to terminate or continue the proceedings and to include a provision along the following lines: “unless there are any matters that may be decided and the arbitral tribunal considers it appropriate to do so.” It was proposed to add the word “remaining” before the word “matters” in that proposal, in order to clarify that the matters to be dealt with were those initially included by the parties in the notice of arbitration and response thereto. It was said that rules of some international arbitration centres, such as article 6.3 of the ICC Rules of Arbitration (“ICC rules”), provided for wide discretion of the arbitral tribunal to proceed in case of refusal or failure of any of the parties to take part in the arbitration. However, it was questioned whether it was appropriate to provide for broad discretion of the arbitral tribunal and it was said that guarantee should be given to the respondent that in case

a counterclaim was made, the arbitral tribunal would still consider it. To address that concern, it was proposed to include words along the lines of “unless the respondent has submitted a response and there are any matters that need to be decided”.

26. After discussion, the Working Group agreed that article 28, paragraph (1) (a), as contained in document A/CN.9/WG.II/WP.151/Add.1, should be redrafted, so that it would no longer limit the power of the arbitral tribunal in case the claimant failed to submit its statement of claim to a dismissal order for termination. The Working Group requested the Secretariat to reformulate the text, taking account of the suggestions made, for consideration at a future session.

Paragraph (1) (b)

27. It was observed that some inconsistency existed between the wording of article 28, paragraph (1) (b), as contained in document A/CN.9/WG.II/WP.151/Add.1, and the new article 4, paragraph (3), of the draft revised Rules, as contained in document A/CN.9/WG.II/WP.154, which both dealt with the failure of communication of a response to the notice of arbitration by the respondent. To align both articles, it was proposed to delete the last sentence of the new article 4, paragraph (3) or to add at the end of the new article 4, paragraph (3) the words “consistent with article 28, paragraph (1) (b)”. Those proposals did not receive support, as it was considered self-understood that an arbitral tribunal would proceed as it considered appropriate in compliance with the Rules, including article 28 (1) (b).

Paragraph (2)

28. The Working Group decided that the substance of article 28, paragraph (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (3)

Placement

29. A question was raised whether article 28, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, which dealt with the failure by a party to produce documents, exhibits or other evidence, should be located under article 27 of the draft revised Rules (numbered article 24 in the 1976 version of the Rules), as contained in document A/CN.9/WG.II/WP.154/Add.1 (“draft revised article 27”). It was said that draft revised article 27 covered the general matter of evidence, and paragraph (3) of article 28 dealt with the power of the arbitral tribunal to request a party to produce evidence. It would therefore be logical to place paragraph (3) of article 28 as a part of draft revised article 27. It was noted that a comparable provision was contained in article 34, paragraph (3) of the rules of procedure for arbitration proceedings of the International Centre for Dispute Settlement (“ICSID arbitration rules”) which related to general principles on evidence.

30. Other views were expressed that, considering that paragraph (3) dealt with a default situation, it should remain under article 28. As a practical argument, it was said that it might cause confusion to move that paragraph under a provision on evidence since it was originally to be found under a provision on default. It was

further said that there did not seem to be any compelling reasons to relocate paragraph (3).

31. After discussion, the Working Group agreed that there was no consensus for placing paragraph (3) of article 28, under draft revised article 27, and the Working Group agreed that paragraph (3) should remain located under article 28.

“without showing sufficient cause for such failure”

32. It was pointed out that article 28, paragraph (3) referred to the situation where a party failed to produce evidence, without showing sufficient cause for such failure, but that that paragraph was silent on the failure of a party to submit evidence when there was sufficient cause for such failure. It was proposed either to delete that paragraph or to complement it by adding a provision clarifying that the arbitral tribunal might draw adverse inferences in case of a party's failure to produce evidence without showing sufficient cause. It was said that it should be clearly stated whether the fact that a party failed to submit evidence might itself be used as evidence against that party. It was further said that there were differing approaches to that matter across various jurisdictions and the Rules could usefully provide more guidance in respect of that issue. Those proposals received little support. It was said that it would unnecessarily complicate the provision to spell out the consequences of a default to provide evidence. It was pointed out that the question of the assessment of the weight of evidence was already dealt with under draft revised article 27, as contained in document A/CN.9/WG.II/WP.154/Add.1. It was further said that the provision, as it stood, provided useful guidance to the arbitral tribunals, had not created any difficulties and reflected current practice.

33. After discussion, the Working Group decided that the substance of article 28, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Closure of hearings

Article 29

Paragraphs (1) and (2)

34. It was observed that the wording of article 29, paragraphs (1) and (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, created the impression that the arbitral tribunal could close the hearings only if there were no further offers of proof or submissions. It was clarified that that was not the intention of the provision as otherwise parties could delay the proceedings by unnecessary offers of proof or submissions. To address that situation, it was suggested to replace the words “if there are none” in paragraph (1) with an expression that would clearly refer to the arbitral tribunal's discretion to rule on the admissibility of the evidence or to add the words “accepted by the tribunal” after the word “none”. In response, it was said that draft revised article 27, paragraph (4), as contained in document A/CN.9/WG.II/WP.154/Add.1, already provided for the arbitral tribunal's discretion to “determine the admissibility, relevance, materiality and weight of the evidence offered”, and that there was therefore no need for further clarification under paragraph (1).

35. It was further said that article 29 did not reflect modern practice and it was suggested to delete article 29 entirely. That suggestion did not find support.

36. Another proposal for modification of article 29 was to replace the word “hearings” by the word “proceedings” where it appeared in that article. It was explained that such replacement in article 29 would not lead to inconsistencies with article 28, paragraph (1) (a), as contained in document A/CN.9/WG.II/WP.151/Add.1, as article 28, paragraph (1) (a) referred to “termination” of proceedings, whereas article 29, paragraph (1) would then refer to the “closure” thereof. Different views were expressed on that proposal.

37. In favour of that proposal, it was stated that the word “proceedings” was broader than the word “hearings”. In that regard, it was noted that the content of article 29 actually referred to the closing of the arguments. It was further noted that using the word “proceedings” instead of the word “hearings” would solve any inconsistency between the English and the French versions of the Rules, as the latter referred to the closure of arguments (“clôture des débats”). It was also said that such modification would constitute a useful revision of the Rules in conformity with the terminology used in, for instance, the Swiss Rules of International Arbitration (“Swiss rules”) and the ICC rules.

38. Against that proposal, it was said that such modification could create inconsistencies with other provisions of the Rules which referred to “proceedings” in a wider sense as well as difficulties in practice due to the broader notion of the word “proceedings”. As a matter of example, it was questioned whether article 41, paragraph (2) of the Rules, which referred to the arbitral tribunal’s power to request supplementary deposit from the parties “during the course of the arbitral proceedings” would still be read as applying after closure of the hearings, in case article 29 would refer to the closing of the proceedings. It was said that the word “proceedings” had a broader meaning under the Rules than the word “hearings”. It was also said that the distinction between the words “closure” and “termination” might not be clear to all potential users of the Rules. The Working Group was reminded of its mandate that the Rules should only be changed if there was a compelling reason therefor.

39. A question was raised whether the word “hearings” was limited to oral hearings or would also include presentation of testimony in written form. In that regard, it was noted that the Model Law differentiated in article 24 between “oral hearings” and “written proceedings”. It was proposed to amend the title of article 28 of the draft revised Rules (numbered article 25 in the 1976 version of the Rules), as contained in document A/CN.9/WG.II/WP.154/Add.1, (“draft revised article 28”) to clarify that that article only referred to oral hearings, whereas the word “hearings” as used in article 29 was meant to encompass both written evidence as well as hearings of witnesses. It was said that such modification to the title of the draft revised article 28 would deserve more consideration. On the other hand, it was also noted that the scope of what the tribunal might “close” under article 29 was clearly indicated in the current text, which referred to whether there was “further proof to offer or witnesses to be heard or submissions to make.”

40. After discussion, the Working Group agreed that the substance of article 29, as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable, and

that no change should be made in the title of draft revised article 28, as contained in document A/CN.9/WG.II/WP.154/Add.1.

Waiver of right to object

Article 30

Proposal to change into affirmative language

41. A proposal was made to clarify and simplify the language of article 30, as contained in document A/CN.9/WG.II/WP.151/Add.1, so that it would be drafted in the affirmative and would read:

“A party which knows:

1. that there has been a failure to comply with any provision of these Rules;
or
2. that there has been a failure to comply with any requirement under the arbitration agreement, and proceeds with the arbitration without making, within a reasonable time, any objection shall be deemed to have waived its right to make such objection.”

42. The proposal did not find broad support. It was stated that it constituted an unnecessary deviation from the approach adopted under the original version of article 30 and also from the corresponding article in the Model Law. In addition, it was said that the proposal did not only change the language into the affirmative but also used different terms such as “within a reasonable time” instead of “without undue delay”, as well as merely “and” instead of “and yet”. It was said that those differences might have practical impacts which would require further assessment.

43. After discussion, the Working Group agreed that the drafting of article 30, in the negative did not create difficulties and should be retained.

Actual — Constructive knowledge

44. It was observed that the waiver of the right to object in article 30, as contained in the 1976 version of the Rules and its proposed revision was based on actual knowledge of the failure to comply with a provision of the Rules or a requirement under the arbitration agreement. It was said that it was difficult in practice to prove actual knowledge of a failure and that in some jurisdictions, actual knowledge was interpreted restrictively, requiring specific proof of a positive knowledge. Therefore, it was proposed to add the words “or ought to have known” after the words “a party which knows”, in order to also capture constructive knowledge of non-compliance with any provision of the Rules or any requirement under the arbitration agreements. It was said that constructive knowledge would allow application of the provision in instances of procedural manoeuvring, and intentional bad faith behaviour of a party. It was also said that the proposed added wording would allow application of the provision in cases where actual knowledge could not be proven.

45. Some views were expressed that such additional wording would create problems and was not commonly found in other arbitration rules. It was said that it could be difficult to evaluate deemed knowledge of non-compliance with any provision of the Rules, and even more difficult concerning requirements under an arbitration agreement. Constructive knowledge in that provision was said to be

problematic in regard to the drastic consequences provided in that article, i.e. that a party would lose its right to object to non-compliance. It was said that the proposed modification introduced subjectivity and possibly different standards for parties in the same proceedings, depending upon the level of arbitration experience of parties or their counsel. It was further stated that, if accepted, the revision could lead to arguments at the enforcement stage of the award. It was pointed out that the Model Law included in its article 4 a similar provision, based on actual knowledge of the non-compliance, and any modification to the corresponding provision in the Rules might be confusing for those countries that had enacted legislation based on the Model Law. It was further observed that the Case Law on UNCITRAL Texts (CLOUT) database showed that there were very few cases relating to article 4, and that the reported cases on article 4 did not relate to the question under consideration.

46. Broad support, however, was expressed for the proposal to address constructive knowledge in article 30, as it was found desirable to allow appropriately dealing with situations of mischief and procedural manoeuvres. It was reiterated that actual knowledge was a highly restrictive concept, difficult to interpret and prove in many different jurisdictions. The deemed waiver of right as provided in article 30 was in any case not automatic, and there should be sufficient safeguards to ensure that the circumstances in which a party failed to object to non-compliance would be taken into account by the tribunal.

47. In order to address concerns expressed by those who favoured limiting waiver of the right to object based on actual knowledge, various proposals were made. Wording along the lines of “taking into account that circumstances indicate that a party was aware of ...” was proposed as a possible compromise for inclusion in article 30. Another proposal was to add language addressing the case where the party had “legitimate grounds” or “valid reasons” for not objecting. Those proposals did not receive support.

48. Article 33 of the ICC arbitration rules was quoted as an example of international arbitration rules that contained a similar provision on waiver, and avoided any reference to knowledge. With the same objective to avoid a reference to knowledge, it was proposed to redraft article 30 as follows: “Any failure to comply with any provision of these Rules or any requirement under the arbitration agreement shall be objected to by the other party without undue delay.” That proposal was objected to on the ground that it would unfairly exclude any extenuating circumstances explaining the failure to object.

49. A view was expressed that the effect of the presumption provision in article 30 was to reverse the burden of proof. In order to avoid departing from article 30, and still address the concerns expressed in relation to actual knowledge, the following drafting proposals were made: “A failure to comply with any provision of these Rules or any requirement of the arbitration agreement may not be invoked by a party that has failed to object without undue delay. This provision does not apply if the party invoking the failure had no knowledge of it.” That proposal, inspired from article 1027 of the German code of civil procedure (ZPO) was said to have the advantage of reversing the burden of proof and to contain safeguards necessary to avoid that a party, acting in good faith, be deprived of its right to object. The provision referred to actual knowledge, as in the 1976 version of the Rules, but placed the burden of proof on the party that relied on lack of knowledge as an excuse. An alternative proposal was presented along the following lines: “A failure

by any party to timely object to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can prove that, under the circumstances, its failure to object was [justified] [excusable]". It was said that the difference between the two alternative proposals was whether the party that failed to object could invoke the absence of knowledge or circumstances justifying failure to object.

50. It was felt that those proposals contained in paragraph 49 above could achieve the purpose of dealing with problems of proving actual knowledge in a manner that provided clarity and useful guidance to the parties as well as the arbitral tribunal, and deserved consideration.

51. After discussion, the Working Group agreed that a revised version of article 30, along the lines of the proposals referred to in paragraph 49 above should be proposed for consideration by the Working Group at a future session. The Secretariat was requested to reformulate the text, taking account of the suggestions made.

Section IV. The award

Decisions

Article 31

Paragraph (1)

52. It was explained that article 31, paragraph (1), as contained in document A/CN.9/WG.II/WP.151/Add.1, stated various options for consideration by the Working Group, in accordance with the discussions at its forty-seventh session (A/CN.9/641, paras. 68-77). Option 1 followed the language contained in article 29 of the Model Law by referring to the majority approach (the so-called "majority requirement") with an opt-out provision for the parties. Option 2, variant 1 provided that when there was no majority, the award would be decided by the presiding arbitrator alone. Option 2, variant 2 reflected the proposal that the presiding arbitrator solution should only apply if the parties had previously agreed to opt into that solution (both variants addressed the so-called "presiding arbitrator solution").

53. It was observed that options 1 and 2 were not mutually exclusive. It was therefore proposed to structure paragraph (1) in such way that a first subparagraph would express the majority requirement, as provided in the 1976 version of the Rules. In case of failure to reach a decision through the majority requirement, the presiding arbitrator solution would then be provided for.

54. It was said that in case one of the variants in option 2 would be retained, the words "on the substance of the dispute" appearing in both variants of option 2 should be deleted, as when read in conjunction with paragraph (2) of article 31, it might create uncertainties as to whether matters of jurisdiction of the tribunal or admissibility of the claim would be covered.

Option 1

55. Option 1 received broad support. It was said that the majority requirement should be the general rule. It was further said that the majority requirement was the

one adopted in the 1976 version of the Rules, and had contributed to the universal applicability of the Rules so that there was no need for modification. It was also said that option 1 met the expectation of parties that all views would be duly taken into consideration by the arbitral tribunal. The Working Group was cautioned that any change to the majority requirement in the 1976 version of the Rules would be a major departure and might also change the dynamics of the decision-making process of the arbitral tribunal. It was questioned whether a problem that arose infrequently justified such a change. It was also pointed out that by the very nature of the problem, it would be difficult to know how frequently it occurred.

56. As a matter of drafting, it was observed that the words “unless otherwise agreed by the parties” in option 1, which were not included in the 1976 version of the Rules, were superfluous as parties could always deviate from the Rules.

57. The supporters of the majority requirement as taken in option 1 expressed the concern that the presiding arbitrator solution, as envisaged in the two variants in option 2, would leave the power in the hands of one person, which was unwise particularly in case of an authoritarian presiding arbitrator. In addition, parties would be put in a delicate position if they had to affirmatively object to the proposal of a decision by the presiding arbitrator, as proposed under option 2, variant 2. Further, it was said that option 2 only offered one solution for a deadlock situation, although there could be many other solutions, as, for example, the appointment of an additional arbitrator.

Option 2, variant 1

58. Option 2, variant 1 also received support. It was said that option 2, variant 1 would provide a good incentive for the arbitrators to reach a unanimous decision. It was further said that the majority requirement often obligated the presiding arbitrator to align itself with the least unreasonable arbitrator. In that respect, it was observed that the perception of increased legitimacy of the decision by the tribunal through the majority requirement was a false perception. Variant 1 was said to have the advantage of providing for a solution in case there was no decision by majority, instead of leaving that choice to be made by the parties. The solution provided by variant 1 was said to be commonly found in international arbitration rules, such as article 25.1 of the ICC rules, article 26.3 of the LCIA rules and article 61 of the arbitration rules of the World Intellectual Property Organization. In response to the concern raised with respect to the concentration of decision-making power in the hands of the presiding arbitrator, it was said that the need for a decision by the presiding arbitrator rarely occurred.

Option 2, variant 2

59. In support of option 2, variant 2, it was said that it constituted a good compromise provision that expressed as a general principle the majority rule, but was still open to the presiding arbitrator solution. It was observed that that approach more truly reflected the spirit of the Rules. Another advantage of option 2, variant 2 was that, as understood by the Working Group, the parties would already know the composition of the arbitral tribunal when reaching agreement on the presiding arbitrator solution. It was suggested that if that variant were to be retained in the revised version of the Rules, parties' decision on the presiding arbitrator solution

could be added as an agenda item in the UNCITRAL Notes on Organizing Arbitral Proceedings.

60. A proposal was made to combine variants 1 and 2 along the lines of “an award or other decision shall be made by the presiding arbitrator unless objected to by one party”. That proposal did not receive support, as it was said that such a provision would require a number of clarifications, for example, as the time when the objection could be raised.

61. After discussion, due to the lack of consensus for changing article 31, paragraph (1), the Working Group agreed to retain paragraph (1) as it appeared in the 1976 version of the Rules with the replacement of the word “three” by the words “more than one”. Many delegates who supported dealing in a revised version of the Rules with a situation where the majority requirement would result in a deadlock, along the lines of option 2, suggested that that should be presented to the Commission as an alternative to retaining the current text of article 31. However, that proposal was not agreed to, as the Working Group considered it preferable to present the Commission with a single text without offering alternatives. In reaching that decision, the Working Group emphasized that the parties had the ability in such situations to agree to another method of decision-making.

Paragraph (2)

62. The Working Group agreed to the replacement of the words “on her or his own” in article 31, paragraph (2) of the 1976 version of the Rules by the word “alone” and the Working Group decided that the substance of article 31, paragraph (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Form and effect of the award

Article 32

Paragraph (1)

63. The Working Group recalled its decision at a previous session that there did not exist any practical need to list the various types of awards and it agreed that the first sentence of article 32, paragraph (1), as contained in document A/CN.9/WG.II/WP.151/Add.1, was useful to clarify that the arbitral tribunal might render awards on different issues during the course of the proceedings.

“issues” — “aspects”

64. A concern was expressed that the word “issues” in the first sentence of paragraph (1) might not properly convey the idea that the arbitral tribunal might render partial awards, dealing only with certain aspects of an issue. In order to avoid ambiguity, it was suggested to replace the word “issues” by the words “aspects of the dispute”. Although some support was expressed for that proposal, the prevailing view was that the word “issues” should remain for the main reasons that that word, which was for instance used in article 26.7 of the LCIA rules, did not seem to have given rise to difficulties and that, in practice, the contents of an award usually

clarified whether it dealt with certain aspects of an issue only. After discussion, the Working Group agreed to maintain the word “issues” as contained in paragraph (1).

“same status and effect”

65. It was questioned whether the second sentence of paragraph (1), which provided that “such awards shall have the same status and effect as any other award made by the arbitral tribunal”, was needed. The prevailing view was that that sentence should be deleted, as awards might not necessarily all have the same status and effect. For instance, an award terminating the proceedings would not have the same effect as an award on interim measures. In addition, it was said that the usage of the word “all” before the word “awards” appearing in the first two sentences of paragraph (2) guaranteed that all awards would be final, binding and carried out by the parties without delay.

66. After discussion, the Working Group agreed to delete the second sentence of paragraph (1), so that paragraph (1) would read: “The arbitral tribunal may make separate awards on different issues at different times.”

Paragraph (2)

“final and binding”

67. The Working Group considered whether the first sentence of article 32, paragraph (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, should be amended to clarify the meaning of the words “final and binding”. The view was expressed that using the word “final” could create ambiguity and the award being “final” could be understood in different ways. For example, it was stated that it could mean that the award finally disposed of some, but not all, claims, that the award terminated the proceedings, or that the arbitral tribunal was no longer entitled to revise it. To avoid such ambiguity, it was proposed to delete the word “final”. It was also suggested to replace it by wording along the lines of the proposal contained in paragraph 24 of document A/CN.9/WG.II/WP.151/Add.1, which read: “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, paragraph 6 for interim measures rendered in the form of an award, article 35 and article 36.”

68. Those proposals did not find support. The Working Group was reminded that, at its forty-seventh session, it had agreed that the “final and binding” character of the award should be envisaged 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 as of the time it was rendered, 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 (A/CN.9/641, para. 81). It was said that the term “final and binding” was widely found in other arbitration rules and had not created any problems in practice. It was pointed out that omission of the word “final” from the long-used term “final and binding” would raise questions in the minds of many users and would thus lead to confusion.

69. It was also suggested to replace the word “all” before the word “awards” in the first and second sentences of paragraph (2) with the word “the”. Against that proposal, it was stated that the modification to the plural had been inserted in order

to avoid any ambiguity in case more than one award had been rendered. The Working Group was reminded that it had previously agreed to delete the last sentence of paragraph (1), on the basis that its content was already captured by the use of the word “all” before the word “awards” in the first and second sentences of paragraph (2) (see above, para. 65).

70. After discussion, the Working Group agreed to maintain the words “final and binding” in the first sentence of paragraph (2). It was noted that the word “final” in the English, French and Spanish language versions differed insofar as the Spanish version provided that the award could not be appealed (“*inapelable*”) and the French version provided that the award could not be appealed before any arbitral tribunal (“*n’est pas susceptible d’appel devant une instance arbitrale*”). It was agreed that the different language versions should be aligned.

Waiver of recourse

General principle

71. The Working Group recalled that, at its forty-fifth and forty-seventh sessions, 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 or other competent authority on the merits of the case or on any point of fact or law (A/CN.9/614, para. 114 and A/CN.9/641, paras. 85-90). The effect of a new provision on that matter would be to make it impossible for parties to use those types of recourse that could be freely waived by the parties (for example, in some jurisdictions, an appeal on a point of law), but not to exclude challenges to the award (for example, on matters such as lack of jurisdiction, violation of due process or any other ground for setting aside the award as set out under article 34 of the Model Law). It was also recalled that provisions on waiver of recourse were found in other international arbitration rules, such as the ICC rules (article 28 (6)) and the LCIA rules (article 26 (9)).

72. At its forty-seventh session, the Working Group had agreed that the provision on waiver of recourse by parties to arbitration should 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 (A/CN.9/641, para. 90).

73. At its current session, the Working Group agreed that the right to resist enforcement of an award as provided under article V of the New York Convention and article 36 of the Model Law was to be understood as excluded from the waiver of recourse. The Working Group confirmed that the term “recourse” used in the third sentence of article 32, paragraph (2) was never intended to refer to a ground for resisting enforcement under the New York Convention or under article 36 of the Model Law, and referred on that matter to the explanations contained under paragraph 45 of the Explanatory Note by the UNCITRAL secretariat on the Model Law. In regulating recourse (i.e., the means through which a party might actively “attack” the award), article 34 of the Model Law did not preclude a party from seeking court intervention by way of defence in enforcement proceedings. It was further said that article 32, paragraph (2) of the draft Rules included a reference to

the setting aside of an award, for the reason that the word “recourse” was used in the context of article 34 of the Model Law, the title of which referred to an “application for setting aside as exclusive recourse against arbitral award”. It was said that parties could not be deprived automatically of an exclusive recourse through the submission of a dispute to the Rules, which explained the reference in article 32, paragraph (2) to an express agreement of the parties regarding waiver of the right to apply for setting aside an award.

74. It was further confirmed that the Working Group did not intend the term “recourse” used in the third sentence of paragraph (2) to refer to a ground for resisting execution of the award such as a defence of sovereign immunity.

Remarks on the drafting of the provision on waiver of recourse

75. The Working Group considered the provision on waiver of recourse in article 32, paragraph (2), as contained in A/CN.9/WG.II/WP.151/Add.1, which provided that “insofar as such waiver can be validly made, the parties shall be deemed to have waived their right to any form of appeal, review or recourse to any court or other competent authority. The right to apply for setting aside an award may be waived only if the parties so expressly agree.”

76. Various concerns were expressed regarding that provision. It was said that the waiver was expressed in too broad a manner, which might create ambiguity, as to the determination of the scope of, and exceptions to, the waiver.

77. It was said that the four sentences of paragraph (2) under consideration were not linked together, a fact that created confusion. To address that concern, it was proposed to redraft the last two sentences as follows: “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. However, this deemed waiver of right to recourse shall not extend to an application for setting aside an award which may be waived only if the parties so expressly agree.” Another proposal was made to provide: “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 that the right to apply for setting aside an award may be waived only if the parties specifically agree.” Yet another proposal was made to link the second and third sentences of paragraph (2) along the lines of: “The parties undertake to carry out all awards without delay and 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.”

78. 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, paragraph (2) of the Rules (numbered article 1, paragraph (3) in the draft revised Rules contained in document A/CN.9/WG.II/WP.154).

79. Concerning the last sentence of article 32, paragraph (2), it was said that a reference to “setting aside” might not be understood in the same manner in all jurisdictions. For instance, in certain jurisdictions, there would be difficulties in applying the provision as the setting aside was a possible remedy under an application to a State court on the merits. It was also said that it was unclear

whether jurisdictional challenges would be excluded from the waiver. Thus, it was proposed to expressly exclude decisions on jurisdiction from the scope of the waiver.

Proposal to delete the draft provision on waiver of recourse

80. In view of the ambiguities and the potential confusion that might result from the adoption of a provision on waiver, as pointed out in paragraphs 75 to 78 above, it was proposed to delete that provision, as it was clear from the remainder of article 32, paragraph (2) that the parties were under an obligation to carry out the award without delay, and in case of appeal or other recourse, the applicable law would apply. That approach was objected to on the ground that the Working Group had already taken a decision of principle to modify the Rules by including a provision on waiver.

Limited scope of waiver: waiver of appeals on merits

81. It was proposed to make a distinction within the provision 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 in many jurisdictions could not be waived. In line with that proposed approach, the parties would be deemed to have waived their right to “any form of appeal on the merits”, and the words “review or recourse” would be deleted for the reason that those words conveyed a broad meaning and the word “recourse” was used in the context of article 34, paragraph (1) of the Model Law.

82. That proposal received some support. It was said that it would clarify the intent of the Working Group, which was to provide for a waiver of any form of appeal on the merits but to exclude from the waiver recourse on setting aside an award, and enforcement proceedings. It sought to differentiate between the waiver, which should be limitatively defined and the exceptions thereto. An alternative to that approach was to refer to “any appeal or any recourse on the merits”, as the word “appeal” might not be understood in the same manner in all jurisdictions and the word “recourse” conveyed a broader meaning.

83. However, it was observed that that proposal focused on various types of recourse, which might not be understood in the same manner in different countries. Introducing categories carried the risk that not all possible types of recourse were listed and the understanding of such categories might not be universally shared. In addition, it was said that appeals or recourses on matters of procedure were not clearly covered under that proposal.

Broad content of waiver of recourse

84. The Working Group agreed that paragraph (2) should contain a waiver of appeal, review and recourse, and be drafted in a manner that avoided any confusion as to the scope of the waiver. To avoid listing recourses excluded from the waiver, it was proposed to adopt a provision along the lines of: “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 that may be waived and the waiver of which does not require express agreement”. It was objected to that proposal, as it would oblige parties to delve into the details of relevant applicable laws and would run counter to

the harmonization objectives of the Rules. It was said that a preferable approach would be that the scope of the waiver be clearly defined in the Rules themselves, without the parties having to determine whether and under which conditions the applicable law permitted such waiver to be made. It was further said that that proposal put the emphasis on whether applicable law would require express agreement of the parties for recourse to be validly waived, a matter that was not necessarily settled in all jurisdictions.

85. In keeping with the approach to define broadly the types of recourse waived, and to clarify the exceptions, a proposal was made along the following lines: “By adopting these Rules, the parties waive their right to any form of appeal, review or recourse to any court or competent authority except for an application for setting aside an award.” That proposal received broad support. The proposed wording was said to address the concerns raised in the course of the discussion that the scope be clearly and concisely defined, and that there were no interference with applicable laws. It removed the reference to a deemed waiver, which was considered to be unnecessary.

86. After discussion, the Working Group agreed that the proposal contained in paragraph 84 above should be included in a revised version of the Rules for consideration by the Working Group at a future session, on the understanding, however, that a few delegations formally objected to amending the Rules on that matter and one delegation requested that it be placed in square brackets.

Paragraphs (3), (4) and (6)

87. The Working Group decided that the substance of article 32, paragraphs (3), (4), and (6), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (5)

88. It was suggested that paragraph (5) could be complemented with provisions aimed at reminding the parties that they might agree on the modalities of the publication of the award. That proposal did not receive support.

89. The Working Group decided that the substance of article 32, paragraph (5), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (7)

90. The Working Group confirmed its decision taken at its forty-seventh session that article 32, paragraph (7) as contained in the 1976 version of the Rules should be deleted (A/CN.9/641, para. 105).

Applicable law, amiable compositeur

Article 33

Paragraph (1)

91. The Working Group noted that it had 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, paragraph (1) (A/CN.9/641, para. 107). In the absence of such designation by the

parties, the Working Group agreed that paragraph (1) should refer to the arbitral tribunal applying the “law” and not the “rules of law” it determined to be applicable, consistent with article 28, paragraph (2) of the Model Law (A/CN.9/641, paras. 108 and 109).

rules of law designated by the parties

92. A suggestion was made to clarify that any designation of law or legal system of a given State by the parties should be construed as referring to the substantive law of that State and not to its conflict-of-law rules. It was said that a similar provision could be found in article 28, paragraph (1) of the Model Law. After discussion, the Working Group considered that such addition was not necessary under the Rules.

Law applied by the arbitral tribunal

93. Concerning the law that an arbitral tribunal should apply to the substance of the dispute, the Working Group considered two options, failing determination by the parties, as contained in document A/CN.9/WG.II/WP.151/Add.1. It was said that both options constituted substantive conflict-of-law rules.

94. Option 2, which provided broad discretion for the arbitral tribunal to apply the law it determined appropriate, received broad support. It was said that that option provided for a flexible solution, and, if adopted, would modernize the Rules by allowing the arbitral tribunal to decide directly on the applicability of the appropriate law.

95. A suggestion was made that the discretion of the arbitral tribunal in determining the more appropriate law to be applied should be limited, or that more guidance should be provided to the tribunal. The suggestion was made to refer to conflict-of-laws rules. It was also proposed to include language which would indicate that the determination should be made by the arbitral tribunal objectively and reasonably. For that purpose, it was suggested to add language along the lines of “based on objective criteria” at the end of paragraph (1), or possibly to merge both options 1 and 2. In response, it was pointed out that the broad discretion left to the arbitral tribunal in the determination of the appropriate law to be applied came into play within the boundaries of the obligation of the arbitral tribunal to render a reasoned award, as provided under article 32, paragraph (3) of the Rules. It was generally felt that there were sufficient safeguards in the Rules in that respect.

96. It was suggested that the provision, by referring to the application of “the law” determined to be appropriate, could be understood as limiting the choice of the arbitral tribunal to one law only. It was pointed out that that might have an impact on the enforceability of the award. However, in international arbitration, it was not unusual that more than one law had to be applied to deal with different issues, such as capacity or corporate matters. After discussion, the Working Group was of the view that the provision was drafted in sufficiently broad terms and it was understood that the tribunal might apply different laws, depending on the issues at stake.

Paragraph (2)

97. The Working Group decided that the substance of article 33, paragraph (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (3)

“any”

98. It was pointed out that article 33, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, had been amended to clarify applicability of the Rules in a situation where a contract was not necessarily the basis of the dispute by referring to the words “any applicable” in relation to a “contract” and “any” in relation to “usages of the trade”. It was said that the language in paragraph (3) might not achieve the objective of clarifying the provision. A better approach, it was said, was to draft paragraph (3) with language along the following lines: “In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usages of trade applicable to the transaction.” That proposal received support.

“agreement” — “contract”

99. A question was raised whether the word “contract” was broad enough to encompass all types of agreements which might form the basis of a transaction. With a view to broadening the scope of that provision, it was proposed to replace the word “contract” by the word “agreement”. It was explained that, in some jurisdictions, the term “contract” was strictly defined, whereas the term “agreement” was understood as including contracts, as well as other forms of agreements on which commercial transactions would usually be based. However, it was objected to that proposal that in some jurisdictions a contract was legally enforceable, which would not necessarily be the case of an agreement. It was also said that the term “contract” was used under the corresponding provision of the Model Law as well as in the European Convention on International Commercial Arbitration of 1961, and using a different language might create difficulties for countries having enacted arbitration law based on the Model Law or countries that were parties to the Convention. In addition, it was said that the term “contract” was used consistently in the Rules, and it might not be appropriate to use a different term under article 33, paragraph (3). Another proposal was made to add the words “or any other legal instrument” after the word “contract” in order to reflect the language adopted by the Working Group when revising the Rules under articles 3 and 18. That proposal did not find support, as the term “legal instruments” would be understood to include, among others, investment treaties, the application of which was not intended to be regulated by that paragraph.

100. After discussion, the Working Group agreed that article 33, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, should be amended along the lines of the proposal contained in paragraph 97 above.

Settlement or other grounds for termination**Article 34***Paragraph (1)*

101. A proposal was made to include in the last sentence of article 34, paragraph (1), the words “or for refusing to issue it”, in order to capture situations where the tribunal would refuse to issue an award on legitimate grounds, for example, if rendering the award would violate public policy. That proposal did not receive support. After discussion, the Working Group decided that the substance of article 34, paragraph (1) as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (2)

102. The Working Group agreed that the language contained in article 34, paragraph (2), as reflected in document A/CN.9/WG.II/WP.151/Add.1, might need to be amended so as to ensure consistency of that provision with the decision adopted by the Working Group in relation to article 28, paragraph (1) (a) to no longer limit the power of the arbitral tribunal to a dismissal order for termination (see paragraphs 22 to 26 above). The Working Group requested the Secretariat to reformulate article 34 paragraph (2), for consideration at a future session.

Paragraph (3)

103. The Working Group agreed that the last sentence of article 34, paragraph (3), should refer to article 32, paragraphs 2 and “4 to 5”, instead of “4 to 6” as the provision of article 32, paragraph (6) were already reflected in paragraph (3). With that modification, the Working Group decided that the substance of article 34, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Interpretation of the award**Article 35***Paragraph (1)*

104. A suggestion was made to add language in article 35, paragraph (1), to clarify that the tribunal might give an interpretation of part of the award only, along the lines of the corresponding provision of the Model Law. That proposal did not receive support and the Working Group decided that the substance of article 35, paragraph (1), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Paragraph (2)

105. The Working Group decided that the substance of article 35, paragraph (2), as contained in document A/CN.9/WG.II/WP.151/Add.1, was generally acceptable.

Correction of the award

Article 36

Time limit

106. The Working Group considered whether article 36, should include a time limit within which the arbitral tribunal should correct an award after having been requested to do so by a party. It was said that such a time limit was provided for under article 35, paragraph (2), of the Rules, when the tribunal was requested to make an interpretation of an award. The Working Group generally agreed that the same principle should apply when the tribunal was requested to make correction to an award. Different views were expressed on whether a time limit for allowing a party to request corrections should comprise 45 days as was provided in article 35, paragraph (2) of the Rules or 30 days as provided in article 33, paragraph (2) of the Model Law.

107. After discussion, the Working Group agreed that article 36 should be modified with the inclusion of a time limit for corrections of 45 days. It was clarified that such time limit only applied when a party requested a correction, and not when the arbitral tribunal made such correction at its own initiative. The Working Group requested the Secretariat to prepare a revised version of article 36 taking account of the above discussion.

“a party”

108. The Working Group agreed that article 36, paragraph (1), would refer to “a party” instead of “any party” in order to align the language in article 36 with that in article 37, as contained in document A/CN.9/WG.II/WP.151/Add.1.

scope of omissions

109. A question was raised whether the wording of article 36, paragraph (1), as contained in document A/CN.9/WG.II/WP.151/Add.1, sufficiently clarified the scope of omissions that could be corrected. The Working Group was reminded that the word “omissions” had been added, in order to cover situations such as the arbitrator omitting to sign the award or to state the place of the award. It was not intended to cover omissions on the substance, and it was questioned whether that matter would need clarification. It was also observed that under article 32, paragraph (4), an award should contain the date on which the award was made as well as the place of arbitration. To a question on the interplay between article 32, paragraph (4) and article 36 of the Rules, it was said that, in certain jurisdictions, an award that would not include the date and place would not be considered an award, and in that case, article 36 would not find application. It was said that matters regarding qualification of an award were dealt with under applicable law.

110. It was also said that the words “of a similar nature” included in the first sentence of paragraph (1) after the word “omissions” clarified that intended meaning of the provision, and was a sufficient and appropriate means to implement the decision of the Working Group to include the word “omissions” in paragraph (1) of article 36.

“form part of the award”

111. It was observed that article 35, paragraph (2) of the Rules, provided that “the interpretation shall form part of the award”. A question was raised whether a similar provision should be included in article 36, paragraph (2) to clarify that correction of an award also formed part of the award. It was said that such a provision would create difficulties, in particular with deadlines for recourse, depending on what the date of the corrected award was determined to be. In response, it was pointed out that the applicable national arbitration law would govern the matter and that it was not for the Rules to address it. It was also observed that rules of a number of international arbitration institutions included a similar provision.

112. After discussion, the Working Group agreed, despite one delegation opposing, to provide in article 36 that corrections would also form part of the award.

Additional award

Article 37

113. The attention of the Working Group was drawn to the fact that article 37, was restricted to “additional awards”. It was said that that provision would therefore not find application in case the tribunal would render a termination order and a party wished to request the arbitral tribunal to make an additional decision on claims presented during the arbitral proceedings, but omitted by the tribunal.

114. Various proposals were made to address that matter. A suggestion was made to include in article 40, paragraph (3), language providing that article 37 would apply by analogy. That suggestion received little support.

115. It was suggested to modify the wording of article 37, paragraph (1) along the following lines: “Within 30 days after the receipt of the award or termination order, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.” That proposal received support as it provided a solution for parties in case the arbitral tribunal failed to address all issues in a termination order. Another proposal was made to address that concern by adopting a more general approach providing in article 34, paragraph (2) that the termination order would have the legal effect or character of an award. It was suggested to insert in article 34, paragraph (2) wording along the lines of “For purposes of article 37, a termination order should be treated as an award.” That approach was also supported.

116. Both proposals contained in paragraph 113 above received support and the Working Group requested the Secretariat to include both proposals in a revised version of the Rules within brackets for consideration by the Working Group at a future session. International arbitral institutions having experience in the manner in which termination orders had been dealt with and of issues arising in that context were invited to provide information to the Secretariat.

Costs

Article 38

117. A question was raised whether the first sentence of article 38, as contained in document A/CN.9/WG.II/WP.151/Add.1, should also include a reference to

“termination orders and awards on agreed terms”. It was pointed out that article 40, paragraph (3), already dealt with that matter. The Working Group considered whether articles 38 and 40 would need to be restructured, in order to avoid any overlapping.

118. It was said that article 38 provided the arbitral tribunal with the power to issue an award on costs and defined the term “costs”, whereas article 40 dealt with questions of allocation of costs, fixing of costs under a termination order or award on agreed terms and fees in the context of interpretation or correction of an award. The concern was expressed that regulating costs in the context of awards, termination orders and awards on agreed terms in one provision might create uncertainty and ambiguity.

119. After discussion, the Working Group agreed that there might be a need for considering to which extent both provisions might overlap, and agreed that that matter might need to be further considered when the Working Group had completed its review of articles 38 to 40.

“an award — any award”

120. It was observed that the arbitral tribunal might fix the costs of the arbitration in more than one award, and the Working Group agreed that a revised version of article 38, should clarify that matter.

“fees stated separately”

121. The question was raised whether the fees of the arbitral tribunal should be stated separately as to each arbitrator as provided currently in article 38, subparagraph (a). In response, it was said that that approach, which was included in the 1976 version of the Rules, had proven useful in particular in disciplining arbitrators and avoiding exaggerated costs.

Article 39

Paragraph (2)

122. The Working Group agreed to replace the words “has issued or endorsed” by the words “has stated it will apply” in article 39, paragraph (2), as that formulation was found to better cover situations where an appointing authority applied a schedule of fees defined by other authorities or rules.

Paragraph (3)

123. The concern was expressed that the reference to the word “methodology” used in article 39, paragraph (3), as contained in document A/CN.9/WG.II/WP.151/Add.1, might not be sufficiently clear, and it was proposed to modify the first sentence of that paragraph as follows: “Promptly after its constitution, the arbitral tribunal shall inform the parties how it proposes to determine the fees of its members.” That proposal was supported.

124. It was further proposed to amend the second sentence of article 39, paragraph (3) by replacing the words “set forth the computation of the amounts due consistent with that methodology” by the words “state how it has computed the fees”. It was said that that proposal aimed at avoiding parties’ allegation that a

calculation of fees was inconsistent with the agreed methodology, and to limit the risk of frivolous litigation that might result from the existing wording. It was also observed that the methodology agreed upon after the constitution of the tribunal might not necessarily apply at the end of the proceedings, in particular in case a party referred the matter to an appointing authority or to the Secretary-General of the PCA, as provided for under article 39, paragraph (4). To address that concern, it was proposed to add at the end of article 39, paragraph (3) the words “fixed by the parties or any other authority having taken a decision on this matter.” The Working Group agreed that further consideration should be given to that question at a future session.

125. It was observed that paragraph (3) should be amended so that the reference contained in its second sentence to article 38 be limited to article 38 (a) and the words “costs of arbitration” be replaced by the words “fees of the arbitral tribunal”. A question was raised whether costs of travels as contained in article 38 (b), or of expert advice as contained in article 38 (c) should also be included as they might be the subject of an agreement between the arbitral tribunal and the parties. The Working Group agreed to give further consideration to that question at a future session.

Paragraph (4)

126. Various concerns were expressed regarding article 39 and different matters were raised for further consideration at a future session. It was said that the chronology of events mentioned in paragraph (4) might need to be revisited. It was questioned whether modification of fees should be deemed part of the award, as that might have consequences in terms of delaying potential recourse. It was pointed out that the decision of the tribunal on costs should be made in a form that could be revised. It was also questioned whether any decision on costs should be made in a separate award. Other issues were proposed for consideration such as the manner in which to address requests for deposit and interim payments.

**B. Note by the Secretariat on settlement of commercial disputes: Revision of the
UNCITRAL Arbitration Rules, submitted to the Working Group on Arbitration
and Conciliation at its fifty-first session
(A/CN.9/WG.II/WP.154/Add.1)**

[Original: English]

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I. Introduction

1. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that, in respect of future work of the Working Group, priority be given to a revision of the UNCITRAL Arbitration Rules (1976) (“UNCITRAL Arbitration Rules” or “Rules”).¹

2. The Working Group started its work on a revision of the UNCITRAL Arbitration Rules at its forty-fifth session² and completed a first reading of a draft revised Rules during its forty-sixth to forty-eighth sessions³ on the basis of document A/CN.9/WG.II/WP.145 and its addendum. At its forty-ninth and fiftieth sessions,⁴ the Working Group made a second reading of a draft revised Rules up to article 26 on the basis of document A/CN.9/WG.II/WP.151 and its addendum.

3. This note contains an annotated draft of revised articles 18 to 26 of the UNCITRAL Arbitration Rules (renumbered articles 20 to 28, see para. 4 below), based on the deliberations of the Working Group at its fiftieth session. The annotated draft of revised articles 1 to 17 of the Rules (renumbered articles 1 to 19) is contained in document A/CN.9/WG.II/WP.154. Unless otherwise indicated, all

¹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 182-187.

² The report of the forty-fifth session of the Working Group (Vienna, 11-15 September 2006) is contained in document A/CN.9/614.

³ The reports of the forty-sixth (New York, 5-9 February 2007), forty-seventh (Vienna, 10-14 September 2007) and forty-eighth (New York, 4-8 February 2008) sessions of the Working Group are contained in documents A/CN.9/619, A/CN.9/641 and A/CN.9/646, respectively.

⁴ The reports of the forty-ninth (Vienna, 15-19 September 2008) and fiftieth (New York, 9-13 February 2009) sessions of the Working Group are contained in documents A/CN.9/665 and A/CN.9/669, respectively.

references to deliberations by the Working Group in this note are to deliberations made at the fiftieth session of the Working Group.

II. General remark

Numbering of articles

4. The Working Group may wish to consider whether the articles of the revised Rules should be renumbered as proposed in document A/CN.9/WG.II/WP.154 and in this addendum. The cross references contained in the draft articles have been amended accordingly. If the Working Group decides that the articles should be renumbered, it may wish to consider whether to include in the revised Rules a table, as proposed in an annex to document A/CN.9/WG.II/WP.154 and this addendum, showing the concordance between the articles of the 1976 version of the Rules and those of the revised version.

III. Draft revised UNCITRAL Arbitration Rules

Section III. Arbitral proceedings

Statement of claim

Article 20

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration in article 3, paragraph 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2, 3 and 4 of this article.
2. The statement of claim shall include the following particulars:
 - (a) The names and contact details of the parties;
 - (b) A statement of the facts supporting the claim;
 - (c) The points at issue;
 - (d) The relief or remedy sought;
 - (e) The legal grounds or arguments supporting the claim.
3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.
4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

*Remarks on draft article 20 [numbered article 18 in the 1976 version of the Rules]**Paragraph (1)*

5. The last sentence of paragraph (1) deals with the situation where the claimant decides to treat its notice of arbitration as a statement of claim (A/CN.9/669, para. 19). The words “provided that the notice of arbitration also complies with the requirements of paragraphs 2, 3 and 4 of this article” have been added at the end of paragraph (1) to clarify that a notice of arbitration treated as a statement of claim should also comply with the requirements of draft article 20, paragraphs (2) to (4). With that modification, the Working Group adopted the substance of paragraph (1) (A/CN.9/669, paras. 20-22).

Paragraph (2)

6. The Working Group adopted the substance of paragraph (2), without modifications (A/CN.9/669, para. 23).

Paragraphs (3) and (4)

7. The Working Group agreed that the word “evidence” appearing in the second sentence of paragraph (3), and used in the 1976 version of the Rules should be kept and replace the words “evidentiary materials” which were proposed in earlier draft versions of that article (A/CN.9/669, para. 24). With that modification, the Working Group adopted the substance of paragraph (3).

8. The Working Group may wish to note that the words “out of or in relation to which the dispute arises” have been added to clarify which contract or legal instrument should be annexed to the statement of claim.

9. The provision in paragraph (4) appeared as the second sentence of paragraph (3) in the previous draft of revised Rules. It is proposed to place that provision in a separate paragraph for the sake of clarity (see below, para. 13).

Statement of defence**Article 21**

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration in article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article.

2. The statement of defence shall reply to the particulars (b), (c), (d) and (e) of the statement of claim (article 20, paragraph 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

4. The provisions of article 20, paragraphs 2 and 4 shall apply to a counterclaim and a claim relied on for the purpose of a set-off.

Remarks on draft article 21 [numbered article 19 in the 1976 version of the Rules]

Paragraph (1)

10. The last sentence of paragraph (1) addresses the situation where the respondent decides to treat its response to the notice of arbitration as a statement of defence. The words “provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article” have been added at the end of the last sentence of paragraph (1) (A/CN.9/669, para. 25) and that language mirrors the modification adopted in respect of draft article 20, paragraph (1) (see paragraph 5 above). With that modification, the Working Group adopted the substance of paragraph (1).

Paragraph (2)

11. The Working Group adopted paragraph (2) in substance and confirmed, for the sake of consistency with draft article 20, paragraph (3) that the word “evidence”, as used in the 1976 version of the Rules, should be kept (see paragraph 7 above) (A/CN.9/669, para. 26).

Paragraph (3)

12. Paragraph (3) reflects the decision of the Working Group that the arbitral tribunal’s competence to consider counterclaims and claims for the purpose of a 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.9/669, para. 27). To achieve that extension, the Working Group agreed to delete the words “arising out of the same contract” where they appear in the original version of paragraph (3) and to include at the end of paragraph (3) the following words: “provided that the arbitral tribunal has jurisdiction over it”. With that modification, the Working Group adopted the substance of paragraph (3) (A/CN.9/669, paras. 27-32).

Paragraph (4)

13. The Working Group adopted the substance of paragraph (4), without modifications (A/CN.9/669, para. 33). A reference to the provision of article 20, paragraph (4) has been added to take account of the intention of the Working Group that, consistent with article 19, paragraph (4) of the 1976 version of the Rules, a counterclaim or a claim for the purpose of a set-off should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

Amendments to the claim or defence

Article 22

During the course of the arbitral proceedings a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to

allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Remarks on draft article 22 [numbered article 20 in the 1976 version of the Rules]

14. The Working Group agreed that, following the revision adopted under draft article 21, paragraph (3) (see paragraph 12 above), the last sentence of draft article 22 should be amended accordingly, and the reference to “the scope of the arbitration agreement” should be replaced by a reference to “the jurisdiction of the arbitral tribunal” (A/CN.9/669, para. 34).

15. The Working Group further agreed that the words “or defence” should be added in the second sentence of draft article 22 to align it with the wording of the first sentence of that article (A/CN.9/669, para. 35).

16. The Working Group may wish to consider whether, for the sake of consistency:

- The reference to “a claim for the purpose of a set-off” should be added after the words “a counterclaim [or]”, in both sentences of draft article 22;
- The words “or supplement” should be added after the word “amendment” in the first sentence of draft article 22 and the words “or supplemented” should be added after the word “amended” in the second sentence of draft article 22.

Pleas as to the jurisdiction of the arbitral tribunal

Article 23

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 shall not entail automatically the invalidity of the arbitration clause.

2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

*Remarks on draft article 23 [numbered article 21 in the 1976 version of the Rules]**Paragraph (1)*

17. Paragraph (1) reflects the view expressed in the Working Group that the 1976 version of article 21, paragraphs (1) and (2) should be redrafted along the lines of article 16, paragraph (1) of the UNCITRAL Model Law on International Commercial Arbitration (“UNCITRAL Arbitration Model Law”) (A/CN.9/669, paras. 36-39). In accordance with the decisions of the Working Group, in the last sentence of paragraph (1), the words “and void”, which appeared after the word “null” have been deleted (A/CN.9/669, paras. 40-43) and the word “automatically” is used in replacement of the words “ipso jure”. [The words “ipso jure” are retained in the Spanish version of the revised Rules; the appropriate words for the French version of the revised Rules would be “de plein droit” (A/CN.9/669, para. 44)]. With those modifications, the Working Group adopted the substance of paragraph (1).

Paragraph (2)

18. The Working Group adopted the substance of paragraph (2), without modifications (A/CN.9/669, para. 45).

Paragraph (3)

19. The Working Group adopted the substance of paragraph (3), without modifications (A/CN.9/669, para. 46).

Further written statements**Article 24**

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

Remarks on draft article 24 [numbered article 22 in the 1976 version of the Rules]

20. Draft article 24 is reproduced without modifications from the 1976 version of the Rules and was adopted by the Working Group in substance, without modifications (A/CN.9/669, para. 47).

Periods of time**Article 25**

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed 45 days. However, the arbitral tribunal may extend the time limits if it concludes that an extension is justified.

Remarks on draft article 25 [numbered article 23 in the 1976 version of the Rules]

21. Draft article 25 is reproduced without modifications from the 1976 version of the Rules and was adopted by the Working Group in substance, without modifications (A/CN.9/669, para. 48).

Interim measures**Article 26**

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, including, without limitation:
 - (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, (i) current or imminent harm or (ii) 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. Nothing in these Rules shall have the effect of creating a right, or of limiting any right which may exist outside these Rules, of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, in either case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure.
6. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

7. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
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 was requested or granted.
9. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.
10. A request for interim measures 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 on draft article 26 [numbered article 26 in the 1976 version of the Rules]

22. It is proposed to place draft article 26 on interim measures before the provisions on evidence, hearings, and experts so as to group together those provisions (A/CN.9/669, para. 85).
23. Paragraphs (1) to (4) and (6) to (9) are modelled on the provisions on interim measures contained in chapter IV A of the UNCITRAL Arbitration Model Law. Paragraph (5) addresses the question of preliminary orders and paragraph (10) corresponds to article 26, paragraph (3) of the 1976 version of the Rules which the Working Group agreed to retain in the revised Rules (A/CN.9/641, para. 52). The Working Group may wish to consider whether it would be preferable to place the revised version of paragraph (5) before paragraph (10) so that paragraphs (1) to (8) would deal with interim measures granted by arbitral tribunals, paragraph (9) with preliminary orders granted by arbitral tribunals as provided for under applicable law or other applicable instruments, and paragraph (10) with interim measures requested by a party to a State court.

Paragraph (1)

24. The Working Group adopted paragraph (1), without modifications (A/CN.9/669, para. 91).

Paragraph (2)

25. The Working Group agreed to add at the end of the chapeau to paragraph (2) the words “including, without limitation,” to emphasize the non-exclusive nature of the list contained in paragraph (2) (A/CN.9/669, paras. 92-94).
26. An editorial change has been introduced in paragraph (2) (b), consisting in the insertion of “(i)” before the word “current” and “(ii)” before the word “prejudice”, in order to clarify the meaning intended by the drafters of the UNCITRAL Arbitration Model Law that the situation of “prejudice to the arbitral process” is distinct from the situation of “current or imminent harm” (A/CN.9/669, para. 95).

Paragraphs (3) and (4)

27. The Working Group adopted paragraphs (3) and (4), without modifications (A/CN.9/669, para. 99).

Paragraph (5)

28. Paragraph (5), which deals with the power of the arbitral tribunal to grant preliminary orders, reflects the discussions of the Working Group (A/CN.9/669, para. 112). As paragraph (5) leaves the question of preliminary orders entirely to be dealt with under applicable law or other applicable instruments, references to preliminary orders in paragraphs (3) and (6) to (10) of the previous version of draft article 26 (contained in document A/CN.9/WG.II/WP.151/Add.1) have been deleted (A/CN.9/669, paras. 100-112).

Paragraph (6)

29. The Working Group adopted paragraph (6) in substance (A/CN.9/669, para. 113).

Paragraph (7)

30. The Working Group adopted paragraph (7) in substance (A/CN.9/669, para. 114).

Paragraph (8)

31. The Working Group adopted paragraph (8) in substance (A/CN.9/669, para. 115).

Paragraph (9)

32. It was noted that paragraph (9) might have the effect that a party requesting an interim measure be liable to pay costs and damages in situations where, for instance, the conditions of draft article 26 had been met but the requesting party lost the arbitration (A/CN.9/669, para. 116). The Working Group requested the Secretariat to provide information to assist further discussion on how the different *leges arbitri* dealt with the matter of liability for damages that might result from the granting of interim measures (A/CN.9/669, para. 118). In that respect, the Working Group may wish to note that paragraph (9) mirrors article 17 G of the UNCITRAL Arbitration Model Law. At its thirty-ninth and fortieth sessions where the Working Group considered article 17 G, it was also strongly felt that the final decision on the merits should not be an essential element in determining whether the interim measure was justified or not (A/CN.9/545, para. 65), and that the provision of article 17 G, by leaving all determination to the arbitral tribunal, without including any reference to the merits of the case, avoided any requirement that could make liability dependent on the final disposition of the claims on the merits (A/CN.9/547, para. 106).

33. The Working Group may also wish to consider document A/CN.9/WG.II/WP.127, which contains information regarding the liability regimes in the context of national laws on interim measures and was prepared to assist the Working Group when it revised article 17 of the UNCITRAL Arbitration Model Law.

Paragraph (10)

34. The Working Group adopted paragraph (10) in substance (A/CN.9/669, para. 119).

Evidence**Article 27**

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.
2. Unless otherwise directed by the arbitral tribunal, statements by witnesses and experts may be presented in writing and signed by them.
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 arbitral tribunal shall determine.
4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Remarks on draft article 27 [numbered article 24 in the 1976 version of the Rules]

Title to draft article 27

35. The Working Group may wish to consider whether, in the interest of clarity, draft article 27 should be titled “Evidence” as it deals with evidence and the form in which the statements of witnesses and experts would be presented.

Paragraphs (1) and (3)

36. Paragraphs (1) and (3), which are reproduced from the 1976 version of the Rules, were adopted by the Working Group without modifications (A/CN.9/669, para. 49). As a general remark, the Working Group confirmed its understanding that the power of the arbitral tribunal to refuse late submission is provided for under paragraph (3) (A/CN.9/669, para. 75).

Paragraph (2)

- as contained in the 1976 version of that article

37. Paragraph (2) as contained in the 1976 version of that article has been deleted in accordance with a widely prevailing view in the Working Group that it was not common practice for an arbitral tribunal to require parties to present a summary of documents (A/CN.9/669, paras. 50 and 51).

- as contained in the draft revised version

38. The Working Group may wish to recall its decision to group under draft article 27 all provisions relating to evidence. Therefore, the Working Group agreed that the substance of article 25, paragraph (5) of the 1976 version of the Rules should be deleted from that article and placed as paragraph (2) of draft article 27. The Working Group adopted the substance of paragraph (2), without modifications (A/CN.9/669, paras. 70 and 72).

Paragraph (4)

39. Consistent with the decision mentioned under paragraph 38 above to group under draft article 27 all provisions relating to evidence, the Working Group agreed to place the provision of article 25, paragraph (6) of the 1976 version of the Rules under draft article 27, as a new paragraph (4) (A/CN.9/669, paras. 70 and 73). The Working Group adopted the substance of paragraph (4), without modifications.

Hearings**Article 28**

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.
2. Witnesses and experts who are presented by the parties and then admitted to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Such witnesses and experts may be heard under the conditions and examined in the manner set by the arbitral tribunal.
3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or expert during the testimony of other witnesses or experts, except that a witness or expert who is a party to the arbitration shall not, in principle, be asked to retire.
4. The arbitral tribunal may direct that witnesses and experts be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

*Remarks on draft article 28 [numbered article 25 in the 1976 version of the Rules]**Title*

40. The Working Group agreed that draft article 28 be titled “Hearings”, as the purpose of that article is to deal with the organization of hearings (A/CN.9/669, para. 70).

Paragraph (1)

41. Paragraph (1) is reproduced without modification from the 1976 version of the Rules and was adopted in substance by the Working Group (A/CN.9/669, para. 70).

Paragraph (2)

- as contained in the 1976 version of that article

42. The Working Group agreed to delete paragraph (2) as contained in the 1976 version of that article considering that the requirement for an arbitral tribunal to send advance notice to parties in the event of oral hearing in paragraph (1) also cover the identification of persons who are to be examined at the hearing and that the Rules already contain a provision on languages in article 17 (A/CN.9/669, para. 80).

- as contained in the draft revised version

43. The Working Group adopted the substance of paragraph (2) of draft article 28, subject to further drafting consideration (A/CN.9/669, para. 79). The proposed revised version of paragraph (2) is based on drafting suggestions made in the Working Group (A/CN.9/669, paras. 57-60 and 70) and the Working Group may wish to consider whether it adequately addresses the concern expressed by the Working Group that the distinction between experts appointed by a party and by the tribunal be clarified (A/CN.9/669, paras. 76 and 77).

Paragraph (3)

- as contained in the 1976 version of that article

44. The Working Group agreed to delete paragraph (3) as contained in the 1976 version of that article because its provisions have been found too detailed to be included in modern arbitration rules (A/CN.9/669, paras. 63 and 81).

- as contained in the draft revised version

45. The Working Group adopted the substance of paragraph (3) of draft article 28, subject to the clarification that a party appearing as a witness (or expert) should not generally be requested to retire during the testimony of other witnesses (or experts) (A/CN.9/669, paras. 82 and 83). The words “except when the witness or expert is also a party to the arbitration” are proposed to be added at the end of paragraph (3) to address that matter.

Paragraph (4)

46. The Working Group adopted the substance of paragraph (4) (A/CN.9/669, para. 84). Concerning the example of examination by video transmission, the Working Group requested the Secretariat to find appropriate wording to cover the example of examination by video transmission. The Working Group may wish to consider whether the additions of the words “of telecommunication” after the word “means” would appropriately cover all existing and future means of communication and whether the words “videoconference” should be kept in brackets as an example thereof (A/CN.9/669, paras. 65-67 and 84).

47. The Working Group may wish to consider whether a provision should be added to address the situation where a party failed to appear at a hearing without showing sufficient cause.

Annex

Table of concordance

<i>Revised version of the UNCITRAL Arbitration Rules</i>	<i>1976 version of the UNCITRAL Arbitration Rules</i>
Section III. Arbitral proceedings	Section III. Arbitral proceedings
Statement of claim (article 20)	Statement of claim (article 18)
Statement of defence (article 21)	Statement of defence (article 19)
Amendments to the claim or defence (article 22)	Amendments to the claim or defence (article 20)
Pleas to the jurisdiction of the arbitral tribunal (article 23)	Pleas to the jurisdiction of the arbitral tribunal (article 21)
Further written statements (article 24)	Further written statements (article 22)
Periods of time (article 25)	Periods of time (article 23)
Interim measures (article 26)	Interim measures of protection (article 26)
Evidence (article 27)	Evidence and hearings (article 24)
Hearings (article 28)	Evidence and hearings (article 25)

**C. Report of the Working Group on Arbitration and Conciliation on the work of its
fifty-second session (New York, 1-5 February 2010)
(A/CN.9/688)**

[Original: English]

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I. Introduction

1. At its thirty-first session (New York, 1-12 June 1998), the Commission, with reference to discussions at the special commemorative New York Convention Day held in June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“the New York Convention”), considered that it would be useful to engage in a discussion of possible future work in the area of arbitration. It requested the

Secretariat to prepare a note that would serve as a basis for the consideration of the Commission at its next session.¹

2. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission had before it a note entitled “Possible future work in the area of international commercial arbitration” (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985) (“the UNCITRAL Model Law”), as well as the use of the UNCITRAL Arbitration Rules (“the UNCITRAL Arbitration Rules” or “the Rules”) and the UNCITRAL Conciliation Rules, and to evaluate, in the universal forum of the Commission, the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.² When the Commission discussed that topic, it left open the question of what form its future work might take. It was agreed that decisions on the matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide).³

3. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments elaborated by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were recognized as a very successful text, adopted by many arbitration centres and used in many different instances, such as, for example, in investor-State disputes. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit 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 carefully define the list of topics which might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.⁴ The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.156, paragraphs 5-20.

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its fifty-second session in New York, from 1 to 5 February 2010. The session was attended by the following States members of the Working Group: Armenia, Australia, Austria, Belarus, Bolivia (Plurinational State of), Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Ecuador, Egypt,

¹ *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 235.

² *Ibid.*, *Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 337.

³ *Ibid.*, para. 338.

⁴ *Ibid.*, *Sixty-first Session, Supplement No. 17 (A/61/17)*, para. 184.

El Salvador, France, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Lebanon, Madagascar, Malaysia, Mexico, Mongolia, Morocco, Nigeria, Norway, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Serbia, Singapore, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Argentina, Belgium, Costa Rica, Croatia, Cuba, Finland, Indonesia, Iraq, Kuwait, Libyan Arab Jamahiriya, Mauritania, Mauritius, Netherlands, Panama, Peru, Philippines, Qatar, Romania, the former Yugoslav Republic of Macedonia, Turkey and United Arab Emirates.

6. The session was attended by observers from the following non-member States and entities: Holy See and Palestine.

7. The session was attended by observers from the following organization of the United Nations System: the International Centre for Settlement of Investment Disputes (ICSID) and the World Bank.

8. The session was attended by observers from the following invited international intergovernmental organizations: Asian-African Legal Consultative Organization (AALCO), International Cotton Advisory Committee (ICAC) and Permanent Court of Arbitration (PCA).

9. The session was also attended by observers from the following invited international non-governmental organizations: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association (AAA), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Asia Pacific Regional Arbitration Group (APRAG), *Asociación Americana de Derecho Internacional Privado (ASADIP)*, Association for the Promotion of Arbitration in Africa (APAA), 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), *Centre pour l'Étude et la Pratique de l'Arbitrage National et International (CEPANI)*, *Centro de Estudios de Derecho, Economía y Política (CEDEP)*, Chartered Institute of Arbitrators (CIARB), *Comité Français de l'Arbitrage (CFA)*, Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Council of Bars and Law Societies of Europe (CCBE), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Gulf Cooperation Council (GCC) Commercial Arbitration Centre, ICC International Court of Arbitration, Institute of International Commercial Law, Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), International Arbitration Institute (IAI), International Bar Association (IBA), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), International Swaps and Derivatives Association (ISDA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), London Court of International Arbitration (LCIA), Milan Club of Arbitrators, Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for International Commercial Arbitration — Lagos (RCICAL) and Swiss Arbitration Association (ASA).

10. The Working Group elected the following officers:
Chairman: Mr. Michael E. Schneider (Switzerland)
Rapporteur: Ms. Susan Downing (Australia)
11. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.156); (b) notes by the Secretariat on a revision of the UNCITRAL Arbitration Rules (A/CN.9/WG.II/WP.157, A/CN.9/WG.II/WP.157/Add.1 and A/CN.9/WG.II/WP.157/Add.2).
12. 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

13. 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.157, A/CN.9/WG.II/WP.157/Add.1 and A/CN.9/WG.II/WP.157/Add.2). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.
14. At the closing of its deliberations, the Working Group requested the Secretariat to prepare a draft of revised UNCITRAL Arbitration Rules, based on the deliberations and decisions of the Working Group, noting those provisions that had not been fully discussed or where disagreement remained (draft article 2, paragraph (2), draft article 6, paragraph (3), draft article 34, paragraph (2) and draft article 41, paragraphs (3) and (4)). The Secretariat was requested to circulate the draft revised Rules to Governments for their comments, with a view to consideration and adoption of the draft revised Rules by the Commission at its forty-third session, scheduled to be held in New York, from 21 June to 9 July 2010.

IV. Revision of the UNCITRAL Arbitration Rules

15. The Working Group recalled that it had concluded a second reading of articles 27 to 39 of the draft revised Rules at its fifty-first session (A/CN.9/684) and agreed to resume discussions on the revision of the Rules on the basis of document A/CN.9/WG.II/WP.157 and its addenda 1 and 2.

Draft article 40

(corresponding to article 38 of the 1976 version of the Rules) — definition of costs

paragraph (1)

16. The Working Group agreed to replace, in paragraph (1), the words “and, if it deems it appropriate, in any other award” by the words “or, if it deems appropriate, in another decision”, in order to clarify that the arbitral tribunal could fix the costs in any decision it might render at any stage of the proceedings. It was further said that article 40, paragraph (3) of the 1976 version of the Rules provided that the arbitral tribunal should fix the costs of arbitration in the text of a termination order or an award on agreed terms when it issued such decisions. It was said that if the Working Group intended to place the substance of article 40, paragraph (3) of the 1976 version of the Rules under draft article 40, paragraph (1), it might then be preferable, for the sake of clarity, to add a reference to “termination order” and “award on agreed terms” in draft article 40, paragraph (1).

17. After discussion, the Working Group agreed with the proposed modifications to paragraph (1), as contained above in paragraph 16 and requested the Secretariat to redraft paragraph (1) accordingly.

paragraph (2)

18. It was noted that the words “if such costs were claimed during the arbitral proceedings” as contained in article 38, paragraph (e) of the 1976 version of the Rules had been deleted in draft article 40, paragraph (2) (e). It was then questioned whether that deletion could be understood as empowering the arbitral tribunal to decide on its own initiative on legal and other costs incurred by the parties in relation to the arbitration, regardless of whether such costs were actually claimed. In response, it was clarified that no such deviation from article 38, paragraph (e) of the 1976 version of the Rules was intended.

19. After discussion, the Working Group agreed that the substance of paragraph (2) was generally acceptable.

Draft article 41

(corresponding to article 39 of the 1976 version of the Rules) - fees of arbitrators

mechanism for review of fees and expenses of the arbitrators

20. The Working Group considered draft article 41, which included revised provisions aimed at providing parties with an opportunity to obtain review by disinterested third persons of whether the fees sought by arbitrators were excessive, in line with the decisions made by the Working Group at its forty-fifth (A/CN.9/614, paras. 133 and 134), forty-eighth (A/CN.9/646, paras. 20 to 27) and fifty-first (A/CN.9/684, paras. 122 to 126) sessions.

21. The necessity of providing a neutral mechanism aimed at such a review of fees charged by arbitrators in the case of non-administered arbitration was underlined. It was said that such a mechanism for review was advisable as a precaution to guard against the rare situations where an arbitrator might seek excessive fees. It was also pointed out that the process for establishing the arbitrators’ fees was crucial for the legitimacy and integrity of the arbitral process itself. It was further said that the revision of the provisions relating to the costs of arbitration, and in particular the

fixing of the fees by the arbitrators without any control thereof, was one of the main reasons for undertaking a revision of the Rules.

22. However, concerns were raised on the risks that draft article 41 might also entail. It was said that, in certain jurisdictions, domestic law provided for challenge and appeal procedures which allowed a State court to make a decision on arbitrators' fees and therefore draft article 41 might create uncertainties as to the beginning of the time period to apply for such challenge or appeal. It was said that according to draft article 41, paragraph (4), the appointing authority or, failing such authority, the Secretary-General of the Permanent Court of Arbitration (PCA) was empowered to impose modifications to the part of the award relating to costs, which might give rise to challenge of the award. Furthermore, the fixing of the fees was said to be a matter of a contractual nature between the parties and the arbitrators, and therefore intervention of a third party in that process was not justified. It was also said that some appointing authorities might inject their own views about appropriate fee levels into the review process, regardless of the arbitrators' original proposal on fees. It was noted that draft article 41, paragraphs (3) and (4) introduced significant time periods for challenging the arbitrator's fees, thereby creating potential delays for the finality of the award.

23. A question was raised whether the decision made by the appointing authority in relation to the fixing of the arbitrators' fees should be of a binding nature. It was said that the appointing authority might not, in all instances, be properly qualified to make such decision. The criteria to be applied by the appointing authority or the Secretary-General of the PCA in paragraph (4) were said not to provide enough guidance to those bodies and might encourage time-consuming scrutiny even of fee determinations that were fully consistent with a fees proposal that had been reviewed and left unchanged under draft article 41, paragraph (3).

24. The length of draft article 41 was found cumbersome. It was observed that the drafting of that provision should be simplified to reflect policy decisions only.

25. After discussion, the Working Group agreed to further consider whether the concerns expressed in the Working Group could be addressed by revising the drafting of paragraphs (3) and (4).

paragraph (3)

26. With a view to simplifying paragraph (3), it was proposed to delete the text referring to the designation of an appointing authority in case no such authority had already been agreed by the parties, and to deal with that question more generally under draft article 6. That proposal was supported. It was further said that the provision to be included under draft article 6 should also clarify whether the designation of an appointing authority would suspend the running of the time period defined under paragraph (3) (see below, para. 127).

27. It was further proposed to simplify the last sentence of paragraph (3) by deleting the words "remain under its continuing duty to". That proposal received support. It was suggested that the last sentence of paragraph (3) should also be made applicable with respect to paragraph (4). That suggestion also received support.

paragraph (4)

“pursuant to article 40, paragraphs 2 (a), (b) and (c)”

28. It was said that it might not be necessary to include in the review undertaken by the appointing authority or the Secretary-General of the PCA the “costs of expert advice and of other assistance required by the arbitral tribunal”. Accordingly, it was suggested that the reference to paragraph “2 (c)” in the first sentence of paragraph (4) be deleted.

“when informing the parties”

29. It was pointed out that the losing party might be tempted to challenge the decision of the arbitrators on fees, thereby delaying the rendering of the final award. It was suggested that paragraph (4) should therefore allow the arbitral tribunal to inform the parties of its decision on fees before a final award was made. To achieve that result, it was proposed to replace the words “when informing the parties of the arbitrators’ fees [and expenses] that have been fixed pursuant to article 40, paragraphs 2 (a), (b) and (c)” by the following words: “On informing the parties of its determination of the fees [and expenses]”. In response, it was said that draft article 40 already provided that the arbitral tribunal could determine the costs in any decision, and the proposed modification might not be necessary.

scope of review

30. In order to limit the scope of revision of costs by the appointing authority or the Secretary-General of the PCA, it was proposed to replace the words “satisfy the criteria in paragraph 1 as applied in” by the words “are consistent with”. However, it was said that retaining a reference to paragraph (1) would be advisable as it referred to the notion of reasonableness of the amount of arbitrators’ fees, an element to be taken into account by the appointing authority in its review. It was also said that such reference could prevent situations where, despite applying the agreed method for determining the fees, arbitrators would charge exaggerated amounts. In order to address the concern that the review process was too intrusive, it was suggested to modify the aforementioned proposal to “are manifestly inconsistent with”.

“fees and expenses”

31. The Working Group considered whether the review mechanism by the appointing authority and the Secretary-General of the PCA should also apply to the expenses of the arbitrators. It was said that review of expenses could be a cumbersome exercise, in particular in complex cases, and that it would be difficult for such a review to be made within 45 days, as currently provided under paragraph (4). In response, it was said that exaggeration also occurred in the determination of expenses and therefore expenses should be covered by the review mechanism.

32. To address the concern regarding time limitation for such a review, several proposals were made. One proposal was to provide that the appointing authority or the Secretary-General of the PCA should simply endeavour to decide on necessary adjustments within 45 days, and not be under an obligation to do so. Another suggestion was that the time period for such review should start running from the

date the appointing authority or the Secretary-General of the PCA received full information for making its decision.

33. After discussion, the inclusion of the expenses in the review to be undertaken by the appointing authority or the Secretary-General of the PCA was generally supported.

“treated as a correction to the award”

34. The Working Group agreed that the last sentence of paragraph (4), which provided that if the award had already been issued, any adjustment decided by the appointing authority or the Secretary-General of the PCA “be treated as a correction to the award pursuant to article 38”, should be clarified. It was observed that a modification of the decision of the arbitral tribunal on costs did not constitute a mere correction. It was suggested to replace the words “be treated as” by the words “has a status equivalent to”. That proposal did not receive support.

proposed new paragraph (5)

35. In order to address the concern regarding additional delays with respect to the rendering of the final award that might result from the application of paragraph (4), it was proposed to add a new paragraph to draft article 41, along the following lines: “A referral under paragraphs (3) and (4) shall not affect [the status] [the final nature] of the arbitral tribunal’s decisions on any matter contained in the award other than the amount of its fees.” It was said that that new paragraph usefully clarified that the finality of the award on decisions pertaining to the merits of the case would not be affected by the mechanism provided under paragraph (4). However, it was pointed out that such a provision might not be applicable in certain jurisdictions. Doubts were also expressed whether an award, which would leave out the decision on costs, could be enforced under the New York Convention. After discussion, the Working Group agreed to include the proposed new paragraph (5) in draft article 41.

proposal for a revision of draft article 41

36. After discussion, there was general support in the Working Group to modify draft article 41, to serve as a basis for the third reading of that article, as follows:

- Paragraph (1): the words “[and expenses]” would be added in square brackets after the word “fees”.
- Paragraph (2) would remain unchanged.
- Paragraph (3) would read as follows: “Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees [and expenses], including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is [manifestly] inconsistent with the criteria in paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.”

- Paragraph (4) would read as follows: “When informing the parties of the arbitrators’ fees [and expenses] that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated. Within 15 days of receiving the arbitral tribunal’s determination of fees [and expenses], any party may refer for review such determination to the appointing authority or, if no appointing authority has been agreed upon or designated or if such an appointing authority fails, refuses, or is unable to fulfil its functions under this paragraph, to the Secretary-General of the PCA. If, within 45 days of receiving such a referral, the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal’s determination is manifestly inconsistent with the arbitral tribunal’s proposal (as may have been adjusted) under paragraph 3 or with the criteria in paragraph 1, the appointing authority or the Secretary-General of the PCA shall make any necessary adjustments to the arbitral tribunal’s determination, which shall be binding upon the arbitral tribunal. Any such adjustments either shall be included by the tribunal in its award or, if the award has already been issued, shall be [reflected] [implemented] in a correction to the award pursuant to article 38.”
- The following paragraphs would be added. Paragraph (5) would read: “Throughout the procedure under paragraph 3 or 4, the arbitral tribunal shall proceed with the arbitration, in accordance with article 17, paragraph 1.” Paragraph (6) would read: “A referral under paragraph 4 shall not affect any determination in the award other than the arbitral tribunal’s fees and expenses.”

Draft article 42

(corresponding to article 40 of the 1976 version of the Rules) — allocation of costs

37. The Working Group agreed that the substance of draft article 42 was generally acceptable.

Draft article 43

(corresponding to article 41 of the 1976 version of the Rules) — deposit of costs

38. The Working Group agreed that the substance of draft article 43 was generally acceptable.

Draft additional provision — Filling of gaps in the Rules

39. The Working Group considered a proposed draft additional article which established a gap-filling provision aimed at clarifying that matters governed by the Rules which were not expressly settled in them were to be settled in conformity with the general principles on which the Rules were based (A/CN.9/WG.II/WP.157/Add.2, para. 34). The Working Group had agreed, at its forty-eighth session, to further consider whether such a provision should be included in the Rules (A/CN.9/646, paras. 50-53).

40. Some support was expressed in favour of retaining a provision on gap filling in a revised version of the Rules. It was considered useful to emphasize that the Rules constituted a self-contained system of contractual norms and that any lacunae

in the Rules were to be filled by reference to the Rules themselves. It was pointed out that issues might arise that were not addressed in the Rules and it was preferable to provide guidance to the users of the Rules by referring to the general principles on which the Rules were based.

41. Some of the delegations that supported inclusion of a gap-filling provision considered that it might be useful to complement that text by adding language along the lines of article 2A, paragraph (1) of the UNCITRAL Model Law. It was said that referring to the international origin of the Rules, the need to promote their uniform interpretation and application, as well as the observance of good faith would be useful information on the applicable principles. That proposal received little support, as it was pointed out that article 2A, paragraph (1) of the UNCITRAL Model Law was aimed at providing guidance on the interpretation of legislative texts and not on instruments of a contractual nature such as the Rules.

42. In order to avoid referring to the notion of “principles”, which might give rise to uncertainty as to their definition, it was proposed to replace the words “the general principles on which those Rules are based” by the words “the spirit of those Rules”, thereby adopting language closer to article 35 of the Rules of Arbitration of the International Chamber of Commerce (“ICC Rules of Arbitration”) and article 32.2 of the Rules of the London Court of International Arbitration (“LCIA Rules”). That proposal received some support.

43. Those opposing inclusion of a gap-filling provision in the Rules said that since general principles referred to in that provision were not defined, complex issues of interpretation might ensue. It was said that the same concern applied to the use of “the spirit of the Rules”, as proposed above, in paragraph 42. In addition, it was pointed out that the application of such a provision could lead to challenge of awards on the grounds that the procedure adopted by the arbitral tribunal differed from that agreed by the parties. Further, it was pointed out that draft article 17 of the Rules already provided guiding principles regarding the conduct of arbitral proceedings, due process and efficiency of arbitral proceedings. While it was recognized that draft article 17 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.

44. After discussion, in the absence of consensus, the Working Group agreed not to include a provision on gap filling in a revised version of the Rules.

Draft additional provision, tentatively numbered draft article 16

exclusion of liability

45. The Working Group considered a proposed draft provision on liability, tentatively numbered draft article 16 (A/CN.9/WG.II/WP.157, para. 41). Draft article 16 established immunity for the participants in the arbitration and sought to preserve exoneration in cases where the applicable law allowed contractual exoneration from liability, to the fullest extent permitted by such law (A/CN.9/646, paras. 38-45).

46. The Working Group agreed that participants in the arbitration should in principle be granted immunity or limitation of liability for their acts or omissions in connection with the arbitration to the fullest extent permitted by the applicable law.

It was said that such a provision would ensure that arbitrators were protected from 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.

47. It was explained that a waiver "to the fullest extent permitted under the applicable law" did not and should not extend to intentional wrongdoing. Therefore, it was suggested to expressly exclude from the scope of exemption of liability the case of "intentional wrongdoing". That proposal received support.

48. After discussion, the Working Group agreed to revise draft article 16 along the following lines: "Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority, the Secretary-General of the PCA and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration."

Draft article 29

(corresponding to article 27 of the 1976 version of the Rules) — proposal for a new paragraph on objecting against experts appointed by the arbitral tribunal

principle of inclusion of a provision on challenge of, or on objections against, experts appointed by the arbitral tribunal

49. The Working Group considered whether a procedure for challenging, or objecting against, experts appointed by the arbitral tribunal should be provided for in draft article 29 on the basis of a draft provision contained in document A/CN.9/WG.II/WP.157/Add.1, paragraph 37 ("draft provision"), and of a proposal along the following lines: "1. Within ten days of their being notified of the designation of the expert or experts, the parties may, giving their reasons, challenge the expert or experts. 2. At the request — with reasons given — of the parties, the deadline for the challenging of experts may be extended by the arbitral tribunal. 3. Exceptionally, experts may, up until they are about to render their opinion, be challenged by the parties on the grounds that information casting doubt on their impartiality and independence has recently come to light. 4. The arbitral tribunal shall decide on the challenge, upholding it or confirming the appointment of the expert."

50. The Working Group generally agreed that, as a matter of principle, a procedure for objecting against experts appointed by the arbitral tribunal should be included in the revised Rules. The Working Group took note that the draft provision followed article 6 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules") and general support was expressed for adopting the approach reflected in the draft provision.

impartiality and independence

51. The Working Group agreed to include the words "impartiality and" before the word "independence" where that word appeared in the draft provision.

52. It was agreed that objections could be made to an expert's qualifications as well as to his or her independence or impartiality.

53. To align the wording of the draft provision with article 6 of the IBA Rules, it was suggested to provide that the expert should be impartial and independent not only from the parties and the arbitral tribunal but also from the legal advisers. However, it was pointed out that the purpose of broadening application of the provision would be better achieved by deleting the words “from the parties[, their legal advisers] and the arbitral tribunal” at the end of the first sentence of the draft provision. That proposal found broad support.

“before accepting the appointment”

54. It was said that the draft provision did not permit the arbitral tribunal to appoint an expert before he or she submitted his or her statement of independence and impartiality. It was suggested that some level of flexibility should be introduced by including the words “or, as soon as practical” before the word “submit” in the first sentence of the draft provision to accommodate situations in which the arbitral tribunal found urgent need of an expert, such as to evaluate perishable evidence. It was suggested that that objective could also be achieved by including the words “in principle” before the words “before accepting appointment” to highlight the exceptional character of that procedure. Those proposals received support.

“within the time ordered by the arbitral tribunal”

55. It was pointed out that the draft provision enabled the parties to object to the choice of an expert within the time limit provided by the tribunal and that that provision could be understood as prohibiting parties from raising objections thereafter. It was proposed that parties should expressly be allowed to challenge experts anytime and that experts be subject to a continuing duty of disclosure throughout the proceedings. Concern was expressed that allowing parties to challenge experts at any time might give rise to dilatory tactics. It was said that since draft article 27, paragraph (4) provided the arbitral tribunal with the discretion to determine the relevance and weight of the evidence offered, and draft article 29 allowed parties to submit their opinion on the expert’s report, it might not be necessary to specifically address that matter in the draft provision.

additional paragraph to draft article 29

56. After discussion, the Working Group agreed that a new paragraph would be added in draft article 29, after paragraph (1), along the following lines: “The expert shall, in principle before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her impartiality and independence. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert’s qualifications, impartiality or independence. The arbitral tribunal shall decide promptly whether to accept any such objections. After an expert’s appointment, a party may object to the expert’s qualification, impartiality or independence only if the objection is for reasons of which the party becomes aware after the appointment has been made. The arbitral tribunal shall decide promptly what, if any, action to take.”

Draft model arbitration clause for contracts

57. The Working Group agreed that the substance of the draft model arbitration clause for contracts was acceptable.

Draft model statement of independence pursuant to article 11 of the Rules

58. The Working Group approved the draft model statement of independence and took note of the proposed additional statement regarding declaration of availability by the arbitrators. The Working Group agreed that the sentence introducing that statement should read: “Note — The parties may require the arbitrators to also make the following statement:”

Section I. Introductory rules

59. The Working Group commenced its third reading of the draft revised Rules on the basis of document A/CN.9/WG.II/WP.157 and its addenda 1 and 2. The Working Group focused on provisions listed by the Secretariat in the aforementioned document that the Working Group had, in previous sessions, indicated should be further considered, and also on provisions that delegations had identified for additional consideration.

60. Under section I, introductory rules, the Working Group approved the substance of draft articles 1, 3 and 5 without any change.

Draft article 2

notice and calculation of periods of time

paragraphs 1 and 2

61. The Working Group considered paragraphs (1) and (2), which sought to reflect the decision of the Working Group at its forty-ninth session to expressly include in the first paragraph language which authorized delivery of notice by any means of communication that provided a record of transmission and to include in the second paragraph provisions addressing the situation where a notice could not be delivered to the addressee in person (A/CN.9/665, paras. 28 and 29).

62. Various concerns were expressed in relation to those paragraphs. It was said that paragraph (1) only provided that a notice should “be delivered by any means of communication that provides a record of its transmission”, thereby not requiring confirmation of delivery of notices. The term “designated address” in paragraph (2) was found ambiguous and it was said that a better approach would be to replace those words by wording along the lines of “postal address or e-mail address designated by a party for receipt of such notice”.

63. It was further said that the concept of deemed delivery of notice in paragraph (2) might not receive application in those jurisdictions which required actual delivery of notice. It was suggested that draft article 2 should make a clear distinction between delivery and sending of notices, depending on whether the addressee could actually be reached. It was further proposed to clarify the last sentence of paragraph (2) by replacing it by wording along the following lines: “Such notice shall also be deemed to have been received if received via an address

or method as agreed to by the parties or according to the practice followed by the parties in previous dealings.”

64. To address the aforementioned concerns expressed in the Working Group, a proposal was made to replace paragraph (2) by a provision along the following lines: “For the purposes of these Rules, any notice is deemed to have been received if: (a) it is physically delivered to the addressee, or if it is delivered at its habitual residence, place of business, the postal address, or at electronic address or telefax number previously designated by the addressee for this purpose, in each case by means which provide the record of the [actual] delivery, or (b) if none of these can be found after making reasonable inquiry, or if delivery otherwise failed under subparagraph (a), then notice is deemed to have been received if it is sent to the addressee’s last known address or place of business by registered letter or any other means which provides a record of the attempt to deliver it. Notice shall be deemed to have been received on the day it is so delivered.”

65. Concerns were raised that the structure of the proposed amendment to paragraph (2) might be confusing as the chapeau referred to “deemed delivery”, whereas subparagraph (a) referred to actual delivery. It was questioned whether the listing of means of delivery was needed. A proposal was made to amend paragraph (2) along the following lines: “For the purposes of these Rules, any notice is deemed to have been received if (a) it is delivered to the addressee personally, or it is delivered at its place of business, habitual residence, postal address, or (if so designated) electronic address or telefax number, [in each case, by means which provide a record of delivery]; or (b) notwithstanding reasonable efforts, delivery cannot be effected under any of the methods in paragraph (a), it is sent to the addressee’s last known place of business, habitual residence, or postal address, by means which provide a record of the attempt [under subparagraph (a)] to deliver it [under subparagraph (b)]. Notice shall be deemed to have been received on the date it is so delivered or attempted to be delivered.” Some views were expressed that the bracketed text “in each case, by means which provide a record of delivery” was necessary to ensure that the means used provided a record of delivery. In response, it was said that the bracketed language would apply to all transmissions, which might be excessive. The following other matters were raised in the Working Group for future discussion: the list of communications of a particular importance requiring report of receipt, and relying on the burden of proof in the context of notification.

66. After discussion, the Working Group requested the Secretariat to prepare a revised draft of article 2 based on the discussions of the Working Group, for further consideration by the Commission.

Draft article 4

(new article) — response to the notice of arbitration

inclusion of a third party before constitution of the arbitral tribunal

67. It was noted that draft article 17, paragraph (5), which allowed third parties to be joined in the arbitration as a party, only applied after the constitution of the arbitral tribunal. It was further noted that the most appropriate time for a party to be joined in arbitration proceedings was at the early stage of the procedure, before the arbitral tribunal was constituted. In that regard, it was agreed to add in draft

article 4, paragraph (2) a new subparagraph along the following lines: “(f) in so far as the respondent formulates claims against a party to the arbitration agreement other than the claimant, its response shall include a notice of arbitration in accordance with article 3.”

paragraph (3)

68. It was noted that, while the arbitral tribunal was expressly authorized to resolve any controversy regarding the sufficiency of the notice of arbitration under draft article 3, paragraph (5), no corresponding provision could be found in relation to controversy regarding the response to the notice of arbitration in draft article 4, paragraph (3). Therefore, the Working Group agreed to modify draft article 4, paragraph (3) as follows: “The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the respondent’s failure to communicate a response to the notice of arbitration, or an incomplete or late response to the notice of arbitration, which shall be finally resolved by the arbitral tribunal”.

69. With that modification to paragraph (3), the Working Group approved draft article 4 in substance.

Section II. Composition of the arbitral tribunal

70. Under section II, composition of the arbitral tribunal, the Working Group approved the substance of draft articles 8, 9, 11, 12, 15 and 16 (as article 16 appeared above in para. 48) without any change.

Draft article 7

(corresponding to article 5 of the 1976 version of the Rules) — number of arbitrators

paragraph (2)

71. For the sake of clarity, the Working Group agreed to include in the first line of paragraph (2) the word “other” before the word “party” and the word “party’s” before the word “proposal”.

72. With that modification, the Working Group approved draft article 7 in substance.

Draft article 10 (new article)

paragraph (3)

73. The Working Group recalled its decision at its forty-sixth session to include in draft article 10, paragraph (3), as a matter of principle, a provision authorizing the appointing authority to constitute the arbitral tribunal, including the right to revoke already appointed arbitrators (see A/CN.9/619, paras. 89-91). Although one concern was expressed regarding the use of the word “revoke” in paragraph (3), that paragraph was generally found acceptable.

74. After discussion, the Working Group approved draft article 10 in substance.

Draft article 13

(corresponding to articles 11 and 12 of the 1976 version of the Rules)

paragraph (4)

75. It was suggested to replace the words “all parties do not agree” contained in the first line of draft article 13, paragraph (4) by the words “not all parties agree”, in order to clarify that the disagreement by one party sufficed to trigger the procedure in draft article 13, paragraph (4). In response, it was said that the current wording clearly conveyed that meaning.

76. After discussion, the Working Group approved draft article 13 in substance. The Working Group took note that paragraph (4) would be amended following inclusion in draft article 6 of a general provision regulating the situation where the Rules provided for a period within which a party should act before the appointing authority, and no appointing authority had been agreed upon or designated (see below, para. 127).

Draft article 14

(corresponding to article 13 of the 1976 version of the Rules) - replacement of an arbitrator

*paragraph (2)**role of the appointing authority*

77. The Working Group considered paragraph (2), which referred to situations where a party, in exceptional circumstances, had to be deprived of its right to appoint the substitute arbitrator. A suggestion was made that the arbitrators themselves, rather than just the appointing authority should be given the power to decide to proceed as a truncated tribunal. In response, it was said that allowing the arbitrators to decide whether to proceed as a truncated tribunal might not provide sufficient safeguards for the parties, in particular in the case of collusion between arbitrators. It was also said that in rules of other international arbitral institution, that decision was in the hands of a third party and not of the arbitrators. Article 12 (5) of the ICC Rules of Arbitration was quoted as an illustration. After discussion, the aforementioned suggestion did not receive support.

“in view of the exceptional circumstances of the case”

78. It was suggested to replace the words “exceptional circumstances” appearing before the words “of the case” in paragraph (2) by wording along the lines of “circumstances that lead to the replacement of the arbitrator”, to better define the circumstances that might give rise to the decision by an appointing authority to deprive a party of its right to appoint a substitute arbitrator. However, it was felt that a broader approach might be preferable and a reference to “the circumstances of the case” would allow the appointing authority to take account of all circumstances or incidents which might have occurred during the proceedings.

79. After discussion, the Working Group agreed to retain the words “in view of the exceptional circumstances of the case”.

“if the same occurs”

80. For the sake of clarity, it was proposed to delete the opening words “if the same occurs” in paragraph (2) (b). In response, it was said that those words should be kept as they clarified that an appointing authority might only permit an arbitral tribunal to proceed as a truncated tribunal after the closure of the hearings. In support for the proposal, it was said that those words were likely to create confusion, as it was unclear which occurrence the word “same” was meant to refer to. Further, it was pointed out that those words might be understood as limiting the assessment of the exceptional circumstances by the appointing authority to those circumstances which would have occurred after the closure of the hearings.

81. The Working Group agreed to delete the words “if the same occurs” from paragraph (2) (b).

82. The Working Group approved draft article 14 in substance, with the modifications mentioned above in para. 81.

Section III. Arbitral proceedings

83. Under section III, arbitral proceedings, the Working Group approved the substance of draft articles 18 to 25, 28, 29 (with the inclusion of a new paragraph, as reflected above, in para. 56), 30 and 31 without any change.

Draft article 17

(corresponding to article 15 of the 1976 version of the Rules) - general provisions

paragraph (1)

84. It was pointed out that the first and the second sentences of paragraph (1) might be inconsistent, as the first sentence provided that the arbitral tribunal “may conduct the arbitration in such manner as it considers appropriate”, whereas the second sentence could be read as imposing on the tribunal an obligation to conduct the proceedings in accordance with certain principles. It was therefore proposed to replace the words “in exercising its discretion, shall” by the words “should conduct the proceedings in the manner it considers appropriate”. That proposal did not receive support as it was felt that the existing wording sufficiently reflected the arbitral tribunal’s discretion.

paragraph (2)

85. It was proposed to include as a first sentence in paragraph (2) a provision along the following lines: “As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration”. An objection was made that that attempted to regulate the conduct of proceedings in a way that might not be appropriate in all cases. However, the proposal found broad support on the basis that it would enhance efficiency of the proceedings and reflected good practice.

86. The Working Group agreed to include that proposal in paragraph (2).

paragraph (4)

87. The Working Group considered the words in square brackets in paragraph (4) which read “[except for communications referred to in article 26, paragraph 9]”. The Working Group agreed that those words should be retained in the revised Rules as they usefully clarified the exception to simultaneous communication in the case of preliminary orders.

paragraph (5)

88. It was pointed out that the term “prejudice” contained in paragraph (5) might be understood differently. It was proposed to replace the words “because of prejudice to any of those parties” by the words “taking into consideration fairness to each of the parties”. It was said that the reasons to be taken into account by the arbitral tribunal to refuse joinder of a third person might not be limited to consideration of fairness and should be wider, including the principles in draft article 17, paragraph (1). In addition, it was said that prejudice was only one of those principles, and the reference to it could be understood as excluding application of other principles. Therefore, another proposal was made to include in paragraph (5) a reference to paragraph (1). Those proposals did not find support as the principles in paragraph (1) were viewed to be applicable in any case.

89. After discussion, the Working Group agreed that paragraph (5) should not be amended.

proposed additional provision

90. A proposal was made to include a new provision in draft article 17 along the following lines: “The arbitral tribunal may hold one or more procedural conferences with the parties at any appropriate stage in the arbitral proceedings”. That proposal was not supported, since it was said to overregulate the matter.

91. The Working Group approved draft article 17 in substance, with the modifications mentioned above in para. 85.

Draft article 26

(corresponding to article 26 of the 1976 version of the Rules) - interim measures

paragraph 8

92. The Working Group recalled that, at its fiftieth session, it was considered that paragraph (8) might have the effect that a party requesting an interim measure be liable to pay costs and damages in situations where, for instance, the conditions of draft article 26 had been met, but the requesting party lost the arbitration (A/CN.9/669, para. 116). That included situations where the granting of interim measures was not justified in light of the outcome of the case, in particular where the arbitral tribunal later found that the claim for which the interim measure was sought was not valid. To address that concern, options were proposed for the Working Group’s consideration.

93. The options were that the party requesting an interim measure might be liable for any costs and damages caused by the measure if the arbitral tribunal determined that the measure “should not have been granted” or “was not justified”. Some support was expressed for the inclusion of the words “should not have been

granted” at the end of the first sentence of paragraph (8), for the sake of consistency with the approach taken in article 17 G of the UNCITRAL Model Law. Other views supported the second option in paragraph (8) that the measure “was not justified”, as it was found to better cater for the situation where a measure was granted in compliance with all conditions, but was later found to cause damages.

94. After discussion, the Working Group agreed to modify the first sentence of paragraph (8), so that it would read as follows: “The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted”.

95. With that modification, the Working Group agreed that the substance of draft article 26 was acceptable.

Draft article 27

(corresponding to article 24 of the 1976 version of the Rules) — evidence

paragraph (1)

96. It was observed that paragraph (1), which provided that each party should have the burden of proving the facts relied on to support its claim or defence, might conflict with applicable law on evidence, since there were a variety of legislative approaches to that matter. Therefore, it was proposed to include at the beginning of paragraph (1) the words: “Save as otherwise provided by applicable law”. That proposal found some support on the basis that it expressed a legitimate concern, and would clarify which provision would prevail in circumstances where applicable domestic law would contain a regulation different from paragraph (1). Another view expressed was that paragraph (1) might not serve a useful purpose and could be deleted.

97. Against deletion or modification of paragraph (1), it was said that the purpose of that paragraph was to clarify that the parties should be expected to provide evidence to support their allegations. Arbitrators would in any case have the ability to determine the applicable law, including to the question of evidence and burden of proof. It was also said that the general principle in paragraph (1) had proven useful in the context of treaty-based investor-State arbitration and was found in a number of arbitration rules of arbitral institutions.

98. After discussion, the Working Group agreed to maintain paragraph (1) without any change on the understanding that it did not prevent application of regulations on the burden of proof in the applicable law.

paragraph (2)

99. The Working Group found the reference to “witnesses, including expert witnesses” in paragraph (2) acceptable and approved draft article 27 in substance.

Draft article 32

(corresponding to article 30 in the 1976 version of the Rules) — waiver of right to object

100. The Working Group noted that draft article 32 had been redrafted pursuant to its deliberation at its fifty-first session (A/CN.9/684, paras. 49 and 51).

101. The Working Group approved draft article 32 in substance.

Section IV. The award

102. Under section IV, the award, the Working Group approved the substance of draft articles 33, 35, 37, 38, 40 and 43 without any change.

Draft article 34

(corresponding to article 32 of the 1976 version of the Rules) - form and effect of the award

paragraph (2)

“shall” — “undertake”

103. The Working Group agreed to replace in the second sentence of paragraph (2) the word “undertake” appearing before the words “to carry” by the word “shall”. The Working Group clarified that, by adopting that revised language, it did not intend to modify the substance of that provision, and only wished to address a concern expressed regarding the meaning attributed to that term in certain jurisdictions. The Working Group requested the Secretariat, for the sake of consistency, to replace the word “undertake” by the word “shall”, where that word appeared in the Rules.

“except for an application for setting aside an award”

104. The Working Group considered the third sentence of paragraph (2), which addressed the question of waiver of recourses against an award by the parties. As a matter of principle, the Working Group agreed that paragraph (2) should contain a waiver of all recourses which could be validly waived and be drafted in a manner that avoided any confusion as to the scope of the waiver. Diverging views were expressed regarding the manner in which the scope of the waiver should be determined.

105. A view was expressed that the reference to the setting aside of awards as a recourse to be expressly excluded from the scope of the waiver would give rise to a number of difficulties. That term, it was further said, was not defined in the Rules. Despite being referred to in the context of article V (1) (e) of the New York Convention and article 34 of the UNCITRAL Model Law, the notion of “setting aside” encompassed a variety of procedures and, depending on the jurisdictions, was applied differently. In addition, it was observed that article V (1) (e) of the New York Convention allowed State courts to refuse recognition and enforcement of awards in cases where the award had been set aside or suspended by a competent authority. Therefore, highlighting that particular recourse might have the unintended effect of increasing the number of applications for setting aside, thereby affecting finality of awards.

106. It was proposed to replace the words “except for an application for setting aside an award” by the words “insofar as such waiver can be validly made”, thereby adopting a more general formulation along the lines of corresponding provisions that could be found in rules of other arbitral institutions such as in article 28 (6) of the ICC Rules of Arbitration and article 26.9 of the LCIA Rules. Another proposal

was made to limit the waiver to recourse regarding revision of the award on the merits.

107. Against the approach reflected in those proposals, it was observed that there was doubt on the part of practitioners as to the scope of the waiver and, given that the Working Group did not intend the waiver to extend to actions for setting aside, the revised language should remove such doubt. It was also recalled that the reference in draft article 34, paragraph (2) to an express agreement of the parties regarding waiver of the right to apply for setting aside an award was intended to avoid the situation where parties could be deprived automatically of an exclusive recourse through the submission of a dispute to the Rules. Therefore, it was felt necessary to maintain an express exclusion from the scope of the waiver of that specific recourse, and keep paragraph (2) as it appeared in draft article 34. Some of those in favour of retaining such express exclusion proposed to slightly amend the second sentence of paragraph (2) by replacing the words “for setting aside an award” appearing at the end of paragraph (2) by the words “requesting a setting aside”.

right to resist enforcement of an award

108. With the aim of clarifying the scope of the waiver, the Working Group considered whether additional language should be provided in order to put it beyond doubt that the right to resist enforcement of an award as provided under article V of the New York Convention and article 36 of the UNCITRAL Model Law was to be understood as excluded from the waiver of recourse. Following that approach, it was suggested to insert language modelled on paragraph 45 of the Explanatory Note by the UNCITRAL secretariat on the Model Law, along the lines of: “In regulating recourse, this paragraph does not preclude a party from seeking court control by way of defence in enforcement proceedings.” Towards the same aim, another proposal was made to replace the word “regarding” appearing after the word “recourse” in the third sentence of paragraph (2) by the word “against” so that it would no longer be necessary to include a proposal on enforcement.

proposed revised version of the provision on waiver of recourses

109. In order to reconcile the diverging views, it was proposed to add as the opening words of the third sentence of paragraph (2) wording along the lines of: “Insofar as they may validly do so,”. Further, it was proposed to add a sentence providing that nothing in paragraph (2) should prejudice enforcement of an award. That proposal was supported.

110. After discussion, the following proposal was made: “Insofar as they may validly do so by adopting these Rules, the parties waive their right to [initiate] any form of appeal [or] review [or recourse] against an award to any court or other competent authority [, except for an application requesting a setting aside, and proceedings regarding execution and enforcement of an award]”. That proposal received support. It was suggested that if an exception to the waiver was to be provided, it should then encompass all recourses that were intended to be excluded from the waiver. However, the desirability of expressly listing the exceptions to the general provision on waiver of recourse was questioned, as the two first sentences of draft paragraph (2) made clear that the awards were final and binding on the parties, and parties were under an obligation to carry out all awards without delay.

111. After discussion, the Working Group decided that the proposal should be submitted to the Commission for further consideration.

Draft article 36

(corresponding to article 34 of the 1976 version of the Rules) — settlement or other grounds for termination

112. The Working Group noted that paragraph (2) had been revised for the sake of consistency with the decision made under draft article 30, paragraph (1) (a) to no longer limit the power of the arbitral tribunal to a dismissal order for termination in case the continuation of the arbitral proceedings became unnecessary or impossible. The Working Group found the substance of draft article 36 acceptable.

Draft article 39

(corresponding to article 37 of the 1976 version of the Rules) — additional Award

113. The Working Group noted that paragraph (1) reflected a proposal made at the fifty-first session of the Working Group to clarify that draft article 39 also applied in case the arbitral tribunal rendered a termination order and a party wished to request the tribunal to make an additional decision on claims presented during the arbitral proceedings but omitted by the tribunal (A/CN.9/684, paras. 113-116). The Working Group further noted that paragraphs (2) and (3) had been amended accordingly. The Working Group found the substance of draft article 39 acceptable.

Draft article 41

(corresponding to article 39 of the 1976 version of the Rules) — fees and expenses of arbitrators

114. The Working Group proceeded with its consideration of draft article 41, on the basis of the revised draft discussed by the Working Group at its current session and contained above in paragraph 36.

period of time

115. With a view to removing doubt on the application of time limitation with respect to the determination by the appointing authority of the arbitral tribunal's proposal regarding its fees and expenses, it was suggested to modify the last sentence of draft article 41, paragraph (3) along the following lines: "If, after receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is [manifestly] inconsistent with the criteria in paragraph 1, it shall within 45 days of receipt of the proposal make any necessary adjustments thereto, which shall be binding upon the tribunal." It was noted, that for the sake of consistency, the same modifications should be made in paragraph (4).

116. Questions were raised whether a period of 45 days regarding the determination by the appointing authority of the arbitral tribunal's proposal on its fees and expenses, as contained in paragraphs (3) and (4), was appropriate. Diverging views were expressed on whether a shorter period should be provided. In relation to the timing issue, it was said that the consequences of an appointing authority not responding within the time period prescribed in paragraph (3) were not addressed. Its silence could either be interpreted as an approval of the arbitrators' proposal or, on the contrary, as a failure to act by the appointing authority, thereby allowing a

party to seek appointment of a substitute appointing authority in accordance with the mechanism defined under draft article 6. It was felt that some flexibility should be introduced in paragraphs (3) and (4) by providing that the authority should act “promptly and, save for exceptional circumstances, within 45 days.” That proposal found some support. However, it was pointed out that that provision might be too vague and procedural matters required clear rules.

mechanism

117. It was suggested that if the Secretary-General of the PCA was requested by the parties to designate a replacement appointing authority under paragraph (3), he should be given the discretion to extend the time period within which the existing appointing authority should make its determination. It was also said that it might be simpler to duplicate in paragraph (3) the procedure provided under paragraph (4), and authorize the Secretary-General of the PCA to decide the matter, should the appointing authority fail to act.

118. The Working Group agreed that the proposed revised draft article 41, paragraphs (3) and (4) might need to be revised to provide flexibility in their application and consistency with the general provision on the designating and appointing of authorities contained in draft article 6. Under paragraph (3), at the very early stage of the procedure, promptly after the constitution of the arbitral tribunal, the parties might request the appointing authority chosen or designated in accordance with draft article 6 to decide whether the proposal of the arbitral tribunal on its fees or expenses was consistent with paragraph (1). In case the appointing authority did not reply to the parties within a period of 45 days, the parties might consider that it constituted a failure to act and, under, draft article 6, either agree on the appointment of a substitute appointing authority or request the Secretary-General of the PCA to make that designation. Under paragraph (4), at the late stage of the procedure, when the arbitral tribunal informed the parties of its fees and expenses, any party might refer such determination to the appointing authority for review. In case there was no appointing authority agreed upon or designated at that late stage of the procedure or if such an appointing authority failed, refused, or was unable to fulfil its functions, the matter would then be referred to the Secretary-General of the PCA for determination.

119. Concern was expressed that such provision might be too detailed and create difficulties in practice.

drafting

120. The Working Group considered draft article 41, as modified by the Working Group at its current session (see above, in para. 36). The Working Group reaffirmed its decision (see above para. 33) that the review mechanism by the appointing authority should apply to both the fees and expenses of the arbitrators and agreed to include the words “and expenses” after the word “fees” where it appeared in draft article 41. The Working Group found that the standard of review under paragraph (3) for a proposal for determining fees and expenses of the arbitrators to be “manifestly” inconsistent with paragraph (1) was too high and it agreed to delete the word “manifestly” from paragraph 3. The Working Group further agreed to delete the words “the criteria in” before the word “paragraph” where those words appeared in draft article 41. The Working Group considered proposed alternatives

for words in the last sentence of paragraph (4), and expressed preference for the word “implemented”.

121. With a view to focusing the review function on cases in which abuse might occur and avoiding unnecessary duplication of reviews previously conducted under draft article 41, paragraph (3), it was proposed to amend the third sentence of paragraph (4) as follows: “If, after receiving such a referral, the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal’s determination of fees and expenses is manifestly excessive, taking into account the arbitral tribunal’s proposal (and any adjustment thereto) under paragraph 3 or, to the extent that the determination of fees and expenses is inconsistent with the proposal, finds that the determination does not satisfy paragraph 1, the appointing authority or the Secretary-General of the PCA shall make any necessary adjustments to the arbitral tribunal’s determination, which shall be binding upon the arbitral tribunal.” In support of that proposal, it was said that a review for “manifestly excessive” fees “taking account the arbitral tribunal’s proposal” was intended to cover situations, for example, where an arbitrator had determined final fees that technically complied with his or her proposal for an hourly rate but that were based on a questionably high number of hours. That proposal was generally supported.

122. After discussion, it was felt that a revised draft of that provision should be considered at a later stage and, in view of the difficulty of reaching a consensus on that provision, the Working Group decided to submit it to the Commission for further consideration.

Draft article 42

(corresponding to article 40 of the 1976 version of the Rules) - allocation of costs

123. It was noted that, although the revised Rules regulated the fixing (draft article 40), allocation (draft article 42) and deposit of costs (draft article 43), it did not contain a provision on the reimbursement of parties. It was also noted that difficulties with the execution of the decision on costs had frequently arisen in certain jurisdictions, where the final order or award had not made specific reference to the amount that one party had to pay to the other party. Consequently, the Working Group agreed to include in the revised Rules a second paragraph to draft article 42 along the following lines: “The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award determine any amount that a party may have to pay to another party as a result of the decision on allocation.”

124. The Working Group approved draft article 42 in substance, with the modifications mentioned above in para. 123.

Placement of the draft model arbitration clause for contracts and the model statements of independence pursuant to article 11

125. The Working Group recalled that it approved the draft model arbitration clause for contracts and draft model statements of independence pursuant to article 11 as contained in A/CN.9/WG.II/WP.157/Add.2, paragraphs 29, 31 and 33 (see above, paras. 57 and 58). The Working Group agreed to place the draft model arbitration clause for contracts and the draft model statements of independence pursuant to article 11 in an annex to the revised Rules and to include a reference to them in the

table of contents of the revised Rules, as well as in a footnote to the corresponding articles referring to that annex.

Table of concordance

126. The Working Group, taking note that the articles of the revised Rules would be renumbered, considered whether to include in the revised Rules a table, as proposed in an annex to the document A/CN.9/WG.II/WP.157, showing the concordance between the articles of the 1976 version of the Rules and those of the revised version. Concerns were expressed that that could be misleading in cases where provisions contained in one article of the 1976 version of the Rules had been distributed between two or more articles of the revised Rules. The Working Group did not take any decision in that respect and took note of the fact that the Secretariat would insert such a table as part of publications to be prepared for the revised version of the Rules.

Draft article 6

proposed additional paragraph

127. Before the close of its session, the Working Group agreed that the new following paragraph should be included in draft article 6 along the lines of “Where these Rules provide for a period within which a party must refer a matter to an appointing authority and no appointing authority has been agreed upon or designated, the period is suspended from the date on which a party initiates the procedure for agreeing on or designating an appointing authority until the date of such agreement or designation.” The Working Group requested the Secretariat to make the necessary adjustments and simplifications to provisions dealing with that matter in its preparation of the draft revised Rules to be considered by the Commission.

**D. Note by the Secretariat on settlement of commercial disputes: Revision of the
UNCITRAL Arbitration Rules, submitted to the Working Group on Arbitration and
Conciliation at its fifty-second session
(A/CN.9/WG.II/WP.157 and Add.1-2)**

[Original: English]

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I. Introduction

1. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that, in respect of future work of the Working Group, priority be given to a revision of the UNCITRAL Arbitration Rules (1976) ("the UNCITRAL Arbitration Rules" or "the Rules").¹ In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit or its drafting style, and should respect the flexibility of the text rather than make it more complex.² At its forty-second session (Vienna, 29 June-17 July 2009), the Commission agreed that the time required should be taken for meeting the high standard of UNCITRAL, taking account of the international impact of the Rules, and expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-third session of the Commission, in 2010.³

2. At its forty-fifth session (Vienna, 11-15 September 2006), the Working Group undertook to identify areas where a revision of the UNCITRAL Arbitration Rules might be useful. At that session, the Working Group gave preliminary indications as to various options to be considered in relation to proposed revisions, on the basis of documents A/CN.9/WG.II/WP.143 and A/CN.9/WG.II/WP.143/Add.1, in order to allow the Secretariat to prepare a draft of revised Rules taking account of such indications. The report of that session is contained in document A/CN.9/614.

¹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 182-187.

² *Ibid.*, para. 184.

³ *Ibid.*, *Sixty-fourth session, Supplement No. 17 (A/64/17)*, para. 298.

At its forty-sixth (New York, 5-9 February 2007), forty-seventh (Vienna, 10-14 September 2007) and forty-eighth (New York, 4-8 February 2008) sessions, the Working Group discussed a draft of revised Rules, as contained in documents A/CN.9/WG.II/WP.145 and A/CN.9/WG.II/WP.145/Add.1. The reports of those sessions are contained in documents A/CN.9/619, A/CN.9/641 and A/CN.9/646, respectively. At its forty-ninth (Vienna, 15-19 September 2008), fiftieth (New York, 9-13 February 2009), and fifty-first (Vienna, 14-18 September 2009) sessions, the Working Group carried out its second reading of draft articles 1 to 39 of the revised Rules on the basis of documents A/CN.9/WG.II/WP.151 and A/CN.9/WG.II/WP.151/Add.1. The reports of those sessions are contained in documents A/CN.9/665, A/CN.9/669 and A/CN.9/684, respectively.

3. This note contains an annotated draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-ninth to fifty-first sessions. It has been prepared for the consideration of the Working Group for the third reading of the revised version of the Rules, in replacement of documents A/CN.9/WG.II/WP.154 and A/CN.9/WG.II/WP.154/Add.1, as it seemed clearer to propose a complete draft of revised Rules, instead of adding annotations and comments to such previous documents. This note covers draft articles 1 to 16 of the revised Rules. Draft articles 17 to 32 are dealt with under document A/CN.9/WG.II/WP.157/Add.1 and draft articles 33 to 43, as well as the draft model arbitration clause, draft model statements of independence and the proposed additional draft provision on gap filling are dealt with under document A/CN.9/WG.II/WP.157/Add.2. The Working Group may wish to note that where this note refers to the previous draft revised Rules, it refers to the draft as contained in documents A/CN.9/WG.II/WP.151 and A/CN.9/WG.II/WP.151/Add.1.

II. General remarks

Renumbering of articles

4. The Working Group may wish to consider whether the articles of the revised Rules should be renumbered as proposed in this note, and if so, whether to include in the revised Rules a table, as proposed in an annex to this note, showing the concordance between the articles of the 1976 version of the Rules and those of the revised version. The Working Group may also wish to decide whether to place the model arbitration clause and statements of independence at the end of the revised Rules (A/CN.9/665, para. 22).

Provisions to be considered for the third reading of the revised version of the Rules

5. The Working Group may wish to note that it decided at its forty-ninth to fifty-first sessions to give further consideration to the following draft provisions of the revised Rules contained in this note: draft article 2, paragraph (2) on the delivery of the notice of arbitration (see below, para. 8); draft article 7, paragraph (2) on the number of arbitrators (see below, para. 23); draft article 14, paragraph (2) on the replacement of an arbitrator in exceptional circumstances (see below, para. 36); and draft article 16 on liability (see below, para. 41).

III. Draft revised UNCITRAL Arbitration Rules

Section I. Introductory rules

Draft article 1

6. Draft article 1 reads as follows:

Scope of application

1. Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.
2. The parties to an arbitration agreement concluded after [date of adoption by UNCITRAL of the revised version of the Rules] shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after [date of adoption by UNCITRAL of the revised version of the Rules] an offer made before that date.
3. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Remarks on draft article 1 [article 1 of the 1976 version of Rules]⁴

7. The Working Group agreed to replace the word “another” by the words “a particular” in the first sentence of paragraph (2), and with that modification, the Working Group approved the substance of draft article 1 at its forty-ninth session (A/CN.9/665, paras. 18 to 20). The Working Group may wish to note that, for the sake of clarity, the words “unless the parties have agreed to apply a particular version of the Rules”, which appeared as the opening words of the first sentence of paragraph (2) in the previous draft, have been placed at the end of that first sentence.

Draft article 2

8. Draft article 2 reads as follows:

Notice and calculation of periods of time

1. Any notice, including a notification, communication or proposal shall be delivered by any means of communication that provides a record of its transmission.

⁴ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 22-34; A/CN.9/619 paras. 18-38; A/CN.9/646, paras. 71-78 and A/CN.9/665, paras. 18-20.

2. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at its habitual residence, place of business or designated address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.
3. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

Remarks on draft article 2 [article 2 of the 1976 version of the Rules]⁵

9. Paragraphs (1) and (2) seek to reflect the decision of the Working Group at its forty-ninth session to expressly include in the first paragraph language which authorizes delivery of notice by any means of communication that provides a record of transmission and to include in the second paragraph provisions addressing the situation where a notice could not be delivered to the addressee in person (A/CN.9/665, paras. 28 and 29).
10. At its forty-eighth session, the Working Group agreed to replace the word "mailing" appearing before the word "address" by the word "designated" in the first sentence of paragraph (2) (numbered paragraph (1) in the 1976 version of the Rules) (A/CN.9/646, para. 82), and this constitutes the only modification to that paragraph compared to its original version. The Working Group may wish to consider whether additional language should be included in paragraph (2) to provide more guidance to parties, and in particular to limit the risk of communication in arbitration being made through general e-mail addresses that would not be expected to be used for such purposes. Such additional language could provide that any notice may also be delivered to any address agreed by the parties, or failing such agreement, according to the practice followed by the parties in their previous dealings.
11. Paragraph (3) (numbered paragraph (2) in the 1976 version of the Rules) is reproduced without any modification from the 1976 version of the Rules, and was approved in substance by the Working Group at its forty-ninth session (A/CN.9/665, para. 31).

⁵ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 39-47; A/CN.9/619, paras. 44-50; A/CN.9/646, paras. 80-84 and A/CN.9/665, paras. 23-31.

Draft article 3

12. Draft article 3 reads as follows:

Notice of arbitration

1. The party or parties initiating recourse to arbitration (hereinafter called the “claimant”) shall give to the other party or parties (hereinafter called the “respondent”) a notice of arbitration.
2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.
3. The notice of arbitration shall include the following:
 - (a) A demand that the dispute be referred to arbitration;
 - (b) The names and contact details of the parties;
 - (c) Identification of the arbitration agreement that is invoked;
 - (d) Identification of any contract or other legal instrument out of or in relation to which the dispute arises or, in the absence of such contract or instrument, a brief description of the relevant relationship;
 - (e) A brief description of the claim and an indication of the amount involved, if any;
 - (f) The relief or remedy sought;
 - (g) A proposal as to the number of arbitrators, language and place of arbitration, if the parties have not previously agreed thereon.
4. The notice of arbitration may also include:
 - (a) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;
 - (b) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;
 - (c) Notification of the appointment of an arbitrator referred to in article 9 or article 10.
5. The constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.

Remarks on draft article 3 [article 3 of the 1976 version of the Rules]⁶

13. The Working Group agreed that the decision by the claimant that its notice of arbitration would constitute its statement of claim should be postponed until the stage of proceedings reflected in draft article 20 (corresponding to article 18 of the 1976 version of the Rules). It therefore agreed to delete from paragraph (4) the words: “The statement of claim referred to in article 18” (A/CN.9/665, para. 36).

⁶ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 48-55; A/CN.9/619, paras. 51-57 and A/CN.9/665, paras. 32-37 and 42.

With that modification, the substance of draft article 3 was approved by the Working Group at its forty-ninth session (A/CN.9/665, paras. 33-42).

14. The Working Group may wish to note that, as a result of the proposal to insert the provision on the response to the notice of arbitration in a separate article (A/CN.9/665, para. 32), the provision formerly numbered article 3, paragraph (7), dealing with the consequences of an incomplete notice of arbitration or incomplete or missing response thereof, has been split into two paragraphs: draft article 3, paragraph (5) deals with the consequences of an incomplete notice of arbitration, and draft article 4, paragraph (3) deals with the consequences of a missing, incomplete or late response thereof (see below, para. 17). The phrase “the arbitral tribunal shall proceed as it considers appropriate”, which appeared in the previous draft of that paragraph, has been deleted as that discretionary power of the arbitral tribunal is a principle of general application which is already provided for under draft article 17, paragraph (1).

Draft article 4

15. Draft article 4 reads as follows:

Response to the notice of arbitration

1. Within 30 days of the receipt of the notice of arbitration, the respondent shall communicate to the claimant a response to the notice of arbitration, which shall include:

(a) The name and contact details of each respondent;

(b) A response to the information set forth in the notice of arbitration, pursuant to article 3, paragraphs 3 (c) to (g).

2. The response to the notice of arbitration may also include:

(a) Any plea that an arbitral tribunal constituted under these Rules lacks jurisdiction;

(b) A proposal for the designation of an appointing authority referred to in article 6, paragraph 1;

(c) A proposal for the appointment of a sole arbitrator referred to in article 8, paragraph 1;

(d) Notification of the appointment of an arbitrator referred to in article 9 or article 10;

(e) A brief description of counterclaims or claims for the purpose of a set-off, if any, including where relevant, an indication of the amounts involved, and the relief or remedy sought.

3. The constitution of the arbitral tribunal shall not be hindered by failure of the respondent to communicate a response to the notice of arbitration, or by an incomplete or late response to the notice of arbitration.

*Remarks on draft article 4 [new article — numbered article 3, paragraphs (5) to (7) in the previous draft revised Rules]*⁷

16. In the previous draft revised Rules, the provisions on response to the notice of arbitration were included in draft article 3. The Working Group noted that it might be preferable to insert those provisions in a separate article (A/CN.9/665, para. 32). Paragraphs (1) and (2) (numbered article 3, paragraphs (5) and (6) in the previous draft revised Rules) take account of the decisions made in the Working Group to include in paragraph (1) (b) a reference to article 3, paragraph (3) (g) (A/CN.9/665, para. 67); and to provide that any plea that an arbitral tribunal lacks jurisdiction be part of optional items under paragraph (2) (A/CN.9/665, para. 39). With those modifications, the provisions of draft article 4 were approved in substance by the Working Group at its forty-ninth session (A/CN.9/665, paras. 38-42).

17. The Working Group may wish to note that the provision formerly numbered article 3, paragraph (7) dealing with the consequences of an incomplete notice of arbitration or incomplete or missing response thereto has been split into two paragraphs, and paragraph (3) deals with the consequences of a missing, incomplete or late response to the notice of arbitration (see above, para. 14).

Draft article 5

18. Draft article 5 reads as follows:

Representation and assistance

Each party may be represented or assisted by persons chosen by it. The names and addresses of such persons must be communicated to all parties and to the arbitral tribunal. Such communication must specify whether the appointment is being made for purposes of representation or assistance. Where a person is to act as a representative of a party, the arbitral tribunal, on its own initiative or at the request of any party, may at any time require proof of authority granted to the representative in such a form as the arbitral tribunal may determine.

*Remarks on draft article 5 [article 4 of the 1976 version of the Rules]*⁸

19. Draft article 5 includes the drafting modifications agreed by the Working Group (A/CN.9/665, paras. 43-44), and was approved in substance by the Working Group at its forty-ninth session (A/CN.9/665, para. 45).

Draft article 6

20. Draft article 6 reads as follows:

Designating and appointing authorities

1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent

⁷ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 56 and 57; A/CN.9/619, paras. 58-60 and A/CN.9/665, paras. 32, 38-42 and 67.

⁸ For discussions at previous sessions of the Working Group, see documents A/CN.9/619, paras. 63-68 and A/CN.9/665, paras. 43-45.

Court of Arbitration at the Hague (hereinafter called the “PCA”), one of whom would serve as appointing authority.

2. If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.

3. If the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party’s request to do so, any party may request the Secretary-General of the PCA to designate an appointing authority. If the appointing authority refuses or fails to make any decision on the fees of the arbitrators under article 41, paragraph 4, any party may request the Secretary-General of the PCA to make that decision.

4. In exercising their functions under these Rules, the appointing authority and the Secretary-General of the PCA may require from any party and the arbitrators the information they deem necessary and they shall give the parties and, where appropriate, the arbitrators, an opportunity to present their views in any manner they consider appropriate. All such communications to and from the appointing authority and the Secretary-General of the PCA shall also be provided by the sender to all other parties.

5. When the appointing authority is requested to appoint an arbitrator pursuant to articles 8, 9, 10 or 14, the party making the request shall send to the appointing authority copies of the notice of arbitration and, if it exists, any response to the notice of arbitration.

6. The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Remarks on draft article 6 [new article — numbered article 4 bis in the previous draft revised Rules]⁹

21. Paragraphs (1) and (4) include the drafting modifications agreed by the Working Group (A/CN.9/665, paras. 51 and 54). With those modifications, the substance of draft article 6 was approved by the Working Group at its forty-ninth session (A/CN.9/665, paras. 51-56).

22. The Working Group may wish to note that in the first sentence of paragraph (4), a reference has been added to “the Secretary-General of the PCA” and to “the arbitrators”, as there are instances (such as a challenge procedure) in which the Secretary-General of the PCA and the appointing authorities, in exercising their functions, may require information from the arbitrators (and not only from the parties).

⁹ For discussions at previous sessions of the Working Group, see documents A/CN.9/619, paras. 69-78 and A/CN.9/665, paras. 46-56. For discussions on the designating and appointing authorities at the forty-second session of the Commission, see *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 292-297.

Section II. Composition of the arbitral tribunal

Draft article 7

23. Draft article 7 reads as follows:

Number of arbitrators

1. If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.
2. Notwithstanding paragraph 1, if no party has responded to a proposal to appoint a sole arbitrator within the time limit provided for in paragraph 1 and the party or parties concerned have failed to appoint a second arbitrator in accordance with article 9 or article 10, the appointing authority may, at the request of a party, appoint a sole arbitrator pursuant to the procedure provided for in article 8, paragraph 2 if it determines that, in view of the circumstances of the case, this is more appropriate.

Remarks on draft article 7 [article 5 of the 1976 version of the Rules]¹⁰

24. Paragraph (1) reflects the decision of the Working Group to maintain the three-arbitrator default rule, as contained in article 5 of the 1976 version of the Rules, with the adjustment that such default rule would apply if the parties failed to reach an agreement on the number of arbitrators, and did not agree that there should be only one arbitrator within the 30-day time limit provided for responding to the notice of arbitration under draft article 4, paragraph (1) (A/CN.9/665, paras. 57-61, 65-67).

25. At its forty-ninth session, the Working Group agreed to further consider paragraph (2), which provides for a corrective mechanism involving the appointing authority in case a party, more likely the respondent, does not participate in the determination of the composition of the arbitral tribunal, and the arbitration case does not warrant the appointment of a three-member arbitral tribunal (A/CN.9/665, paras. 62-64).

Draft article 8

26. Draft article 8 reads as follows:

Appointment of arbitrators (articles 8 to 10)¹¹

1. If the parties have agreed that a sole arbitrator is to be appointed, and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator, the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority.

¹⁰ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 59-61; A/CN.9/619, paras. 79-83 and A/CN.9/665, paras. 57-67.

¹¹ Corresponding to articles 6 to 8 of the 1976 version of the Rules.

2. The appointing authority shall appoint the sole arbitrator as promptly as possible. In making the appointment, the appointing authority shall use the following list-procedure, unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

(a) The appointing authority shall communicate to each of the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which it objects and numbered the remaining names on the list in the order of its preference;

(c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

Remarks on draft article 8 [article 6 of the 1976 version of the Rules]¹²

27. Draft article 8 includes the drafting modifications adopted by the Working Group, and with those modifications, the substance of draft article 8 was approved by the Working Group at its forty-ninth session (A/CN.9/665, para. 68).

Draft article 9

28. Draft article 9 reads as follows:

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8, paragraph 2.

¹² For discussions at previous sessions of the Working Group, see documents A/CN.9/619, para. 84 and A/CN.9/665, para. 68.

*Remarks on draft article 9 [article 7 of the 1976 version of the Rules]*¹³

29. The Working Group approved the substance of draft article 9 at its forty-ninth session (A/CN.9/665, para. 69).

Draft article 10

30. Draft article 10 reads as follows:

1. For the purposes of article 9, paragraph 1, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator.
2. If the parties have agreed that the arbitral tribunal is to be composed of a number of arbitrators other than one or three, the arbitrators shall be appointed according to the method agreed upon by the parties.
3. In the event of any failure to constitute the arbitral tribunal under these Rules, the appointing authority shall, at the request of any party, constitute the arbitral tribunal, and in doing so, may revoke any appointment already made, and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

*Remarks on draft article 10 [new article — numbered article 7 bis in the previous draft revised Rules]*¹⁴

31. The Working Group approved the substance of draft article 10 at its forty-ninth session (A/CN.9/665, para. 71). The Working Group may wish to note that the words “under paragraphs 1 and 2” appearing after the phrase “In the event of any failure to constitute the arbitral tribunal”, in the previous draft of paragraph (3), have been deleted and replaced by the words “under these Rules” as that provision may find application in any instances of failure to constitute the arbitral tribunal under the Rules.

Draft article 11

32. Draft article 11 reads as follows:

Disclosures by and challenge of arbitrators (articles 11 to 13)¹⁵

When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

¹³ For discussions at previous sessions of the Working Group, see documents A/CN.9/619, para. 85 and A/CN.9/665, para. 69.

¹⁴ For discussions at previous sessions of the Working Group, see documents A/614, para. 62, A/CN.9/619, paras. 86-93 and A/CN.9/665, paras. 70 and 71.

¹⁵ Corresponding to articles 9 to 12 of the 1976 version of the Rules.

*Remarks on draft article 11 [article 9 of the 1976 version of the Rules]*¹⁶

33. The Working Group agreed to add the words “disclosures by and” in the title of draft article 11 and the words “and the other arbitrators” after the word “parties” in the second sentence of draft article 11. With those modifications, the Working Group approved draft article 11 in substance at its forty-ninth session (A/CN.9/665, paras. 73 and 74).

Draft article 12

34. Draft article 12 reads as follows:

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.
2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.
3. In the event that an arbitrator fails to act or in the event of de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.

Draft article 13

35. Draft article 13 reads as follows:

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.
2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.
3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.
4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall either seek a decision on the challenge by the appointing authority or, if no appointing authority has been agreed upon or designated, initiate the procedure for agreeing on, or designating an appointing authority and then, within 15 days of such agreement or designation, seek a decision on the challenge.

¹⁶ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 64 and 65, A/CN.9/619, para. 95 and A/CN.9/665, paras. 73 and 74.

Draft article 14

36. Draft article 14 reads as follows:

Replacement of an arbitrator

1. Subject to paragraph (2), in any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 8 to 11 that was applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party had failed to exercise its right to appoint or to participate in the appointment.

2. If, at the request of a party, the appointing authority determines that, in view of the exceptional circumstances of the case, it would be justified for a party to be deprived of its right to appoint a substitute arbitrator, the appointing authority may, after giving an opportunity to the parties and the remaining arbitrators to express their views: (a) appoint the substitute arbitrator; or (b) if the same occurs after the closure of the hearings, authorize the other arbitrators to proceed with the arbitration and make any decision or award.

Remarks on draft articles 12,¹⁷ 13¹⁸ and 14¹⁹ [articles 10, 11, 12 and 13 of the 1976 version of the Rules]

37. The Working Group may wish to note that, according to its decision at its forty-ninth session, the 1976 version of articles on challenge to arbitrators (articles 10 to 12) and their replacement (article 13) have been restructured. Draft article 12 deals with the reasons for the challenge or instances in which a challenge procedure would apply. Draft article 13 deals with the procedure for challenge. Draft article 14 deals with the replacement procedure. The Working Group may wish to consider whether the proposed draft provisions properly reflect the decisions made by the Working Group.

38. The Working Group may wish to note that draft articles 12, 13 and 14 above include the drafting modifications adopted by the Working Group, and that the Working Group approved the substance of those provisions at its forty-ninth session (A/CN.9/665, paras. 81, 83-84, 88, 91-93, 97, 98 and 102). The Working Group also agreed to further consider draft article 14, paragraph (2) addressing the situation where a party, in exceptional circumstances, has to be deprived of its right to appoint the substitute arbitrator (A/CN.9/665, paras. 115-117).

¹⁷ For discussions at previous sessions of the Working Group, see documents A/CN.9/619, para. 100 and A/CN.9/665, para. 81.

¹⁸ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para. 66, A/CN.9/619, paras. 101-105 and A/CN.9/665, paras. 82-102.

¹⁹ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 63, 67-74, A/CN.9/619, paras. 106-112 and A/CN.9/665, paras. 103-117.

Draft article 15

39. Draft article 15 reads as follows:

Repetition of hearings in the event of the replacement of an arbitrator

If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise.

*Remarks on draft article 15 [numbered article 14 in the 1976 version of the Rules]*²⁰

40. The Working Group approved the substance of draft article 15 at its forty-ninth session (A/CN.9/665, para. 118).

Draft article 16

41. Draft article 16 reads as follows:

Liability

To the fullest extent permitted under the applicable law, the parties waive any claim against the arbitrators, the appointing authority, the Secretary-General of the PCA and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

*Remarks on draft article 16 (new article)*²¹

42. Draft article 16 on liability seeks to address comments made in the Working Group at its forty-eighth session that the provision establishing immunity should cover the broadest possible range of participants in the arbitration and preserve exoneration in cases where the applicable law allows contractual exoneration from liability, to the fullest extent permitted by such law (A/CN.9/646, paras. 38-45). The Working Group agreed to give further consideration to draft article 16. The Working Group may wish to consider whether draft article 16 should be placed, as proposed, at the end of section II of the Rules.

²⁰ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para. 75, A/CN.9/619, para. 113 and A/CN.9/665, para. 118.

²¹ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para. 136, A/CN.9/646, paras. 38-45.

Annex

Table of concordance

<i>Revised version of the UNCITRAL Arbitration Rules</i>	<i>1976 version of the UNCITRAL Arbitration Rules</i>
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A/CN.9/WG.II/WP.157/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 fifty-second session**

ADDENDUM

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I. Introduction

1. This note contains an annotated draft of revised articles 17 to 32 of the UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-ninth to fifty-first sessions. It has been prepared for the consideration of the Working Group for the third reading of the revised version of the Rules, in replacement of documents A/CN.9/WG.II/WP.154 and A/CN.9/WG.II/WP.154/Add.1, as it seemed clearer to propose a complete draft of revised Rules, instead of adding annotations and comments to such previous documents. The annotated draft of revised articles 1 to 16 of the Rules is contained in document A/CN.9/WG.II/WP.157. The annotated draft of revised articles 33 to 43 of the Rules, as well as of the model arbitration clause, model statements of independence and the proposed additional provision on gap filling is contained in document A/CN.9/WG.II/WP.157/Add.2. The Working Group may wish to note that where this note refers to the previous draft revised Rules, it refers to the draft as contained in documents A/CN.9/WG.II/WP.151 and A/CN.9/WG.II/WP.151/Add.1.

II. General remark

Provisions to be considered for the third reading of the revised version of the Rules

2. The Working Group may wish to note that it decided at its forty-ninth to fifty-first sessions to give further consideration to the following draft provisions of the revised Rules contained in this addendum: draft article 17, paragraph (5) on joinder (see below, para. 3); draft article 26, paragraphs (8) and (9) on interim measures (see below, para. 25); draft article 27, paragraph (2) on the definition of witnesses (see below, para. 30); proposal on the challenge of experts under draft article 29 (see below, para. 37); draft article 30, paragraph (1)(a) on the power of the arbitral tribunal in case the claimant fails to submit its statement of claim (see below, para. 38); and draft article 32 on waiver of right to object (see below, para. 42).

III. Draft revised UNCITRAL Arbitration Rules

Section III. Arbitral proceedings

Draft article 17

3. Draft article 17 reads as follows:

General provisions

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given an opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.
2. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.
3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.
4. All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties[, except for communications referred to in article 26, paragraph 9].
5. The arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.

Remarks on draft article 17 [article 15 of the 1976 version of the Rules]¹

4. Paragraphs (1), (2) (numbered paragraph (1 bis) in the previous draft revised Rules) and (3) (numbered paragraph (2) in the previous draft revised Rules) were approved in substance by the Working Group at its forty-ninth session (A/CN.9/665, paras. 119, 123, 125 and 126).
5. The Working Group may wish to note that the bracketed text at the end of paragraph (4) (numbered paragraph (3) in the previous draft revised Rules) should be further considered in light of the decision of the Working Group in relation to

¹ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 76-86; A/CN.9/619, paras. 114-136 and A/CN.9/665, paras. 119-135.

draft article 26, paragraph (9) on preliminary orders (A/CN.9/665, para. 127) (see below, para. 29).

6. The Working Group may wish to further consider the language in paragraph (5) on joinder (numbered paragraph (4) in the previous draft revised Rules) which seeks to reflect the decision made by the Working Group that the arbitral tribunal may decide that a party be joined in the arbitration without the consent of that party, but before making its decision, the tribunal should provide that party with an opportunity to be heard and decide on the prejudice (A/CN.9/665, paras. 128-135).

Draft article 18

7. Draft article 18 reads as follows:

Place of arbitration

1. If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to be made at the place of arbitration.
2. The arbitral tribunal may meet at any location it considers appropriate for deliberations. Unless otherwise agreed by the parties, the arbitral tribunal may also meet at any location it considers appropriate for any other purpose, including hearings.

Remarks on draft article 18 [article 16 of the 1976 version of the Rules]²

8. Draft article 18 includes the drafting modifications adopted by the Working Group. With those modifications, the Working Group approved the substance of draft article 18 at its forty-ninth session (A/CN.9/665, paras. 136-139).

Draft article 19

9. Draft article 19 reads as follows:

Language

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.

² For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 87-90; A/CN.9/619, paras. 137-144 and A/CN.9/665, paras. 136-139.

Remarks on draft article 19 [article 17 of the 1976 version of the Rules]³

10. Draft article 19 is reproduced without modification from the 1976 version of the Rules, and was approved in substance by the Working Group at its forty-ninth session (A/CN.9/665, paras. 140 and 141).

Draft article 20

11. Draft article 20 reads as follows:

Statement of claim

1. The claimant shall communicate its statement of claim in writing to the respondent and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The claimant may elect to treat its notice of arbitration in article 3 as a statement of claim, provided that the notice of arbitration also complies with the requirements of paragraphs 2 to 4 of this article.
2. The statement of claim shall include the following particulars:
 - (a) The names and contact details of the parties;
 - (b) A statement of the facts supporting the claim;
 - (c) The points at issue;
 - (d) The relief or remedy sought;
 - (e) The legal grounds or arguments supporting the claim.
3. A copy of any contract or other legal instrument out of or in relation to which the dispute arises and of the arbitration agreement shall be annexed to the statement of claim.
4. The statement of claim should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

Remarks on draft article 20 [article 18 of the 1976 version of the Rules]⁴

12. Draft article 20 includes the drafting modifications adopted by the Working Group. With those modifications, the Working Group approved draft article 20 in substance at its fiftieth session (A/CN.9/669, paras. 19-24).

13. The Working Group may wish to note that the words “out of or in relation to which the dispute arises” have been added to clarify which contract or legal instrument should be annexed to the statement of claim. The provision in paragraph (4), which appeared as the second sentence of paragraph (3) in the previous draft revised Rules, are placed in a separate paragraph for the sake of clarity (see below, para. 15).

³ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para. 91; A/CN.9/619, para. 145 and A/CN.9/665, paras. 140 and 141.

⁴ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para. 92; A/CN.9/619, paras. 146-155 and A/CN.9/669, paras. 19-24.

Draft article 21

14. Draft article 21 reads as follows:

Statement of defence

1. The respondent shall communicate its statement of defence in writing to the claimant and to each of the arbitrators within a period of time to be determined by the arbitral tribunal. The respondent may elect to treat its response to the notice of arbitration in article 4 as a statement of defence, provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article.
2. The statement of defence shall reply to the particulars (b), (c), (d) and (e) of the statement of claim (article 20, paragraph 2). The statement of defence should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.
3. In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.
4. The provisions of article 20, paragraphs 2 and 4 shall apply to a counterclaim and a claim relied on for the purpose of a set-off.

Remarks on draft article 21 [article 19 of the 1976 version of the Rules]⁵

15. The last sentence of paragraph (1) addresses the situation where the respondent decides to treat its response to the notice of arbitration as a statement of defence. The words “provided that the response to the notice of arbitration also complies with the requirements of paragraph 2 of this article” have been added at the end of the last sentence of paragraph (1) (A/CN.9/669, para. 25) and that language mirrors the modification adopted in respect of draft article 20, paragraph (1). Paragraph (3) reflects the decision of the Working Group that the arbitral tribunal’s competence to consider counterclaims and claims for the purpose of a 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.9/669, para. 27). To achieve that extension, the Working Group agreed to delete the words “arising out of the same contract” where they appear in the original version of paragraph (3) and to include at the end of paragraph (3) the following words: “provided that the arbitral tribunal has jurisdiction over it” (A/CN.9/669, paras. 27-32). In paragraph (4), a reference to the provision of article 20, paragraph (4) has been added to take account of the intention of the Working Group that, consistent with article 19, paragraph (4) of the 1976 version of the Rules, a counterclaim or a claim for the purpose of a set-off should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them. With those modifications, the Working Group adopted the substance of draft article 21 at its fiftieth session (A/CN.9/669, paras. 25-33).

⁵ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 93-96; A/CN.9/619, paras. 156-160 and A/CN.9/669, paras. 25-33.

Draft article 22

16. Draft article 22 reads as follows:

Amendments to the claim or defence

During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. However, a claim or defence, including a counterclaim or a claim for the purpose of a set-off, may not be amended or supplemented in such a manner that the amended or supplemented claim or defence falls outside the jurisdiction of the arbitral tribunal.

Remarks on draft article 22 [article 20 of the 1976 version of the Rules]⁶

17. The Working Group agreed that, following the revision adopted under draft article 21, paragraph (3) (see above, para. 15), the last sentence of draft article 22 should be amended accordingly, and the reference to “the scope of the arbitration agreement” should be replaced by a reference to “the jurisdiction of the arbitral tribunal” (A/CN.9/669, para. 34). The Working Group further agreed that the words “or defence” should be added in the second sentence of draft article 22 to align it with the wording of the first sentence of that article (A/CN.9/669, para. 35). With those modifications, the Working Group approved the substance of draft article 22 at its fiftieth session (A/CN.9/669, paras. 34 and 35).

18. The Working Group may wish to note that, for the sake of consistency, the reference to “a claim for the purpose of a set-off” has been added after the words “a counterclaim [or]” in both sentences of draft article 22; the words “or supplement” have been added after the word “amendment” in the first sentence of draft article 22 and the words “or supplemented” have been added after the word “amended” in the second sentence of draft article 22.

Draft article 23

19. Draft article 23 reads as follows:

Pleas as to the jurisdiction of the arbitral tribunal

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 shall not entail automatically the invalidity of the arbitration clause.
2. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the

⁶ For discussions at previous sessions of the Working Group, see documents A/CN.9/619, para. 161 and A/CN.9/669, paras. 34 and 35.

claim for the purpose of a set-off. A party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

3. The arbitral tribunal may rule on a plea referred to in paragraph 2 either as a preliminary question or in an award on the merits. The arbitral tribunal may continue the arbitral proceedings and make an award, notwithstanding any pending challenge to its jurisdiction before a court.

*Remarks on draft article 23 [article 21 of the 1976 version of the Rules]*⁷

20. In accordance with the decisions of the Working Group, the words “and void”, which appeared after the word “null” in the last sentence of paragraph (1) have been deleted (A/CN.9/669, paras. 40-43) and the word “automatically” is used in replacement of the words “ipso jure” (A/CN.9/669, para. 44). With those modifications, the Working Group approved the substance of draft article 23 at its fiftieth session (A/CN.9/669, paras. 36-46).

Draft article 24

21. Draft article 24 reads as follows:

Further written statements

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

*Remarks on draft article 24 [article 22 of the 1976 version of the Rules]*⁸

22. Draft article 24 is reproduced without modifications from the 1976 version of the Rules and was approved by the Working Group at its fiftieth session (A/CN.9/669, para. 47).

Draft article 25

23. Draft article 25 reads as follows:

Periods of time

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.

⁷ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 97-102; A/CN.9/619, paras. 162-164; A/CN.9/641, para. 18 and A/CN.9/669, paras. 36-46.

⁸ For discussions at previous sessions of the Working Group, see documents A/CN.9/641, para. 19 and A/CN.9/669, para. 47.

Remarks on draft article 25 [article 23 of the 1976 version of the Rules]⁹

24. Draft article 25 is reproduced without modifications from the 1976 version of the Rules and was approved by the Working Group at its fiftieth session (A/CN.9/669, para. 48).

Draft article 26

25. Draft article 26 reads as follows:

Interim 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, including, without limitation:
 - (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, (i) current or imminent harm or (ii) 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 paragraphs 2 (a), (b) and (c) shall satisfy the arbitral tribunal that:
 - (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
 - (b) There is a reasonable possibility that the requesting party will succeed on the merits 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 paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.
5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

⁹ For discussions at previous sessions of the Working Group, see documents A/CN.9/641, para. 20 and A/CN.9/669, para. 48.

6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.
8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in [view of all] the circumstances, the measure [should not have been granted] [was not justified]. The arbitral tribunal may award such costs and damages at any point during the proceedings.
9. Nothing in these Rules shall have the effect of creating a right, or of limiting any right which may exist outside these Rules, of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, in either case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure.
10. A request for interim measures 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 on draft article 26 [article 26 of the 1976 version of the Rules]¹⁰

26. As decided by the Working Group, draft article 26 on interim measures is placed before the provisions on evidence and hearings (A/CN.9/669, para. 85).

27. Paragraphs (1) to (8) are modelled on the provision on interim measures contained in chapter IV A of the Model Law. Paragraph (9) (numbered paragraph (5) in the previous draft revised Rules) addresses the question of preliminary orders and paragraph (10) corresponds to article 26, paragraph (3) of the 1976 version of the Rules (A/CN.9/641, para. 52). At the fiftieth session of the Working Group, the provision on interim measures was extensively discussed on the basis of different proposals. The current version reflects the changes agreed to by the Working Group on draft article 26 (A/CN.9/669, para. 85-119). With those modifications, the Working Group approved in substance paragraphs (1) to (7) and (10) of draft article 26, and agreed to give further consideration to paragraphs (8) and (9).

28. At the fiftieth session of the Working Group, it was said that paragraph (8) might have the effect that a party requesting an interim measure be liable to pay costs and damages in situations where, for instance, the conditions of draft article 26 had been met but the requesting party lost the arbitration (A/CN.9/669, para. 116). This includes situations where the granting of interim measures was not justified with respect to the outcome of the case, in particular where the arbitral tribunal later finds that the claim for which the interim measure was sought is not valid. To address that concern, options in brackets are proposed for the Working Group's consideration. The Working Group will have before it a note prepared by the Secretariat (A/CN.9/WG.II/WP.127) to assist further discussion on how the different

¹⁰ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 104 and 105; A/CN.9/641, paras. 46-60 and A/CN.9/669, paras. 85-119.

leges arbitri deal with the matter of liability for damages that might result from the granting of interim measures (A/CN.9/669, para. 118).

29. Paragraph (9), which deals with the power of the arbitral tribunal to grant preliminary orders, takes account of the discussions of the Working Group at its fiftieth session (A/CN.9/669, para. 112). That provision reflects a proposal made with the aim to reconcile the diverging views expressed in the Working Group on the question of preliminary orders, and the Working Group may wish to give further consideration to that provision.

Draft article 27

30. Draft article 27 reads as follows:

Evidence

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.
2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them.
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 arbitral tribunal shall determine.
4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Remarks on draft article 27 [article 24 of the 1976 version of the Rules]¹¹

31. The Working Group may wish to consider whether, in the interest of clarity, draft article 27 should be titled “Evidence” as it deals with evidence and the form in which the statements of witnesses and experts would be presented.

32. Paragraphs (1) and (3), which are reproduced from the 1976 version of the Rules, were adopted by the Working Group without modifications at its fiftieth session (A/CN.9/669, paras. 49, 70 and 75). In accordance with the decision of the Working Group to group under draft article 27 all provisions relating to evidence, the substance of article 25, paragraphs (5) and (6) of the 1976 version of the Rules has been placed under draft article 27 (as paragraph (2), second sentence and paragraph (4), respectively) (A/CN.9/669, para. 70, 72 and 73). The first sentence of paragraph (2) is based on drafting suggestions made in the Working Group and is proposed to be placed under draft article 27, instead of draft article 28, as it relates to the definition of the term “witnesses” (A/CN.9/669, paras. 57-60, 70, 76 and 77).

¹¹ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para. 103; A/CN.9/641, paras. 21-26 and A/CN.9/669, paras. 49-51 and 70-75.

Draft article 28

33. Draft article 28 reads as follows:

Hearings

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.
2. Witnesses, including expert witnesses, may be heard under the conditions and examined in the manner set by the arbitral tribunal.
3. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses, including expert witnesses, during the testimony of such other witnesses, except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire.
4. The arbitral tribunal may direct that witnesses, including expert witnesses, be examined through means of telecommunication that do not require their physical presence at the hearing (such as videoconference).

Remarks on draft article 28 [numbered article 25 in the 1976 version of the Rules]¹²

34. The Working Group agreed that draft article 28 be titled “Hearings” and approved the substance of draft article 28 at its fiftieth session, subject to the clarification in paragraph (3) that a party appearing as a witness (or expert) should not generally be requested to retire during the testimony of other witnesses (or experts) (A/CN.9/669, paras. 82 and 83). The phrase “except that a witness, including an expert witness, who is a party to the arbitration shall not, in principle, be asked to retire” is proposed to be added at the end of paragraph (3) to address that matter.

Draft article 29

35. Draft article 29 reads as follows:

Experts appointed by the arbitral tribunal

1. After consultation with the parties, the arbitral tribunal may appoint one or more independent experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert’s terms of reference, established by the arbitral tribunal, shall be communicated to the parties.
2. The parties shall give the expert any relevant information or produce for his or her inspection any relevant documents or goods that he or she may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.
3. Upon receipt of the expert’s report, the arbitral tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party shall be

¹² For discussions at previous sessions of the Working Group, see documents A/CN.9/641, paras. 27-45 and A/CN.9/669, paras. 52-71, 73 and 76-84.

entitled to examine any document on which the expert has relied in his or her report.

4. At the request of any party, the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing, any party may present expert witnesses in order to testify on the points at issue. The provisions of article 28 shall be applicable to such proceedings.

Remarks on draft article 29 [article 27 of the 1976 version of the Rules]¹³

36. The Working Group found the substance of draft article 29 generally acceptable at its fifty-first session (A/CN.9/684, para. 21). The Working Group may wish to note that the word “independent” has been added in paragraph (1) before the word “expert”.

37. At its fifty-first session, the Working Group took note that one delegation would make a proposal with respect to challenge of experts (A/CN.9/684, para. 21). The substance of that proposal is along the following lines: “Experts appointed by the arbitral tribunal may be challenged for the same reasons and in the same way as the arbitrators”. That proposal may be elaborated upon in document A/CN.9/WG.II/LII/CRP.2. The Working Group may wish to note that another option may consist in adopting a provision along the lines article 6 of the IBA Rules on the taking of evidence in international commercial arbitration, which would then read: “The expert shall, before accepting appointment, submit to the arbitral tribunal and to the parties a description of his or her qualifications and a statement of his or her independence from the parties and the arbitral tribunal. Within the time ordered by the arbitral tribunal, the parties shall inform the arbitral tribunal whether they have any objections as to the expert’s independence. The arbitral tribunal shall decide promptly whether to accept any such objection.” If the Working Group would decide to include a provision on challenge of experts, it may wish to consider including such a provision as a new paragraph (2) of draft article 29.

Draft article 30

38. Draft article 30 reads as follows:

Default

1. If, within the period of time fixed by these Rules or the arbitral tribunal, without showing sufficient cause:

(a) The claimant has failed to communicate its statement of claim, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings, unless there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so;

(b) The respondent has failed to communicate its response to the notice of arbitration or its statement of defence, the arbitral tribunal shall order that the proceedings continue, without treating such failure in itself as an

¹³ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 106 and 107; A/CN.9/641, para. 61 and A/CN.9/684, para. 21.

admission of the claimant's allegations; the provisions of this subparagraph also apply to a claimant's failure to submit a defence to a counterclaim or to a claim for the purpose of a set-off.

2. If a party, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If a party, duly invited by the arbitral tribunal to produce documents, exhibits or other evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Remarks on draft article 30 [article 28 of the 1976 version of the Rules]¹⁴

39. At its fifty-first session, the Working Group approved the substance of draft article 30, paragraphs (1)(b), (2) and (3) (A/CN.9/684, paras. 27, 28 and 33) and agreed to give further consideration to paragraph (1)(a), which has been redrafted to clarify that the power of the arbitral tribunal in case the claimant fails to submit its statement of claim is not limited to a dismissal order for termination (A/CN.9/684, paras. 22-26). The Working Group may wish to note that, for the sake of consistency, a similar amendment has been made to draft article 36, paragraph (2) (see document A/CN.9/WG.II/WP.157/Add.2, para. 10).

Draft article 31

40. Draft article 31 reads as follows:

Closure of hearings

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 initiative or upon application of a party, to reopen the hearings at any time before the award is made.

Remarks on draft article 31 [article 29 of the 1976 version of the Rules]¹⁵

41. The Working Group approved the substance of draft article 31 at its fifty-first session (A/CN.9/684, paras. 34-40).

¹⁴ For discussions at previous sessions of the Working Group, see documents A/CN.9/641, paras. 62-64 and A/CN.9/684, paras. 22-33.

¹⁵ For discussions at previous sessions of the Working Group, see documents A/CN.9/641, para. 65 and A/CN.9/684, paras. 34-40.

Draft article 32

42. Draft article 32 reads as follows:

Waiver of right to object

A failure by any party to object promptly to any non-compliance with these Rules or with any requirement of the arbitration agreement shall be deemed to be a waiver of the right of such party to make such an objection, unless such party can show that, under the circumstances, its failure to object was justified.

Remarks on draft article 32 [numbered article 30 in the 1976 version of the Rules]¹⁶

43. The Working Group agreed, at its fifty-first session, to give further consideration to draft article 32, which has been redrafted to capture constructive knowledge of non-compliance with any provision of the Rules or any requirement under the arbitration agreement (A/CN.9/684, paras. 49 and 51).

¹⁶ For discussions at previous sessions of the Working Group, see documents A/CN.9/641, paras. 66 and 67 and A/CN.9/684, paras. 41-51.

A/CN.9/WG.II/WP.157/Add.2 (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 fifty-second session****ADDENDUM****CONTENTS**

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I. Introduction

1. This note contains an annotated draft of revised articles 33 to 43 of the UNCITRAL Arbitration Rules, based on the deliberations of the Working Group at its forty-ninth to fifty-first sessions. It has been prepared for the consideration of the Working Group for the third reading of the revised version of the Rules. The annotated draft of revised articles 1 to 16 of the Rules is contained in document A/CN.9/WG.II/WP.157 and the annotated draft of revised articles 17 to 32 of the Rules is contained in document A/CN.9/WG.II/WP.157/Add.1. The Working Group may wish to note that where this note refers to the previous draft revised Rules, it refers to the draft as contained in documents A/CN.9/WG.II/WP.151 and A/CN.9/WG.II/WP.151/Add.1.

II. General remark*Provisions to be considered for the third reading of the revised version of the Rules*

2. The Working Group may wish to note that it decided at its forty-ninth to fifty-first sessions to give further consideration to the following draft provisions of the revised Rules contained in this addendum: draft article 34, paragraph (2) on waiver of recourse (see below, para. 5); draft article 36, paragraph (2) on termination of proceedings (see below, para. 9); draft article 39 on additional award (see below, para. 15); articles 40 to 43 on costs (see below, paras. 17, 19, 25 and 27); and the proposed additional draft provision on gap filling (see below, para. 34).

III. Draft revised UNCITRAL Arbitration Rules

Section IV. The award

Draft article 33

3. Draft article 33 reads as follows:

Decisions

1. When there is more than one arbitrator, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.
2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide alone, subject to revision, if any, by the arbitral tribunal.

Remarks on draft article 33 [article 31 of the 1976 version of the Rules]¹

4. At the fifty-first session of the Working Group, due to the lack of consensus for changing draft article 33, paragraph (1), the Working Group agreed to retain that provision as it appeared in the 1976 version of the Rules with the replacement of the word “three” by the words “more than one” (A/CN.9/684, para. 61). The Working Group approved paragraph (2) in substance, which is reproduced from the 1976 version of the Rules, with the replacement of the words “on his or her own” by the word “alone” (A/CN.9/684, para. 62).

Draft article 34

5. Draft article 34 reads as follows:

Form and effect of the award

1. The arbitral tribunal may make separate awards on different issues at different times.
2. All awards shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out all awards without delay. By adopting these Rules, the parties waive their right to any form of appeal, review or recourse regarding an award to any court or other competent authority, except for an application for setting aside an award.
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 the award was made and indicate the place of arbitration. Where there is more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature.
5. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or

¹ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 108-112; A/CN.9/641, paras. 68-77 and A/CN.9/684, paras. 52-62.

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.

Remarks on draft article 34 [article 32 of the 1976 version of the Rules]²

6. The Working Group approved the substance of draft article 34, paragraphs (1) and (3) to (6) at its fifty-first session (A/CN.9/684, paras. 66, 87 and 89). The third sentence of paragraph (2) addresses the question of waiver of recourses and has been redrafted for further consideration by the Working Group, based on the discussions of the Working Group at its fifty-first session (A/CN.9/684, paras. 85 and 86).

Draft article 35

7. Draft article 35 reads as follows:

Applicable law, *amiable compositeur*

1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law 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.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

Remarks on draft article 35 [article 33 of the 1976 version of the Rules]³

8. The drafting modifications decided by the Working Group are reflected in draft article 35, and with those modifications, the Working Group approved draft article 35 at its fifty-first session (A/CN.9/684, paras. 91-100).

Draft article 36

9. Draft article 36 reads as follows:

Settlement or other grounds for termination

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

² For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 113-121; A/CN.9/641, paras. 78-105 and A/CN.9/684, paras. 63-90.

³ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 122-124; A/CN.9/641, paras. 106-113 and A/CN.9/684, paras. 91-100.

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 there are remaining matters that may need to be decided and the arbitral tribunal considers it appropriate to do so.
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 34, paragraphs 2, 4 and 5 shall apply.

Remarks on draft article 36 [article 34 of the 1976 version of the Rules]⁴

10. The Working Group approved paragraphs (1) and (3) in substance at its fifty-first session (A/CN.9/684, paras. 101 and 103). Paragraph (2) has been revised for the sake of consistency with the modification to draft article 28, paragraph (1) (a) to no longer limit the power of the arbitral tribunal to a dismissal order for termination in case the continuation of the arbitral proceedings becomes unnecessary or impossible (see document A/CN.9/WG.II/WP.157/Add.1, para. 39) (A/CN.9/684, para. 102).

Draft article 37

11. Article 37 reads as follows:

Interpretation of the award

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request that the arbitral tribunal give an interpretation of the award.
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 34, paragraphs 2 to 6, shall apply.

Remarks on draft article 37 [article 35 of the 1976 version of the Rules]⁵

12. The Working Group approved the substance of draft article 37 at its fifty-first session (A/CN.9/684, paras. 104 and 105).

⁴ For discussions at previous sessions of the Working Group, see documents A/CN.9/641, para. 114 and A/CN.9/684, paras. 101-103.

⁵ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 125 and 126; A/CN.9/641, para. 115 and A/CN.9/684, paras. 104 and 105.

Draft article 38

13. Draft article 38 reads as follows:

Correction of the award

1. Within 30 days after the receipt of the award, a party, with notice to the other parties, may request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitral tribunal considers that the request is justified, it shall make the correction within 45 days of receipt of the request.
2. The arbitral tribunal may within 30 days after the communication of the award make such corrections on its own initiative.
3. Such corrections shall be in writing, and shall form part of the award. The provisions of article 34, paragraphs 2 to 6, shall apply.

Remarks on draft article 38 [article 36 of the 1976 version of the Rules]⁶

14. Paragraph (1) reflects the decision of the Working Group to include a time limit of 45 days for correction of awards, when the correction is made at the request of a party (and not at the initiative of the tribunal) (A/CN.9/684, para. 107) and to refer to “a party” instead of “any party” to align the language in article 36 with that in article 37 (A/CN.9/684, para. 108). Paragraph (2) reflects the decision of the Working Group that corrections would form part of the award (A/CN.9/684, para. 112). With those modifications, the Working Group approved the substance of draft article 38 at its fifty-first session (A/CN.9/684, paras. 106 to 112).

Draft article 39

15. Draft article 39 reads as follows:

Additional award

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.
2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or 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 the award.
3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

⁶ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para. 127; A/CN.9/641, para. 116 and A/CN.9/684, paras. 106-112.

*Remarks on draft article 39 [article 37 of the 1976 version of the Rules]*⁷

16. Paragraph (1) reflects a proposal made at the fifty-first session of the Working Group to clarify that draft article 39 also applies in case the arbitral tribunal renders a termination order and a party wishes to request the tribunal to make an additional decision on claims presented during the arbitral proceedings, but omitted by the tribunal (A/CN.9/684, paras. 113-116). Paragraphs (2) and (3) have been amended accordingly. The Working Group agreed at its fifty-first session to give further consideration to that proposal (A/CN.9/684, para. 116).

Draft article 40

17. Draft article 40 reads as follows:

Definition of costs

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems it appropriate, in any other award.
2. The term “costs” includes only:
 - (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
 - (b) The reasonable travel and other expenses incurred by the arbitrators;
 - (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
 - (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
 - (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
 - (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the PCA.
3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

*Remarks on draft article 40 [article 38 of the 1976 version of the Rules]*⁸

18. Draft article 40 has been modified to take account of the discussions of the Working Group at its fifty-first session (A/CN.9/684, paras. 117-119). Paragraph (1) clarifies that the arbitral tribunal may fix the costs of arbitration in more than one award (A/CN.9/684, para. 120). Paragraph (2) (e) has been modified to provide that the costs incurred by the parties may include legal costs as well as other costs

⁷ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 128 and 129; A/CN.9/641, paras. 117-121 and A/CN.9/684, paras. 113-116.

⁸ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 130-132; A/CN.9/646, paras. 18 and 19 and A/CN.9/684, paras. 117-121.

related to the arbitration. Paragraph (3) contains an amended version of the provision contained in article 40, paragraph (4) of the 1976 version of the Rules. At its forty-eighth session, the Working Group agreed to further consider that provision (A/CN.9/646, paras. 31-36).

Draft article 41

19. Article 41 reads as follows:

Fees of arbitrators

1. The fees of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.
2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the PCA, and if that authority applies or has stated that it will apply a schedule or particular method for determining the fees for arbitrators in international cases, the arbitral tribunal in fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case.
3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees, including any rates it intends to apply. Within 15 days of receiving that proposal, any party, which considers that the proposal does not satisfy the criteria in paragraph 1 may either refer the proposal to the appointing authority for review or, if no appointing authority has been agreed upon or designated, initiate the procedure for agreeing on, or designating an appointing authority and then, within 15 days of such agreement or designation, refer the proposal of the arbitral tribunal for review. Within 45 days of receipt of such a referral, the appointing authority shall determine whether the proposal of the arbitral tribunal satisfies the criteria in paragraph 1 and, if not, may make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal. Throughout this procedure, the arbitral tribunal shall remain under its continuing duty to proceed with the arbitration, in accordance with article 17, paragraph 1.
4. When informing the parties of the arbitrators' fees [and expenses] that have been fixed pursuant to article 40, paragraphs 2 (a), (b) and (c), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated. Within 15 days of receiving the arbitral tribunal's determination of fees [and expenses], any party may refer such determination to the appointing authority or, if no appointing authority has been agreed upon or designated or if such an appointing authority fails, refuses, or is unable to fulfil its functions under this paragraph, to the Secretary-General of the PCA, for review. Within 45 days of receiving such a referral, the appointing authority or the Secretary-General of the PCA shall determine whether the arbitral tribunal's fees [and expenses] satisfy the criteria in paragraph 1 as applied in the arbitral tribunal's proposal according to paragraph 3 and, if not, may make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal. Any such adjustments either shall be included by the tribunal in its award or, if the award has already been issued, shall be treated as a correction to the award pursuant to article 38.

*Remarks on draft article 41 [article 39 of the 1976 version of the Rules]*⁹

20. Paragraph (1) remains unchanged from the 1976 version of the Rules.
21. Paragraph (2) contains the words “applies or has stated it will apply” to cover situations where an appointing authority, most probably an individual, would apply a schedule of fees defined by an institution (A/CN.9/684, para. 122). The Working Group may wish to note that the provision refers to the “method” for determining the fees in addition to the “schedule of fees”.
22. Paragraphs (3) and (4) were not contained in the 1976 version of the Rules. They are included pursuant to the Working Group’s decision to provide rules on control by the appointing authority or the Secretary-General of the PCA over the fees charged by arbitrators (A/CN.9/646, paras. 20, 21 and 24-27). Both paragraphs seek to address the concerns expressed by the Working Group at its fifty-first session (A/CN.9/684, paras. 123-126).
23. Paragraph (3) deals with the information to be provided at the beginning of the arbitral proceedings by the arbitrators to the parties on the manner in which fees will be determined. It provides an opportunity for the parties to control fee determination at an early stage of the proceedings. It includes specific time limits for referring the proposal of the arbitrators on the method for determining the fees to the appointing authority. It also includes a time limit for the appointing authority to make its determination. The Working Group may wish to note that reference is made to the arbitral tribunal’s duty to proceed with the arbitration as provided for under draft article 17, paragraph (1), so that the issue of fees do not delay the arbitral proceedings.
24. Paragraph (4) regulates the situation where the fees and expenses have been fixed. It establishes a duty for the arbitrators to explain the calculation of the fees in the interest of transparency. It includes time limits, so that the issue of fees do not delay the termination of the arbitral proceedings. For completeness, paragraph (4) addresses the situation where either no appointing authority has been designated or where such authority does not fulfil its functions under paragraph (4). In that case, paragraph (4) enables the decision of the arbitral tribunal on costs to be revised by the Secretary-General of the PCA (A/CN.9/684, para. 126). The words “and expenses” have been placed into brackets where they appear in paragraph (4), as the Working Group may wish to decide whether expenses should also form part of the control by the appointing authority and the Secretary-General of the PCA.

Draft article 42

25. Draft article 42 reads as follows:

Allocation of costs

The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

⁹ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 133 and 134; A/CN.9/641, paras. 122-126; A/CN.9/646, paras. 20-27 and A/CN.9/684, paras. 122-126.

*Remarks on draft article 42 [article 40 of the 1976 version of the Rules]*¹⁰

26. At its fifty-first session, the Working Group considered whether articles 38 and 40 of the Rules (corresponding to draft articles 40 and 42) would need to be restructured, to avoid any overlapping (A/CN.9/684, para. 119). Pursuant to that suggestion, paragraph (3) of article 40 of the 1976 version of the Rules has been deleted as its substance is reflected in draft article 40, paragraph (1). Paragraph (4) has been deleted and its substance placed under draft article 40, paragraph (3) (see above, para. 18). It is recalled that article 40, paragraph (2) of the 1976 version of the Rules has been deleted pursuant to the Working Group's decision at its forty-eighth session (A/CN.9/646, paras. 28-36).

Draft article 43

27. Article 43 reads as follows:

Deposit of costs

1. The arbitral tribunal, on its establishment, may request the parties to deposit an equal amount as an advance for the costs referred to in article 40, paragraphs 2 (a), (b) and (c).
2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.
3. If an appointing authority has been agreed upon or designated, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority, which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.
4. If the required deposits are not paid in full within 30 days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.
5. After a termination order or final award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

*Remarks on draft article 43 [article 41 of the 1976 version of the Rules]*¹¹

28. Draft article 43 has been adopted in substance by the Working Group at its forty-eighth session (A/CN.9/646/, para. 37). The Working Group may wish to note that the words "After the award", which appeared in article 41, paragraph (5) of the 1976 version of the Rules have been replaced in draft article 43, paragraph (5) by the words "After a termination order or final award".

¹⁰ For discussions at previous sessions of the Working Group, see documents A/CN.9/614, para.135 and A/CN.9/646, paras. 28-36.

¹¹ For discussions at previous sessions of the Working Group, see document A/CN.9/646, para. 37.

Draft model arbitration clause for contracts

29. The model arbitration clause for contracts reads as follows:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note — Parties should consider adding:

- (a) The appointing authority shall be ... (name of institution or person);
- (b) The number of arbitrators shall be ... (one or three);
- (c) The place of arbitration shall be ... (town and country);
- (d) The language to be used in the arbitral proceedings shall be

*Remarks on the draft model arbitration clause for contracts*¹²

30. The draft model arbitration clause was approved in substance by the Working Group at its forty-ninth session (A/CN.9/665, para. 21).

Draft model statements of independence pursuant to article 11 of the Rules

31. The model statements of independence pursuant to article 11 of the Rules read as follows:

No circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence. I hereby undertake promptly to notify the parties and the other arbitrators of any such circumstances that may subsequently come to my attention during this arbitration.

Circumstances to disclose: I am impartial and independent of each of the parties and intend to remain so. Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances. [Include statement] I confirm that those circumstances do not affect my independence and impartiality. I hereby undertake promptly to notify the parties and the other arbitrators of any such further relationships or circumstances that may subsequently come to my attention during this arbitration.

*Remarks on the draft model statements of independence*¹³

32. The model statements of independence seek to reflect the discussions of the Working Group at its forty-ninth session (A/CN.9/665, paras. 75-80). The purpose

¹² For discussions at previous sessions of the Working Group, see documents A/CN.9/614, paras. 36-38, A/CN.9/619, paras. 39-42; A/CN.9/646, para. 79 and A/CN.9/665, paras. 21-22.

¹³ For discussions at previous sessions of the Working Group, see documents A/CN.9/619, paras. 96-99 and A/CN.9/665, paras. 75-80.

of the second statement of independence is to allow parties to decide whether there are actually circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence. The modifications made to the second statement of independence aim at ensuring consistency of the statement with draft article 11 (A/CN.9/665, paras. 77 and 80).

33. The Working Group may wish to consider whether the following statement could be added to the model statements of independence:

“Note — The parties may consider adding to the statement of independence:

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules.”

Draft additional provision

34. The draft additional provision reads as follows:

[Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based].

*Remarks on the proposed additional provision*¹⁴

35. The draft additional provision contains a general principle aimed at clarifying that matters governed by the Rules which are not expressly settled in them are to be settled in conformity with the general principles on which the Rules are based. The Working Group agreed, at its forty-eighth session, to further consider whether such a provision should be included in the Rules (A/CN.9/646, paras. 50-53). If the Working Group agrees on the inclusion of that provision in the text of the Rules, it may wish to decide on its placement and to further consider how the general principles on which the Rules are based are to be determined, as the draft provision leaves that question open.

¹⁴ For discussions on the proposed additional provision, see documents A/CN.9/614, paras. 120-121 and A/CN.9/646, paras. 50-53.

II. SECURITY INTERESTS

A. Report of the Working Group on Security Interests on the work of its sixteenth session (Vienna, 2-6 November 2009)

(A/CN.9/685)

[Original: English]

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I. Introduction

1. At its present session, Working Group VI continued its work on the preparation of a Supplement 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 2007.¹ The Commission’s decision to undertake work on security rights in intellectual property was taken in response to the need to supplement its work on

¹ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17 (Part I))*, para. 162.

the Guide by providing specific guidance to States as to the appropriate coordination between secured transactions and intellectual property law.²

2. At its thirty-ninth session, in 2006, the Commission considered its future work on secured financing law. It was noted that intellectual property rights (e.g. copyrights, patents and trademarks) were becoming an extremely important source of credit and should not be excluded from a modern secured transactions law. In addition, it was noted that the recommendations of the draft Guide generally applied to security rights in intellectual property to the extent that they were not inconsistent with intellectual property law. Moreover, it was noted that, as the recommendations of the draft Guide had not been prepared with the special intellectual property law issues in mind, enacting States should consider making any necessary adjustments to the recommendations to address those issues.³

3. In order to provide more guidance to States, the suggestion was made that the Secretariat should prepare, in cooperation with international organizations with expertise in the fields of secured financing and intellectual property law and, in particular the World Intellectual Property Organization (WIPO), a note for submission to the Commission at its fortieth session, in 2007, discussing the possible scope of work that could be undertaken by the Commission as a supplement to the draft Guide. In addition, it was suggested that, in order to obtain expert advice and the input of the relevant industry, the Secretariat should organize expert group meetings and colloquiums as necessary.⁴ 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.⁵

4. 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.⁶

5. At the first part of its fortieth session (Vienna, 25 June-12 July 2007), the Commission considered a note by the Secretariat entitled "Possible future work on security rights in intellectual property" (A/CN.9/632). The note took into account the conclusions reached at the colloquium on security rights in intellectual property rights. In order to provide sufficient guidance to States as to the adjustments that they might need to make in their laws to avoid inconsistencies between secured

² Ibid., para. 157.

³ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 81 and 82.

⁴ Ibid., para. 83.

⁵ Ibid., para. 86.

⁶ See www.uncitral.org/uncitral/en/commission/colloquia/2secint.html.

financing and intellectual property law, the Commission decided to entrust Working Group VI (Security Interests) with the preparation of an annex to the draft Guide specific to security rights in intellectual property rights.⁷

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 rights would subsequently be prepared.⁸

7. At its thirteenth session (New York, 19-23 May 2008), the Working Group considered a note by the Secretariat entitled "Security rights in intellectual property rights" (A/CN.9/WG.VI/WP.33 and Add.1). At that session, the Working Group requested the Secretariat to prepare a draft of the Annex to the Guide on security rights in intellectual property reflecting the deliberations and decisions of the Working Group (see A/CN.9/649, para. 13). As the Working Group was not able to reach agreement as to whether certain matters related to the impact of insolvency on a security right in intellectual property (see A/CN.9/649, paras. 98-102) were sufficiently linked with secured transactions law so as to justify their discussion in the Annex to the Guide, it decided to revisit those matters at a future meeting and to recommend that Working Group V (Insolvency Law) be requested to consider those matters (see A/CN.9/649, para. 103).

8. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted with satisfaction the good progress achieved by the Working Group. The Commission also noted the decision of the Working Group with respect to certain matters related to the impact of insolvency on a security right in intellectual property and decided that Working Group V should be informed and invited to express any preliminary opinion at its next session. It was also decided that, should any remaining issue require joint consideration by the two working groups after that session, the Secretariat should have discretion to organize a joint discussion of the impact of insolvency on a security right in intellectual property when the two Working Groups meet back to back in the spring of 2009.⁹

9. At its fourteenth session (Vienna, 20-24 October 2008), the Working Group continued its work based on a note prepared by the Secretariat entitled "Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property" (A/CN.9/WG.VI/WP.35 and Add.1). At that session, the Working Group requested the Secretariat to prepare a revised version of the draft annex reflecting the deliberations and decisions of the Working Group (see A/CN.9/667, para. 15). The Working Group also referred to Working Group V (Insolvency Law) certain matters relating to the impact of insolvency on a security right in intellectual property (see A/CN.9/667, paras. 129-140). In that connection, it was widely felt that every effort should be made to conclude discussions of these matters as soon as possible, so that the result of those discussions could be included in the draft annex by the fall of 2009 or the early spring of 2010 and the draft annex could be submitted to the Commission for final approval and adoption at its forty-third session in 2010 (see A/CN.9/667, para. 143).

⁷ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17 (Part I))*, paras. 156, 157 and 162.

⁸ *Ibid.*, *Sixty-second session, Supplement No. 17 (A/62/17 (Part II))*, paras. 99-100.

⁹ *Ibid.*, *Sixty-third session, Supplement No. 17 (A/63/17)*, para. 326.

10. At its fifteenth session (New York, 27 April-1 May 2009), the Working Group continued its work based on a note by the Secretariat entitled “Draft Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property” (A/CN.9/WG.VI/WP.37 and Add.1-4). At that session, the Working Group requested the Secretariat to prepare a revised version of the draft Annex reflecting the deliberations and decisions of the Working Group (see A/CN.9/670, para. 16). In addition, the Working Group, having taken note of a note by the Secretariat entitled “Discussion of intellectual property in the Legislative Guide on Insolvency Law” (A/CN.9/WG.V/WP.87), approved the substance of the discussion of the impact of insolvency of a licensor or licensee of intellectual property on a security right in that party’s rights under a licence agreement (see A/CN.9/WG.VI/WP.37/Add.4, paras. 22-40) and referred it to Working Group V (see A/CN.9/670, paras. 116-122). Moreover, the Working Group had a preliminary discussion about its future work programme (see A/CN.9/670, paras. 123-126).

11. At its thirty-sixth session, Working Group V (Insolvency Law) considered the insolvency-related issues referred to it by Working Group VI on the basis of documents A/CN.9/WG.V/WP.87 and A/CN.9/WG.VI/WP.37/Add.4 and an extract from the report of the Working Group (see A/CN.9/670, paras. 116-122). At that session, Working Group V approved the contents of those parts of the draft Annex dealing with the impact of insolvency of a licensor or licensee of intellectual property on a security right in that party’s rights under a licence agreement, as set forth in document A/CN.9/WG.VI/WP.37/Add.4, paragraphs 22-40, and the conclusions and revisions of Working Group VI reached at its fifteenth session (see A/CN.9/670, paras. 116-122).

12. At its forty-second session (Vienna, 29 June-17 July 2009), the Commission expressed its appreciation to the Working Group and the Secretariat for the progress achieved thus far and emphasized the importance of the draft Supplement (referred to above as the “draft Annex”). The Commission also noted with appreciation the results of the coordination efforts of Working Groups V and VI on insolvency-related matters in an intellectual property context. Noting the interest of the international intellectual property community, the Commission requested the Working Group to expedite its work so as to finalize the draft Supplement in one or two sessions and submit it to the Commission for finalization and adoption at its forty-third session, in 2010, so that the draft Supplement may be offered to States for adoption as soon as possible. In addition, the Commission noted with interest the future work topics discussed by the Working Group at its fourteenth and fifteenth sessions and agreed that, depending on the availability of time, preparatory work could be advanced through a discussion at the sixteenth session of the Working Group. As to the process for the preparation of a future work programme for the Working Group, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 with broad participation of experts from Governments, international organizations and the private sector. It was generally agreed that, on the basis of a note to be prepared by the Secretariat, the Commission would be in a better position to consider and make a decision on the future work programme of the Working Group at its forty-third session, in 2010.¹⁰

¹⁰ Ibid., *Sixty-fourth session, Supplement No. 17* (A/64/17), paras. 317-319.

II. Organization of the session

13. The Working Group, which was composed of all States members of the Commission, held its sixteenth session in Vienna from 2 to 6 November 2009. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Belarus, Bolivia (Plurinational State of), Bulgaria, Canada, China, Colombia, Egypt, El Salvador, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Lebanon, Mexico, Norway, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

14. The session was attended by observers from the following States: Angola, Argentina, Belgium, Côte d'Ivoire, Croatia, Democratic Republic of the Congo, Dominican Republic, Georgia, Indonesia, Philippines, Qatar, Romania, Slovakia, Slovenia, Tajikistan, the Former Yugoslav Republic of Macedonia, Togo and United Republic of Tanzania. The session was also attended by the following Entity maintaining a Permanent Observer Mission: Palestine.

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

(a) *United Nations system*: The World Bank;

(b) *Intergovernmental organizations*: Hague Conference on Private International Law (HCCH);

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Association of European Trade Mark Owners (MARQUES), Commercial Finance Association (CFA), European Brands Association (AIM), European Communities Trademark Association (ECTA), Forum for International Conciliation and Arbitration (FICACIC), Fédération Internationale des Associations de Distributeurs de films (FIAD), Independent Film and Television Alliance (IFTA), Inter-American Bar Association (IABA), International Federation of Film Producers Association (FIAPF), International Federation of the Phonographic Industry (IFPI), International Insolvency Institute (III) and International Trademark Association (INTA).

16. The Working Group elected the following officers:

Chairman: Ms. Kathryn SABO (Canada)

Rapporteur: Mr. Magued Sobhy BOULOS (Egypt)

17. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.38 (Provisional Agenda), A/CN.9/WG.VI/WP.39 and Addenda 1 to 7 (Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property) and A/CN.9/WG.VI/WP.40 (Proposal by the Permanent Bureau of the Hague Conference on Private International Law).

18. 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

19. The Working Group considered a note by the Secretariat entitled “Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property” (A/CN.9/WG.VI/WP.39 and Addenda 1 to 7) and a proposal by the Permanent Bureau of the Hague Conference on Private International Law (A/CN.9/WG.VI/WP.40). The deliberations and decisions of the Working Group are set forth below in chapter IV. The Secretariat was requested to prepare a revised version of the draft Supplement reflecting the deliberations and decisions of the Working Group.

IV. Security rights in intellectual property

A. Introduction (A/CN.9/WG.VI/WP.39, paras. 1-59)

1. Background (A/CN.9/WG.VI/WP.39, paras. 1-12)

20. The Working Group approved the substance of paragraphs 1-12 unchanged.

2. The interaction between secured transactions and law relating to intellectual property (A/CN.9/WG.VI/WP.39, paras. 13-18)

21. The Working Group agreed that the draft Supplement should state in a broad manner the general principle of property and secured transactions law that a security right in an encumbered asset was limited to the grantor’s rights in the asset as those rights were determined by property or contract law. It was widely felt that, as a result of that principle, the secured creditor could acquire no greater rights in the encumbered asset than the grantor had, whether the encumbered asset was a tangible asset, a receivable or intellectual property (referred to as the “*nemo dat* principle”). Subject to that change, the Working Group approved the substance of paragraphs 13-18.

3. Terminology (A/CN.9/WG.VI/WP.39, paras. 19-39)

22. It was agreed that: (a) in the last sentence of paragraph 22, it should be clarified that the owner, licensor or licensee could encumber all or part of its rights, but only if they were transferable under law relating to intellectual property; and (b) in the second sentence of paragraph 36, reference should be made to an “outright transferee” rather than to a “transferee”. Subject to those changes, the Working Group approved the substance of paragraphs 19-39.

4. Valuation of intellectual property to be encumbered (A/CN.9/WG.VI/WP.39, paras. 40-41)

23. The Working Group approved the substance of paragraphs 40-41 unchanged.

5. Examples of financing practices relating to intellectual property (A/CN.9/WG.VI/WP.39, paras. 42-52)

24. It was agreed that paragraph 43 and examples 5 and 6 could be retained for educational reasons, but placed at the end of the examples with additional wording explaining that they did not involve transactions in which a security right was created in intellectual property. It was also agreed that paragraph 44 did not need to refer to example 7 as reflecting a combination of other categories of transactions. Subject to those changes, the Working Group approved the substance of paragraphs 42-52.

6. Key objectives and fundamental policies (A/CN.9/WG.VI/WP.39, paras. 53-59)

25. The Working Group approved the substance of paragraphs 53-59 unchanged.

B. Scope of application and party autonomy (A/CN.9/WG.VI/WP.39/Add.1, paras. 1-24)

1. Broad scope of application (A/CN.9/WG.VI/WP.39/Add.1, paras. 1-21)

26. The Working Group considered the question whether the commentary should suggest that States enacting the recommendations of the Guide might consider permitting the registration of a notice of an outright transfer of intellectual property in the general security rights registry, so as to rationalize and harmonize the recordation of all transfers of intellectual property whether or not they were registered in an intellectual property registry. The Working Group confirmed its earlier decision (see A/CN.9/649, para. 81) that outright transfers of intellectual property should not be dealt with in the draft Supplement as they did not involve financing transactions. It was widely felt that outright transfers were matter of law relating to intellectual property, as they were not financing transactions, even in the case of securitization, in which typically securitization of receivables was involved, not of intellectual property. The Working Group approved the substance of paragraphs 1-21 unchanged.

2. Application of the principle of party autonomy to security rights in intellectual property (A/CN.9/WG.VI/WP.39/Add.1, paras. 22-24)

27. It was agreed that the last sentence of paragraph 24 should be separated into two parts and the first part should be revised to clarify that the right to pursue infringement claims could not be used as security for credit under law relating to intellectual property. Subject to that change, the Working Group approved the substance of paragraphs 22-24.

**C. Creation of a security right in intellectual property
(A/CN.9/WG.VI/WP.39/Add.2, paras. 1-43)**

**1. The concepts of creation and third-party effectiveness
(A/CN.9/WG.VI/WP.39/Add.2, paras. 1-3)**

28. It was agreed that, in the third sentence of paragraph 2, reference should be made to the registration of a notice of a security right as a method of achieving third-party effectiveness of the security right. Subject to that change, the Working Group approved the substance of paragraphs 1-3.

**2. Functional, integrated and unitary concept of a security right
(A/CN.9/WG.VI/WP.39/Add.2, para. 4)**

29. The Working Group deferred its consideration of paragraph 4 until it had the opportunity to consider acquisition financing in an intellectual property context (see para. 70 below).

**3. Requirements for the creation of a security right in intellectual property
(A/CN.9/WG.VI/WP.39/Add.2, paras. 5-8)**

30. It was agreed that paragraphs 5-8 should be recast to clarify that: (a) if law relating to intellectual property required a specific description of certain types of intellectual property, such as copyrights, recommendation 14, subparagraph (d), was sufficiently flexible to permit such a specific description; and (b) to the extent that in certain cases recommendation 14, subparagraph (d), was inconsistent with law relating to intellectual property, under recommendation 4, subparagraph (b), the latter prevailed. It was also agreed that, as a matter of drafting, paragraph 7 should be revised to refer to: (a) the nature of copyright as a bundle of rights and to the ability of a copyright owner to grant a security right in one or the other or all of the rights rather than to the divisibility of intellectual property rights, which was a different concept; and (b) the possibility that a copyright owner had the right to use rights to obtain credit from another creditor to the extent those rights were not encumbered. Subject to those changes, the Working Group approved the substance of paragraphs 5-8.

**4. Rights of a grantor with respect to the intellectual property to be encumbered
(A/CN.9/WG.VI/WP.39/Add.2, para. 9)**

31. The Working Group approved the substance of paragraph 9 unchanged.

5. Distinction between a secured creditor and an owner with respect to intellectual property (A/CN.9/WG.VI/WP.39/Add.2, paras. 10-12)

32. The Working Group approved the substance of paragraphs 10-12 unchanged.

**6. Types of encumbered asset in an intellectual property context
(A/CN.9/WG.VI/WP.39/Add.2, paras. 13-36)**

33. It was agreed that: (a) in the second sentence of paragraph 13, it should be clarified that a security right in a tangible asset with respect to which intellectual property was used did not automatically extend to the relevant intellectual property;

(b) in the second sentence of paragraph 14, it should be clarified that, if the recommendations of the Guide were enacted in a particular State, there would be no obstacles to the assignability of future receivables, and, in the last sentence of paragraph 14, a reference should be made to paragraphs 22-29 dealing with the treatment of the right to the payment of royalties; (c) in the second sentence of paragraph 15 and in paragraph 17, it should be clarified that the right to sue infringers and the right to register intellectual property could, in certain circumstances, be exercised by a secured creditor but those rights were not part of the encumbered asset and that that issue should be dealt with in Chapter VII of the draft Supplement on the rights and obligation of the parties to a security agreement relating to intellectual property; (d) in paragraphs 19 and 21, it should be clarified that whether the right to pursue infringers and obtain an injunction and compensation could constitute proceeds of encumbered intellectual property was a matter of law relating to intellectual property; (e) in paragraph 28, the reference to “future” royalties was superfluous and should be deleted; and (f) the examples in paragraph 35 should be deleted and the paragraph should be recast to refer to the general or specific description of encumbered assets in line with paragraphs 5-8 of that section (see para. 30 above). Subject to those changes, the Working Group approved the substance of paragraphs 13-36, as well as recommendation 243.

7. Security rights in future intellectual property (A/CN.9/WG.VI/WP.39/Add.2, paras. 37-41)

34. It was agreed that: (a) the last two sentences of paragraph 39 should be revised so as not to describe the *nemo dat* principle as a statutory prohibition; (b) paragraph 40 should be revised to clarify how the concepts of “improvements” or “adaptations” related to limitations to the use of future intellectual property as security for credit. Subject to those changes, the Working Group approved the substance of paragraphs 37-41.

8. Legal or contractual limitations on the transferability of intellectual property (A/CN.9/WG.VI/WP.39/Add.2, paras. 42-43)

35. The Working Group approved the substance of paragraphs 42-43 unchanged.

D. Effectiveness of a security right in intellectual property against third parties (A/CN.9/WG.VI/WP.39/Add.3, paras. 1-9)

1. The concept of third-party effectiveness (A/CN.9/WG.VI/WP.39/Add.3, paras. 1-3)

36. The Working Group approved the substance of paragraphs 1-3 unchanged.

2. Third-party effectiveness of security rights in intellectual property that are registered in an intellectual property registry (A/CN.9/WG.VI/WP.39/Add.3, paras. 4-7)

37. The Working Group approved the substance of paragraphs 4-7 unchanged.

3. Third-party effectiveness of security rights in intellectual property that are not registered in an intellectual property registry (A/CN.9/WG.VI/WP.39/Add.3, paras. 8-9)

38. The Working Group approved the substance of paragraphs 8-9 unchanged.

E. The registry system (A/CN.9/WG.VI/WP.39/Add.3, paras. 10-42)

1. The general security rights registry (A/CN.9/WG.VI/WP.39/Add.3, paras. 10-11)

39. The Working Group approved the substance of paragraphs 10-11 unchanged.

2. Asset-specific intellectual property registries (A/CN.9/WG.VI/WP.39/Add.3, paras. 12-14)

40. The Working Group approved the substance of paragraphs 12-14 unchanged.

3. Coordination of registries (A/CN.9/WG.VI/WP.39/Add.3, paras. 15-20)

41. It was agreed that, in paragraph 18, reference should be made to paragraph 4. Subject to that change, the Working Group approved the substance of paragraphs 15-20.

4. Registration of notices about security rights in future intellectual property (A/CN.9/WG.VI/WP.39/Add.3, paras. 21-23)

42. The Working Group approved the substance of paragraphs 21-23 unchanged.

5. Dual registration or search (A/CN.9/WG.VI/WP.39/Add.3, paras. 24-27)

43. It was agreed that: (a) in paragraph 25, the last two sentences should be revised to provide that a secured creditor that registered a notice of its security right in a specialized registry had a right to rely on that registration and on the priority attributed to that registration under the recommendations of the Guide; and (b) in paragraph 26, a reference should be added to online searching in intellectual property registries for free. It was also agreed that the note to paragraph 27 should be retained, subject to the clarification of the examples in paragraphs 2, 4, 5 and the last two sentences of the note. Subject to those changes, the Working Group approved the substance of paragraphs 24-27 and the note to paragraph 27.

6. Time of effectiveness of registration (A/CN.9/WG.VI/WP.39/Add.3, paras. 28-30)

44. The Working Group approved the substance of paragraphs 28-30 unchanged.

7. Impact of a transfer of encumbered intellectual property on the effectiveness of registration (A/CN.9/WG.VI/WP.39/Add.3, paras. 31-36)

45. It was agreed that: (a) at the end of the first sentence of paragraph 32, words along the lines “upon the completion of enforcement by the secured creditor” should be added and the second sentence should be deleted; (b) the draft recommendation in the note after paragraph 36 should be recast to mirror recommendation 62, dealing with the impact of a transfer of an encumbered asset on the effectiveness of registration, as recommendation 31 was sufficient to deal with the continuity of

third-party effectiveness of a security right after the transfer of the encumbered asset; (c) reference should be made in the commentary in the note after paragraph 36 to the fact that the examples dealt with transfers and that, under the Guide, a licence was not a transfer, although the Guide deferred to law relating to intellectual property as to the exact meaning of a licence (see A/CN.9/WG.VI/WP.39/Add.4, para. 15). Subject to those changes, the Working Group approved the substance of paragraphs 31-36, as well as the recommendation and the commentary contained in the note after paragraph 36.

8. Registration of security rights in trademarks (A/CN.9/WG.VI/WP.39/Add.3, paras. 37-42)

46. In response to a question, it was noted that, in the case of insolvency of the mark owner, the secured creditor or the insolvency representative should be able to take steps to maintain the mark when necessary. The Working Group approved the substance of paragraphs 37-42 unchanged.

F. Priority of a security right in intellectual property (A/CN.9/WG.VI/WP.39/Add.4, paras. 1-15 and A/CN.9/WG.VI/WP.39/Add.5, paras. 1-22)

1. The concept of priority (A/CN.9/WG.VI/WP.39/Add.4, paras. 1-2)

47. It was agreed that paragraph 2 should be revised to: (a) refer to language along the lines “the grant of exclusive rights, in particular in the case of patents and trademarks” rather than “to notion of title and basic effectiveness”; and (b) elaborate on the notion of priority under law relating to intellectual property, for example, by explaining that a conflict between two secured creditors might not be a priority conflict because of the application of the *nemo dat* rule. Subject to those changes, the Working Group approved the substance of paragraphs 1-2.

2. Identification of competing claimants (A/CN.9/WG.VI/WP.39/Add.4, paras. 3-4)

48. It was agreed that the first sentence of paragraph 4 should be reviewed to ensure that it covered all the possible conflicts. Subject to that change, the Working Group approved the substance of paragraphs 3-4.

3. Relevance of knowledge of prior transfers or security rights (A/CN.9/WG.VI/WP.39/Add.4, paras. 5-6)

49. The Working Group approved the substance of paragraphs 5-6 unchanged.

4. Priority of security rights in intellectual property that are not registered in an intellectual property registry (A/CN.9/WG.VI/WP.39/Add.4, paras. 7-8)

50. The Working Group approved the substance of paragraphs 7-8 unchanged.

5. Priority of security rights in intellectual property that are registered in an intellectual property registry (A/CN.9/WG.VI/WP.39/Add.4, paras. 9-11)

51. It was agreed that paragraph 9 should be aligned with recommendation 78, which referred to security rights that were registered in a specialized registry.

Subject to that change, the Working Group approved the substance of paragraphs 9-11.

52. It was suggested that a new recommendation should be prepared to provide that a security right in intellectual property registered in an intellectual property registry should have priority only as against a transferee of intellectual property and not as against another secured creditor. In support, it was stated that the former priority conflict could be referred to the law of the State in which the intellectual property was protected, while the latter priority conflict could be referred to the law of the State in which the grantor was located. That suggestion was objected to. It was stated that issues of substantive law should be addressed separately from conflict-of-laws issues and the substantive recommendations of the Guide could not be changed to address conflict-of-law issues.

**6. Rights of transferees of encumbered intellectual property
(A/CN.9/WG.VI/WP.39/Add.4, paras. 12-15)**

53. In response to a question, it was noted that the Guide did not contain a recommendation dealing with ordinary-course-of-business transfers of intangible assets (recommendation 81, subparagraph (a), dealt with such transfers of tangible assets only). With respect to paragraph 14, it was agreed that it should be revised to clarify that: (a) the preceding analysis dealt with a priority conflict between a security right and the rights of a subsequent transferee; (b) paragraph 14 dealt with a different situation that involved a transfer of an asset and the subsequent creation of a security right in the asset by the transferor; (c) the latter matter was dealt with by the *nemo dat* rule (and recommendation 13), but was not a priority issue under the Guide; and (d) in the last sentence reference should be made to a secured creditor that acquired its right in an encumbered asset without knowledge of a prior transfer of the encumbered asset. Subject to those changes, the Working Group approved the substance of paragraphs 12-15.

7. Rights of licensees in general (A/CN.9/WG.VI/WP.39/Add.5, paras. 1-6)

54. It was agreed that: (a) the first sentence of paragraph 2 should be split into two parts, the first part stating that, under the Guide, the secured creditor did not become an owner, and the second part stating that whether the intellectual property owner could still exercise the rights of an owner and, for example, grant a licence was a matter of law relating to intellectual property; (b) the first sentence of paragraph 3 should be revised to refer directly to the fact that, if the owner created first a security right in its rights and then granted a licence in breach of an agreement with the secured creditor, the granting of the licence by the owner would be an event of default; (c) the fourth sentence of paragraph 3 should be revised to read along the following lines: "If the encumbered asset is the owner's intellectual property right, the secured creditor may collect the royalties as proceeds of the encumbered asset." Subject to those changes, the Working Group approved the substance of paragraphs 1-6.

8. Rights of certain licensees (A/CN.9/WG.VI/WP.39/Add.5, paras. 7-14)

55. It was agreed that: (a) in the second sentence of paragraph 8, a reference should be added to the enforcement remedies of the secured creditor under the Guide to ensure that any remedies of the secured creditor under law relating to

intellectual property would not be affected; (b) in the penultimate sentence of paragraph 8, reference should be made to the objective of recommendation 81, subparagraph (c), “to limit the enforcement remedies of the secured creditor under the Guide”, rather than “to protect” every day, legitimate transactions; (c) the second sentence of paragraph 11 should be revised to reflect the fact that the statement contained therein was not accurate in all cases; (d) the penultimate sentence of paragraph 11 should refer to “licences”, rather than “copies”, of copyrighted software. Subject to those changes and any consequential changes as a result of recommendation 244 and the relevant commentary, the Working Group approved the substance of paragraphs 7-14.

56. The Working Group considered a new draft recommendation 244 with two alternatives (A and B), which was intended to replace recommendation 81, subparagraph (c), as it applied to the rights of certain licensees of intellectual property as against the rights of a secured creditor of the licensor.

57. Some support was expressed for alternative B. It was stated that alternative B was simple and referred to notions used in law relating to intellectual property, namely, the notions of authorization of a licence by the secured creditor and party autonomy. It was stated, however, that alternative B failed to address the question whether certain licensees should be exempted from the obligation of having to check in the registry to determine whether the licensor had granted a security right in its rights, which was said to be the main objective of recommendation 244.

58. Some support was also expressed for the deletion of recommendation 244. It was observed that both alternatives A and B addressed the rights of certain licensees in terms that were unknown to intellectual property law. For that reason, it was suggested that the matter should be left to intellectual property law, which would prevail over the provisions of the law recommended in the Guide under recommendation 4, subparagraph (b). In that regard, reference was made to the notions of exhaustion and authorization of a licence by a secured creditor. That suggestion was objected to. It was recalled that a new recommendation was necessary to replace recommendation 81, subparagraph (c), which would apply in the absence of a contrary provision of law relating to intellectual property. It was also observed that the concept of exhaustion was not generally applicable to all types of intellectual property and, in any case, there was no universal understanding of its exact meaning.

59. However, the prevailing view was that recommendation 244, alternative A, should be retained and alternative B should be deleted. It was widely felt that alternative A was preferable as it addressed the issue of the rights of certain licensees as against the rights of a secured creditor of the licensor in a manner that was compatible with law relating to intellectual property, in particular, by avoiding any reference to the notion of ordinary-course-of-business licences. As to the exact formulation of alternative A, several suggestions were made, including that: (a) the reference within square brackets in the chapeau to recommendation 80, subparagraph (b), should be deleted and the matter should be explained in the commentary; (b) the reference in the chapeau to end-user licensees should be retained outside square brackets with an explanation in the commentary that it referred to both natural and legal persons; (c) subparagraph (a) should be placed in the commentary with appropriate explanation that the recommendation referred to legitimate, authorized licences; (d) subparagraph (c) or (e) (ii) should be deleted as

they dealt with the same issues; (e) subparagraph (d) should be deleted as it unnecessarily limited the scope of recommendation 244.

60. There was sufficient support for suggestions (a), (b) and (c) above on the understanding that these matters would be addressed in the commentary. However, with respect to suggestion (b), the concern was expressed that, as in the chapeau of recommendation 244 reference was made to a security right “created by the licensor”, limiting the scope of recommendation 244 to end-user licensees would result in such a licensee being exposed to security rights created by a person other than its immediate licensor. In order to address that concern, it was suggested that the words “by the licensor” should be deleted so that an end-user licensee would be protected against certain enforcement remedies of a secured creditor of a licensor higher in the chain of licensing. There was sufficient support for that suggestion on the understanding that the commentary would explain that recommendation 244 referred to enforcement of a security right under the law recommended in the Guide and did not affect the rights of a secured creditor under law relating to intellectual property law (for example, to pursue an unauthorized licensee as an infringer).

61. There was insufficient support for suggestion (d). It was explained that subparagraph (e) (ii) was necessary to deal with the non-customization of the initial licence, while subparagraph (c) was necessary to deal with the non-customization of subsequent adaptations. There was both support for and opposition to suggestion (e). In support, it was stated that the reference in subparagraph (b) to non-exclusive licences was sufficient to define the scope of recommendation 244. In opposition, it was observed that deletion of subparagraph (d) would broaden excessively the scope of application of recommendation 244, which would then cover licences such as theatrical motion picture licences, music performance licences, trademark licences and patent licences.

62. However, there was broad support for a revision of subparagraph (d). Several suggestions were made, including that it should read along the following lines: “the transaction involves a licence of copyrighted software and the delivery of tangible copies thereof”, “the licence covers the right to use copyrighted or patented software” or “the licence covers one or any of the exclusive rights relating to copyrighted software”. With respect to the first of those three drafting proposals, the concern was expressed that the paper or electronic character of the copy should not make a difference in the rule. However, there was sufficient support for the latter two drafting proposals, although it was observed that the third one might inadvertently be overly broad as it appeared covering rights other than the right to use or exploit copyrighted software.

63. In the discussion, the concern was expressed that, as the scope of recommendation 244 was narrower than the scope of recommendation 81, subparagraph (c), the latter might still be applicable to intellectual property licences not covered in recommendation 244. In order to address that concern, it was agreed that the commentary should explain that recommendation 81, subparagraph (c), would not apply at all to any intellectual property licence and that recommendation 80, subparagraph (b) would apply to an intellectual property licence other than a software licence covered in recommendation 244. As a result, in order to be protected as against a secured creditor of the licensor, a person obtaining an intellectual property licence other than a software licence should ensure that the

licensor was authorized by its secured creditor to grant such a licence unaffected by the security right.

64. After discussion, it was agreed that: (a) the reference within square brackets in the chapeau to recommendation 80, subparagraph (b), should be deleted; (b) the reference in the chapeau to end-user licensees should be retained outside square brackets and the words “by the licensor” should be deleted; (c) subparagraph (a) could be deleted, while all those matters should be discussed in the commentary as suggested above; (d) subparagraph (c) should be retained but placed after subparagraph (e); (e) the above-mentioned alternative wording (see para. 62 above) should be retained within square brackets in subparagraph (d) for further consideration by the Working Group; and (f) subparagraph (e) (i) should be revised to read along the following lines: “The licensor is generally in the business of granting non-exclusive licenses *of the kind referred to in (ii).*” Subject to those changes, the Working Group approved the substance of recommendation 244 and the commentary contained in the note after paragraph 14.

9. Priority of a security right in intellectual property granted by a licensor as against a security right granted by a licensee (A/CN.9/WG.VI/WP.39/Add.5, paras. 15-19)

65. It was agreed that paragraph 15 should be revised to clarify that, where the royalties payable by a licensee to a licensor took the form of a percentage of the sub-royalties payable to the licensee as a sub-licensor by sub-licensees: (a) in order to prevail over the secured creditor of the licensee with a security right in all present and future receivables of the licensee, the secured creditor of the licensor would need to either register a notice of its security right in the relevant intellectual property registry, register a notice thereof first in the general security rights registry or obtain a subordination agreement from the secured creditor of the licensee; and (b) the same rule would apply to a priority conflict between an outright assignee of the licensor and a secured creditor of the licensee, as outright assignments were subject, in particular with respect to registration and priority, to the rules applicable to assignments for security purposes. It was also agreed that paragraph 19 should be revised to clarify that the acquisition financing recommendations of the Guide applied to competitions between security rights created by the same grantor and not by different persons (for example, by the licensor and by the licensee). Subject to those changes, the Working Group approved the substance of paragraphs 15-19.

66. The Working Group proceeded to discuss a set of draft recommendations providing for an acquisition security right in intellectual property or a licence of intellectual property. There was broad support in the Working Group for an acquisition security right in intellectual property or a licence of intellectual property. It was widely felt that, for the same reasons the Guide provided for an acquisition security right in tangible assets, the draft Supplement should provide for an acquisition security right in intellectual property or a licence of intellectual property. However, differing views were expressed as to whether the draft Supplement should depart from the approach followed in the Guide and provide, for example, for an acquisition security right in proceeds of intellectual property or a licence of intellectual property, even if those proceeds took the form of cash proceeds (namely, receivables, negotiable instruments and the like).

67. One view was that intellectual property owners and licensors needed to be able to rely on their rights to payment of royalties so as to be able to develop new ideas protected by intellectual property rights and give a licence to others to use them. It was stated that, if the general secured creditors of licensees had always priority over the secured creditors of intellectual property owners or licensors, owners or licensors would not be able to use their rights to payment of royalties as security for credit, a result that could limit their ability to create and licence new ideas protected by an intellectual property right. In addition, it was observed that the different nature of intellectual property rights warranted a different approach in that regard from the approach followed with respect to acquisition financing relating to tangible assets.

68. The prevailing view, however, was that intellectual property owners and licensors could achieve the result described in the preceding paragraph by ensuring that they or their secured creditors obtained: (a) a security right in or an outright assignment of a right to payment of a percentage of the sub-royalties payable to the licensee as a sub-licensor by sub-licensees and registered a notice thereof in the relevant intellectual property registry; (b) a security right in or an outright assignment of a right to payment of a percentage of the sub-royalties payable to the licensee as a sub-licensor by sub-licensees and registered first a notice thereof in the general security rights registry; or (c) a subordination agreement from the secured creditor of the licensee. It was stated that that result could not be achieved through the application of the acquisition financing recommendations of the Guide in an intellectual property context, since: (a) those recommendations dealt with priority conflicts between security rights created by the same grantor; and (b) the priority of an acquisition security right did not extend to cash proceeds of inventory and thus could not extend to proceeds of intellectual property or a licence of intellectual property held by the grantor for licensing or sub-licensing. In addition, it was observed that it was essential for the Guide to provide one acquisition financing regime for all types of asset and not to introduce several regimes depending on the type of asset involved, a result which would make the Guide very difficult to understand and apply. Moreover, it was pointed out that it would be too risky for the Guide to recommend an approach, which would change the balance established after discussions over a long period of time among the interests of the various credit providers and essentially was not followed in any legal system.

69. In response to a question, it was noted that, according to recommendation 181 of the Guide, an acquisition security right, a notice of which was registered in the general security rights registry, did not have priority over a non-acquisition security right, a notice of which was registered in a specialized registry. As a result, by registering a notice of its security right in the specialized registry, the secured creditor of an intellectual property owner or licensor could always obtain priority over the general secured creditor of the licensee. It was agreed that the matter should be discussed in the commentary.

70. After discussion, the Working Group agreed that the Supplement should include new terminology and recommendations making the acquisition financing terminology and recommendations of the Guide (relating to tangible assets) apply to an intellectual property context. The Working Group also agreed that appropriate commentary should be included in the draft Supplement to explain the new terminology and recommendations. The Working Group also agreed that, as with the

exception of conditional transfers (which, in some States, would include exclusive licences), there were no widely used devices to secure the purchase price of intellectual property, it would be sufficient to explain in the commentary that States that preferred to follow a non-unitary approach to acquisition financing would need to appropriately adjust the new terminology and recommendations. In addition, the Working Group agreed that paragraph 4 of document A/CN.9/WG.VI/WP.39/Add.2, dealing with the functional, integrated and unitary concept of a security right, should be adjusted accordingly.

10. Priority of a security right in intellectual property as against the right of a judgement creditor (A/CN.9/WG.VI/WP.39/Add.5, paras. 20-21)

71. The Working Group approved the substance of paragraphs 20-21 unchanged.

11. Subordination (A/CN.9/WG.VI/WP.39/Add.5, para. 22)

72. The Working Group approved the substance of paragraph 22 unchanged.

G. Rights and obligations of the parties to a security agreement relating to intellectual property (A/CN.9/WG.VI/WP.39/Add.6, paras. 1-5)

1. Application of the principle of party autonomy (A/CN.9/WG.VI/WP.39/Add.6, para. 1)

73. The Working Group agreed that paragraph 1 should be aligned with the text of recommendation 245. Subject to that change, the Working Group approved the substance of paragraph 1.

2. Preservation of the encumbered intellectual property (A/CN.9/WG.VI/WP.39/Add.6, paras. 2-5)

74. The Working Group agreed that paragraph 4 should be aligned with the text of recommendation 245. Subject to that change, the Working Group approved the substance of paragraphs 2-5.

75. The Working Group considered alternatives A and B of recommendation 245. It was noted that alternative A, combined with recommendation 4, subparagraph (b), would lead to the same result as alternative B. However, general preference was expressed for alternative B referring party autonomy to law other than the law recommended in the Guide. It was generally understood that the intellectual property owner was the person responsible for the preservation of encumbered intellectual property and that the secured creditor's role in performing that function could be safely described in terms of an entitlement. After discussion, the Working Group decided that alternative B should be retained, subject to describing the role of the secured creditor in the preservation of encumbered intellectual property as an entitlement, and that alternative A should be deleted.

H. Rights and obligations of third-party obligors in intellectual property financing transactions (A/CN.9/WG.VI/WP.39/Add.6, paras. 6-7)

76. The Working Group agreed that the last sentence of paragraph 6 should be revised to read along the following lines: “Similarly, where a licensee assigned to *its secured creditor the licensee’s* claim against a sub-licensee for the payment of royalties under a sub-licence agreement, the sub-licensee would be a third-party obligor *with respect to the licensee’s secured creditor* in the sense of the Guide.” Subject to that change, the Working Group approved the substance of paragraphs 6-7.

I. Enforcement of a security right in intellectual property (A/CN.9/WG.VI/WP.39/Add.6, paras. 8-32)

1. Intersection of secured transactions law and law relating to intellectual property (A/CN.9/WG.VI/WP.39/Add.6, paras. 8-11)

77. The Working Group approved the substance of paragraphs 8-11 unchanged.

2. Enforcement of a security right in different types of intellectual property (A/CN.9/WG.VI/WP.39/Add.6, paras. 12-13)

78. The Working Group approved the substance of paragraphs 12-13 unchanged.

3. Taking “possession” of documents necessary for the enforcement of a security right in intellectual property (A/CN.9/WG.VI/WP.39/Add.6, paras. 14-15)

79. The Working Group approved the substance of paragraphs 14-15 unchanged.

4. Disposition of encumbered intellectual property (A/CN.9/WG.VI/WP.39/Add.6, paras. 16-17)

80. The Working Group approved the substance of paragraphs 16-17 unchanged.

5. Rights acquired through disposition of encumbered intellectual property (A/CN.9/WG.VI/WP.39/Add.6, paras. 18-20)

81. It was agreed that, in paragraph 19, a clear distinction should be drawn between the secured creditor’s enforcement rights under secured transactions law and the secured creditor’s enforcement rights under law relating to intellectual property. Subject to that change, the Working Group approved the substance of paragraphs 18-20.

6. Proposal by the secured creditor to acquire the encumbered intellectual property (A/CN.9/WG.VI/WP.39/Add.6, para. 21)

82. The Working Group approved the substance of paragraph 21 unchanged.

7. Collection of royalties and licence fees (A/CN.9/WG.VI/WP.39/Add.6, para. 22)

83. The Working Group approved the substance of paragraph 22 unchanged.

8. Licensor's other contractual rights (A/CN.9/WG.VI/WP.39/Add.6, para. 23)

84. The Working Group approved the substance of paragraph 23 unchanged.

9. Enforcement of security rights in tangible assets with respect to which intellectual property is used (A/CN.9/WG.VI/WP.39/Add.6, para. 24-27)

85. It was agreed that: (a) in the second sentence of paragraph 24, the word "only" should be inserted before the words "if there is an authorization from the intellectual property owner"; (b) at the end of the third sentence of paragraph 25, the phrase in parenthesis should be deleted because there were instances where an intellectual property right could be exhausted even prior to a sale (for example, where products bearing a trademark had passed the quality control of the trademark owner); (c) in the first sentence of paragraph 26, the reference to "the grantor" should be qualified by wording along the following lines "a grantor that attempts to grant a security right in that product, under law relating to intellectual property, ..."; (d) in the second sentence of paragraph 26, the phrase "is in breach of the licence agreement" should be replaced with wording along the following lines "acts in a manner contrary to the limitations in the licence agreement", since the secured creditor would normally not be a party to the licence agreement and thus could not be in breach of that agreement; and (e) the third sentence of paragraph 27 should be revised to take into account that it would be unlikely that the secured creditor would be willing or able to continue production of partially completed products. Subject to those changes, the Working Group approved the substance of paragraphs 24-27.

10. Enforcement of a security right in a licensee's rights (A/CN.9/WG.VI/WP.39/Add.6, para. 28-32)

86. It was agreed that: (a) at the end of the second sentence of paragraph 28, words along the following lines could be added "or some combination of the foregoing" to cover all possibilities; (b) in the first sentence of paragraph 29, reference should be made to the licensee's rights under the licence agreement and, in the third sentence, reference should be made to the right of the grantor under the secured transactions law and rights of the licensor under law relating to intellectual property; (c) the last sentence of paragraph 30 should be revised along the following lines "If creation by the licensee-sub-licensor of a security right in its right to royalties from its sub-licensee constitutes a breach of an initial or intervening licence agreement, then enforcement of that agreement may prevent the secured creditor from collecting royalties from the sub-licensee or otherwise deprive it of the benefits of its agreement."; and (d) the third sentence of paragraph 32 should be revised to take into account that, in most States, exclusive licensees could sue infringers on their own. Subject to those changes, the Working Group approved the substance of paragraphs 28-32.

J. Law applicable to a security right in intellectual property (A/CN.9/WG.VI/WP.39/Add.7, paras. 1-23)**1. Law applicable to property matters (A/CN.9/WG.VI/WP.39/Add.7, paras. 1-21)**

87. Several drafting suggestions were made. One suggestion was that, to avoid giving prominence to one approach over the other, reference should be made early

in the discussion to all possible approaches, while the detailed discussion should follow. A similar suggestion was that the commentary should follow the order of the alternatives. Those suggestions were objected to. It was widely felt that as each section of the draft Supplement the section on conflicts of laws should start with an explanation of the approach of the Guide. Another suggestion was that the commentary should set out examples explaining each of the proposed alternatives. Yet another suggestion was that the commentary should set out the advantages and disadvantages of each proposed alternative, without suggesting that any of those alternatives could not work at all. There was broad support for those suggestions.

2. Law applicable to contractual matters (A/CN.9/WG.VI/WP.39/Add.7, paras. 22-23)

88. There was broad support in the Working Group for referring the mutual rights and obligations of the grantor and the secured creditor to the law chosen by them and, in the absence of a choice of law, to the law governing the security agreement (see recommendation 216). The Working Group approved the substance of paragraphs 22-23 unchanged.

3. Recommendation 246

89. The Working Group considered the issue of the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property on the basis of alternatives A to D. It also considered another alternative similar to alternative D (see A/CN.9/WG.VI/WP.40). It was noted that, to the extent that not all matters were referred to one and the same law, problems of qualification would arise, unless a State enacted also the substantive law recommendations of the Guide. Otherwise, it was noted, for example, creation could be referred to the law of one State and third-party effectiveness to the law of another State.

90. While there was broad support for referring issues related to the transferability of intellectual property rights to the law of the State in which the intellectual property was protected, diverging views were expressed as to the law applicable to security rights in intellectual property. One view was that the principle of national treatment embodied in international conventions protecting intellectual property implicitly imposed a universal applicable law rule referring all matters arising with respect to property rights in intellectual property to the law of the State in which the intellectual property was protected ("*lex loci protectionis*"). Reference was made in that regard to article 2(1) of the Paris Industrial Property Convention and article 5(2) of the Berne Intellectual Property Convention. On that basis, preference was expressed for an approach based on the law of the State where the intellectual property was protected. It was stated that such an approach would result in applying one law to all property rights relating to intellectual property.

91. Another view was that the above-mentioned interpretation of intellectual property conventions was highly controversial. It was stated that those conventions simply provided that the extent of protection and the rights of redress of intellectual property owners was subject to the law of the State in which the intellectual property was protected, making no reference to the law applicable to security rights. It was also observed that, even if those conventions provided an applicable law rule for security rights, they did not cover all aspects of the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property.

On that basis, preference was expressed for an approach based on the law of the grantor's location, with the exception of a priority conflict between a security right and the rights of a transferee or licensee of the encumbered intellectual property, which could be referred to the *lex loci protectionis*. It was stated that an approach based on the law of the grantor's location would result in all matters with respect to security rights in intellectual property being referred to one law, which would have the additional advantage of being the law governing the grantor's insolvency proceedings (as location was defined by reference to the place where the grantor had its central administration).

92. Yet another view was that a different combination of the above-mentioned approaches might be more appropriate. Several suggestions were made in that regard. One suggestion was that, while the creation of a security right could be referred to the law of the State in which the grantor was located, the third-party effectiveness, priority and enforcement of such a security right should be referred to the law of the State in which the intellectual property was protected. Another suggestion was that security rights to intellectual property that could be registered in an intellectual property registry could be referred to the law of the State under whose authority the registry was maintained. It was observed that such an approach would be consistent with the approach followed in recommendation 205 of the Guide with respect to tangible assets, security rights in which were subject to registration in a specialized registry (such as ships or aircraft). It was also pointed out that such an approach appeared in a previous version of the draft Supplement, but was eliminated on the grounds that it could create uncertainty or increase the time and cost required to conclude a transaction (see A/CN.9/667, para. 124). Moreover, it was noted that, while language could be included in the commentary providing that reference to a State would apply equally to a regional economic integration organization, caution should be exercised not to refer to a regional law that had not provisions or had insufficient provisions on secured transactions. It was also noted that caution should be exercised not to refer to the law of an intellectual property registry, if the majority of laws did not allow registration of security rights in such a registry, because in such a case the approach suggested would simply lead to a legal vacuum.

93. Yet another suggestion was that, while the basic rule should refer to the law of the grantor's location, a priority conflict between a security right registered in the general security rights registry and a security right registered in an intellectual property registry could be referred to the law of the State under whose authority the intellectual property registry was maintained. It was observed that such an approach would be consistent with the approach followed in recommendation 209 of the Guide with respect to receivables arising from a sale, lease or transaction secured by a security agreement. Yet another suggestion was the draft Supplement should make no recommendation at all, leaving the matter to enacting States that would take into account the commentary and the intellectual property conventions, or make more than one recommendation for States to choose from.

94. Several examples were mentioned, in which one or the other approach appeared to be more workable. It was widely felt that there was not one approach that could produce perfect results in all cases. Accordingly, the Working Group agreed that three alternatives should be retained in the draft Supplement. The first alternative should refer the creation, third-party effectiveness, priority and

enforcement of a security right in intellectual property to the law of the State in which the encumbered intellectual property was protected. The second alternative should have two parts; the first part should refer all matters relating to intellectual property rights that could be registered in an intellectual property registry to the law of the State under whose authority the registry was maintained; the second part should refer all matters relating to intellectual property rights that could not be registered in an intellectual property registry to the law of the State in which the grantor was located. The third alternative should refer to the law of the State in which the grantor was located all matters except third-party effectiveness and priority of a security right in intellectual property as against the right of a transferee or a licensee of the encumbered intellectual property, which should be referred to the law of the State in which the intellectual property was protected. It was noted that issues relating to transferability would not be covered in any of the three alternatives (as they are not covered in the other conflict-of-laws recommendations of the Guide and the Guide specifically recommends that statutory limitations on transferability should not be overridden; see recommendation 18).

K. The impact of insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a license agreement (A/CN.9/WG.VI/WP.39/Add.7, paras. 24-42)

95. The Working Group approved the substance of paragraphs 24-42 unchanged. The Working Group also agreed that text along the following lines should be included in the draft Supplement to deal with automatic termination and acceleration clauses in intellectual property licence agreements and referred it to Working Group V (Insolvency Law):

“The UNCITRAL Legislative Guide on Insolvency Law (“the Insolvency Guide”) recommends that any contractual clauses that automatically terminate and accelerate a contract upon an application for commencement, or commencement, of insolvency proceedings or upon the appointment of an insolvency representative should be unenforceable as against the insolvency representative and the debtor (see recommendation 70). The Insolvency Guide also recommends that the insolvency law should specify the contracts that are exempt from the operation of this recommendation, such as financial contracts, or are subject to special rules, such as labour contracts (see recommendation 71).

The commentary of the Insolvency Guide states that some laws uphold these clauses in some circumstances and explains the reasons for this approach. These reasons include “the need for creators of intellectual property to be able to control the use of that property and the effect on a counterparty’s business of termination of a contract, especially one with respect to an intangible” (see Part Two, chapter II, para. 115). For example, automatic termination and acceleration clauses contained in intellectual property licence agreements may be upheld as the insolvency of the licensee may have a negative impact not only on the licensor’s rights but also on the intellectual property right itself. This is the case, for example, where the insolvency of a licensee of a trademark used on products may affect the market value of the trademark and the trademarked products. In any case, clauses included in

intellectual property licence agreements that provide, for example, that a licence terminates after X years or upon material breach such as failure of the licensee to upgrade or market the licensed products on time (that is, where the event that triggers the automatic termination is not insolvency) are not affected (see footnote 39, recommendation 72 of the Insolvency Guide).

The commentary of the Insolvency Guide also states that other laws override these clauses and explains the relevant reasons (see Part Two, chapter II, paras. 116 and 117). The commentary further explains that, although some insolvency laws do permit these types of clause to be overridden if insolvency proceedings are commenced, this approach has not yet become a general feature of insolvency laws. In this regard, the commentary speaks of an inherent tension between promoting the debtor's survival, which may require the preservation of contracts, and affecting commercial dealings by creating a variety of exceptions to general contract rules. The commentary concludes by expressing the desirability that an insolvency law permit such clauses to be overridden (see Part Two, chapter II, para. 118)."

V. Future work

96. The Working Group noted that its seventeenth session is scheduled to take place in New York from 8 to 12 February 2010. The Working Group also noted the plans of the Secretariat to hold the Third International Colloquium on Secured Transactions in Vienna from 1 to 3 March 2010. In that regard, it was noted that, in line with the decision taken by the Commission at its forty-second session (see para. 12 above), the purpose of the Colloquium was for the Secretariat to obtain the views of experts from Governments, international organizations and the private sector on the future work programme of the Commission on security interests and to prepare a note to assist the Commission in its consideration of the matter at its forty-third session, in 2010.

**B. Note by the Secretariat on the Draft Supplement to the
UNCITRAL Legislative Guide on Secured Transactions dealing with
security rights in intellectual property, submitted to the
Working Group on Security Interests at its sixteenth session
(A/CN.9/WG.VI/WP.39 and Add.1-7)**

[Original: English]

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I. Introduction

A. Background

[Note to the Working Group: For paras. 1-12, see A/CN.9/WG.VI/WP.37, paras. 1-8, A/CN.9/670, paras. 17 and 117, A/CN.9/WG.VI/WP.37/Add.4, chapter XI, note to the Working Group, paras. 1-4, A/CN.9/WG.VI/WP.35, paras. 1-7, A/CN.9/667, para. 16, A/CN.9/WG.VI/WP.36, para. 12, A/CN.9/WG.VI/WP.33, paras. 1-5, A/CN.9/WG.VI/WP.34, paras. 10 and 11 and A/63/17, para. 326.]

1. At its thirty-ninth session, in 2006, the Commission considered its future work on secured financing law. It was noted that intellectual property rights (for example, copyrights, patents and trademarks) were increasingly becoming an extremely important source of credit and should not be excluded from a modern secured transactions law. In addition, it was noted that the recommendations of the draft Legislative Guide on Secured Transactions (“the draft Guide”) generally applied to security rights in intellectual property to the extent that they were not inconsistent with intellectual property law. Moreover, it was noted that, as the recommendations had not been prepared with the special intellectual property law issues in mind, the draft Guide suggested that enacting States might consider making any necessary adjustments to the recommendations to address those issues.¹

2. In order to provide more guidance to States, the suggestion was made that the Secretariat should prepare, in cooperation with international organizations with

¹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 81 and 82.

expertise in the fields of secured financing and intellectual property law and in particular the World Intellectual Property Organization (WIPO), a note for submission to the Commission at its fortieth session, in 2007, discussing the possible scope of work that could be undertaken by the Commission as a supplement to the draft Guide. In addition, it was suggested that, in order to obtain expert advice and the input of the relevant industry, the Secretariat should organize expert group meetings and colloquiums as necessary.² After discussion, the Commission requested the Secretariat to prepare, in cooperation with relevant organizations and in particular WIPO, a note discussing the scope of future work by the Commission on intellectual property financing. The Commission also requested the Secretariat to organize a colloquium on intellectual property financing ensuring to the maximum extent possible the participation of relevant international organizations and experts from various regions of the world.³

3. Pursuant to that decision of the Commission, the Secretariat organized in cooperation with WIPO a colloquium on security rights in intellectual property rights (Vienna, 18 and 19 January 2007). The colloquium was attended by experts on secured financing and intellectual property law, including representatives of Governments and national and international, governmental and non-governmental organizations. At the colloquium, several suggestions were made with respect to adjustments that would need to be made to the draft Guide to address issues specific to intellectual property financing.⁴

4. At the first part of its fortieth session (Vienna, 25 June-12 July 2007), the Commission considered a note by the Secretariat entitled "Possible future work on security rights in intellectual property" (A/CN.9/632). The note took into account the conclusions reached at the colloquium. In order to provide sufficient guidance to States as to the adjustments that they might need to make in their laws to avoid inconsistencies between secured financing and intellectual property law, the Commission decided to entrust Working Group VI (Security Interests) with the preparation of an annex to the draft Guide specific to security rights in intellectual property rights.⁵

5. At its resumed fortieth session (Vienna, 10-14 December 2007), the Commission finalized and adopted the UNCITRAL Legislative Guide on Secured Transactions (the "*Guide*") on the understanding that an annex to the *Guide* specific to security rights in intellectual property rights would subsequently be prepared.⁶

6. At its thirteenth session (New York, 19-23 May 2008), Working Group VI considered a note by the Secretariat entitled "Security rights in intellectual property rights" (A/CN.9/WG.VI/WP.33 and Add.1). That note included a brief discussion of insolvency-related matters. At that session, the Working Group requested the Secretariat to prepare a draft of the annex to the *Guide* on security rights in intellectual property ("the Annex") reflecting the deliberations and decisions of the Working Group (see A/CN.9/649, para. 13). At the same session, the Working Group

² Ibid., para. 83.

³ Ibid., para. 86.

⁴ See www.uncitral.org/uncitral/en/commission/colloquia/2secint.html.

⁵ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), paras. 156, 157 and 162.

⁶ Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17 (Part II)), paras. 99 and 100.

felt that, while due deference should be expressed to intellectual property law, the point of reference for the Annex should be the *Guide* and not national secured transactions law (see A/CN.9/649, para. 14). As the Working Group was not able to reach agreement as to whether certain matters related to the impact of insolvency on a security right in intellectual property (see A/CN.9/649, paras. 98-102) were sufficiently linked with secured transactions law so as to justify their discussion in the Annex, it decided to revisit those matters at a future meeting and to recommend that Working Group V (Insolvency Law) be requested to consider those matters (see A/CN.9/649, para. 103).

7. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted with satisfaction the good progress achieved by the Working Group. The Commission also noted the above-mentioned discussion and decision of Working Group VI with respect to certain insolvency-related matters and decided that Working Group V should be informed and invited to express any preliminary opinion at its next session.⁷

8. At its fourteenth session (Vienna, 20-24 October 2008), the Working Group continued its work based on a note prepared by the Secretariat entitled "Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (A/CN.9/WG.VI/WP.35 and Add.1). At that session, the Working Group requested the Secretariat to prepare a revised version of the draft Annex reflecting the deliberations and decisions of the Working Group (see A/CN.9/667, para. 15). The Working Group also referred to Working Group V (Insolvency Law) certain matters relating to the impact of insolvency on a security right in intellectual property (see A/CN.9/667, paras. 129-143). In that connection, it was widely felt that every effort should be made to conclude discussions of these matters as soon as possible, so that their results could be included in the draft Annex by the fall of 2009 or the early spring of 2010 and the draft Annex could be submitted to the Commission for final approval and adoption at its forty-third session in 2010 (see A/CN.9/667, para. 143).

9. At its thirty-fifth session (Vienna, 17-21 November 2008), Working Group V reviewed the issues involving insolvency law referred to it by Working Group VI for inclusion in the draft Annex and confirmed that the responses given in the table at the end of document A/CN.9/667 accurately reflected the impact of the Insolvency Guide. In that connection, it was suggested that those considerations might be included in a commentary to be prepared. With respect to the possibility that a licensee under a licence agreement rejected by the insolvency representative of the licensor might be permitted, under some laws, to continue to exercise its rights under that agreement notwithstanding the rejection, the Working Group agreed that it was not in a position to properly consider that question without a better understanding of the scope and extent of the issues involved and requested the Secretariat to prepare a working paper, for consideration at its next session, that would provide background information on the discussion of the treatment of contracts that had taken place in the course of the development of the Insolvency Guide and the recommendations that had been adopted. Working Group V reached the same conclusion with respect to the issue of whether a secured creditor could request the licensor's insolvency representative or the insolvency court to set a

⁷ Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), para. 326.

deadline within which the insolvency representative should decide whether to continue or reject a licence agreement and set a special hearing before the insolvency court to address any dispute (see A/CN.9/666, paras. 112-117).

10. At its fifteenth session (New York, 27 April-1 May 2009), the Working Group continued its work based on a note prepared by the Secretariat entitled “Draft Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property” (A/CN.9/WG.VI/WP.37 and Add.1-4). At that session, the Working Group requested the Secretariat to prepare a revised version of the draft Annex reflecting the deliberations and decisions of the Working Group (see A/CN.9/670, para. 16). In addition, the Working Group, having taken note of a note by the Secretariat entitled “Discussion of intellectual property in the Legislative Guide on Insolvency Law” (A/CN.9/WG.V/WP.87), approved the substance of the discussion of the impact of insolvency of a licensor or licensee of intellectual property on a security right in that party’s rights under a licence agreement (see A/CN.9/WG.VI/WP.37/Add.4) and referred it to Working Group V (see A/CN.9/670, paras. 116-122). Moreover, the Working Group had a preliminary discussion about its future work programme (see A/CN.9/670, paras. 123-126).

11. At its thirty-sixth session (New York, 18-22 May 2009), Working Group V (Insolvency Law) considered the insolvency-related issues referred to it by Working Group VI on the basis of documents A/CN.9/WG.V/WP.87 and A/CN.9/WG.VI/WP.37/Add.4 and an extract from the report of the Working Group (see A/CN.9/670, paras. 116-122). At that session, Working Group V approved the contents of those parts of the draft Annex dealing with the impact of insolvency of a licensor or licensee of intellectual property on a security right in that party’s rights under a licence agreement, as set forth in document A/CN.9/WG.VI/WP.37/Add.4, paragraphs 22-40, and the conclusions and revisions of Working Group VI reached at its fifteenth session (see A/CN.9/670, paras. 116-122).

12. At its sixteenth session (Vienna, 2-6 November 2009), the Working Group continued its work based on a note prepared by the Secretariat entitled “Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property” (A/CN.9/WG.VI/WP.39 and Add.1-7). [...]

B. The interaction between secured transactions law and law relating to intellectual property

[Note to the Working Group: For paras. 13-18, see A/CN.9/WP.37, paras. 9-14, A/CN.9/670, para. 18, A/CN.9/WG.VI/WP.35, paras. 8-11, A/CN.9/667, paras. 17-19 and A/CN.9/WG.VI/WP.33, paras. 76-82.]

13. With only limited exceptions, the recommendations of the *Guide* apply to security rights in all types of movable asset, including intellectual property (see recommendations 2 and 4-7). With respect to intellectual property, the law recommended in the *Guide* does not apply insofar as its provisions are inconsistent with national law or international agreements, to which the State enacting the law is a party, relating to intellectual property (see recommendation 4, subparagraph (b)).

14. Recommendation 4, subparagraph (b), sets out the basic principle with respect to the interaction of secured transactions and intellectual property law. The meaning given to the term “intellectual property” is intended to ensure consistency of the *Guide* with intellectual property laws and treaties (see paras. 26-28 below). The term “law relating to intellectual property” includes both statutory and case law and is broader than the term “intellectual property law”, but narrower than general contract or property law. The scope of recommendation 4, subparagraph (b), will, consequently, be broader or narrower, depending on how a State defines the scope of intellectual property. It is understood that a State will do so in compliance with its international obligations flowing from intellectual property law treaties (such as the Agreement on Trade Related Aspects of Intellectual Property Rights — generally referred to as “the TRIPS Agreement”), as provided in those treaties. The term “law relating to intellectual property” is used in the Supplement to refer to national law or law flowing from international agreements, to which a State is a party, relating to intellectual property that governs specifically security rights in intellectual property, and not law that generally governs security rights in various types of asset and that may happen to govern security rights in intellectual property (see para. 29 below).

15. The purpose of recommendation 4, subparagraph (b), is to ensure that, when States adopt the recommendations of the *Guide*, they do not inadvertently change basic rules of law relating to intellectual property. As issues relating to the existence, validity and content of a grantor’s intellectual property rights are matters to which the *Guide* does not speak (see A/CN.9/WG.VI/WP.39/Add.1, section II.A.4), the occasions for possible conflict in regimes on these issues are limited. Nevertheless, in matters relating to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property, it is possible that in some States the two regimes will provide for different rules. Where this is the case, recommendation 4, subparagraph (b), preserves the precedence of the intellectual-property-specific rule.

16. It bears noting, however, that rules of law relating to intellectual property in some States relate only to forms of secured transactions that are not unique to intellectual property and that will no longer be available once a State adopts the recommendations of the *Guide* (for example, pledges, mortgages and transfers or trusts of intellectual property for security purposes). For this reason, States that adopt the *Guide* may also wish to review their law relating to intellectual property to coordinate it with the secured transactions law recommended in the *Guide*. In that connection, States enacting the law recommended in the *Guide* will have to ensure that their law reflects in particular the integrated and functional approach recommended in the *Guide*, without modifying the basic policies and objectives of their law relating to intellectual property.

17. The Supplement is intended to provide guidance to States with respect to such an integrated secured transactions and intellectual property law system. Building on the commentary and the recommendations of the *Guide*, the Supplement discusses how the principles of the *Guide* apply where the encumbered asset consists of intellectual property and, where necessary, adds new commentary and recommendations. As is the case with the other asset-specific commentary and recommendations, the intellectual-property-specific commentary and recommendations modify or supplement the general commentary and

recommendations of the *Guide*. Accordingly, subject to contrary provisions of law relating to intellectual property and any asset-specific commentary and recommendations of the Supplement, a security right in intellectual property may be created, be made effective against third parties, have priority and be enforced as provided in the general recommendations of the *Guide*.

18. While it is not the purpose of the Supplement to make any recommendations for changes to a State's law relating to intellectual property, as mentioned above, it may have an impact on that law. The Supplement discusses this impact and, occasionally, includes in the commentary modest suggestions for the consideration of enacting States (the expression used is "States might" or "States may wish to consider ...", rather than "States should"). These suggestions are based on the premise that, by enacting secured transactions laws of the type recommended by the *Guide*, States have made a policy decision to modernize their secured transactions law. The suggestions seek, therefore, to point out where this modernization might lead States to consider how best to coordinate their secured transactions law with their law relating to intellectual property.

C. Terminology⁸

[*Note to the Working Group: For paras. 19-39, see A/CN.9/WG.VI/WP.37, paras. 15-32, A/CN.9/670, paras. 19 and 20, A/CN.9/WG.VI/WP.35, paras. 12-21, A/CN.9/667, paras. 20-22, A/CN.9/WG.VI/WP.33, paras. 39-60, and A/CN.9/649, paras. 104-107.*]

(a) Competing claimant

19. In secured transactions law, the concept of a "competing claimant" is used to identify parties other than the secured creditor in a specific security agreement that might claim a right in an encumbered asset or the proceeds from its disposition (see term "competing claimant", Introduction to the *Guide*, para. 20). Thus, the *Guide* uses the term "competing claimant" in the sense of a claimant that competes with a secured creditor (that is, another secured creditor with a security right in the same asset, another creditor of the grantor that has a right in the same asset, the insolvency representative in the insolvency of the grantor, a buyer or other transferee, or a lessee or licensee of the same asset). The term "competing claimant" is essential for the application in particular of the priority rules recommended in the *Guide*, such as for example of the rule in recommendation 76, under which a secured creditor with a security right in receivables that registered a notice of its security right in the general security rights registry has priority over another secured creditor that acquired a security right in the same receivables by the same grantor before the other secured creditor but failed to register.

20. In law relating to intellectual property, however, the notion of a "competing claimant" is not used, and priority conflicts typically refer to conflicts among transferees and licensees, even if no conflict with a secured creditor is involved (infringers are not competing claimants and, if they are only alleged infringers that

⁸ For the easy reference of the reader, the Supplement follows the order in which the issues are discussed in the *Guide* (that is, Introduction with terminology, examples and key objectives and fundamental policies, Scope, Creation of a security right etc.).

prove that they have a legitimate claim, they are transferees or licensees, and not infringers). Secured transactions law does not interfere with the resolution of such conflicts that do not involve a secured creditor (including a transferee in a transfer for security purposes, who is treated in the *Guide* as a secured creditor). Thus, a conflict between two outright transferees would not be covered by the *Guide*. However, a conflict between an outright transferee of intellectual property rights and a transferee for security purposes of the same intellectual property rights by the same grantor would be covered by the *Guide* (subject to the limitation of recommendation 4, subparagraph (a)).

(b) Encumbered asset

21. The *Guide* uses the term “encumbered asset” to denote an asset that is subject to a security right. While the *Guide* refers by convention to a security right in an “encumbered asset”, what is really encumbered and meant is “whatever right the grantor has in an asset and intends to encumber”.

22. The *Guide* also uses various terms to denote the particular type of intellectual property that may be used as an encumbered asset without interfering with the nature, the content or the legal consequences of such terms for purposes of law relating to intellectual property, as well as contract and property law. These types of intellectual property that may be used as security for credit include the rights of an intellectual property owner (“owner”), the rights of an assignee or successor in title to an owner, the rights of a licensor or licensee under a licence agreement and the rights in intellectual property used with respect to a tangible asset, provided that the intellectual property right is described as an encumbered asset in the security agreement. The owner, licensor or licensee may encumber all or part of its rights.

23. Under law relating to intellectual property, the rights of an intellectual property owner generally include the right to prevent unauthorized use of its intellectual property, the right to renew registrations and the right to transfer and grant licences in its intellectual property. For example, in the case of a patent, the patent owner has exclusive rights to prevent certain acts, such as making, using or selling the patented product without the patent owner’s authorization.

24. Typically, under law relating to intellectual property law and contract law, the rights of a licensor and a licensee depend on the terms of the licence agreement (in the case of a contractual licence), law (in the case of compulsory or statutory licence) or the legal consequences of specific conduct (in the case of an implied licence). In addition, normally, the rights of a licensor include the right to claim payment of royalties and terminate the licence agreement. Similarly, the rights of a licensee include the licensee’s authorization to use the licensed intellectual property in accordance with the terms of the licence agreement and possibly the right to enter into sub-licence agreements and the right to obtain payment of sub-royalties. The rights of a grantor of a security right in a tangible asset with respect to which intellectual property is used are described in the agreement between the secured creditor and the grantor (owner, licensor or licensee of the relevant intellectual property) in line with secured transactions law and law relating to intellectual property.

(c) Grantor

25. As already mentioned, in a secured transaction relating to intellectual property, the encumbered asset may be the intellectual property rights of the intellectual property owner, the rights of a licensor (including the right to the payment of royalties) or the authorization of the licensee to use or exploit the licensed intellectual property, the right to grant sub-licences and the right to the payment of sub-royalties. Thus, depending on the kind of intellectual property that is encumbered, the term “grantor” will refer to an owner, a licensor or a licensee (although, unlike an owner, a licensor or a licensee may not necessarily enjoy exclusive rights as this term is understood under law relating to intellectual property). Finally, as is the case with any secured transaction relating to other types of movable asset, the term “grantor” may reflect a third party granting a security right in its intellectual property to secure the obligation owed by a debtor to a secured creditor.

(d) Intellectual property

26. Under the *Guide*, the term “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 (such as, for example, neighbouring, allied or related rights⁹ or plant varieties). Thus, references in the *Guide* to “intellectual property” are to be understood as references to “intellectual property rights”, such as the rights of an intellectual property owner, licensor or licensee. The commentary to the *Guide* explains that the meaning given to the term “intellectual property” in the *Guide* is intended to ensure consistency of the *Guide* with law relating to intellectual property, while at the same time respecting the right of a State enacting the recommendations of the *Guide* to align the definition with its own law, whether national law or law flowing from treaties (see Introduction to the *Guide*, footnote 24). An enacting State may add to the list mentioned above or remove from it types of intellectual property so that it conforms to national law.¹⁰ That is, the *Guide* treats as “intellectual property”, for the purposes of the *Guide*, whatever an enacting State considers to be intellectual property in conformity with its national law and compliance with its international obligations.

27. For purposes of secured transactions law, the intellectual property right itself is distinct from the income streams that flow from it, such as the income received

⁹ Closely related to “copyright” are “neighbouring rights”, also called allied or related rights. These are rights that are said to be “in the neighbourhood” of copyright. The term typically covers the rights of performers, producers of phonograms and broadcasting organizations, but in some countries it can also include the rights of film producers, or rights in photographs. Sometimes these are called *Diritti Connessi* (“connected rights”) or *Verwandte Schutzrechte* (“related rights”) or *Droits Voisins* (“neighbouring rights”), but the common term is the English “neighbouring rights.” Internationally, neighbouring rights are generally protected under the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done Oct. 26, 1961. Additional protections are accorded to certain performers and phonogram producers in the WIPO Performances and Phonograms Treaty done December 20, 1996.

¹⁰ See footnote 32 of the Introduction to the *Guide*.

from the exercise of broadcasting rights. Under the *Guide* these income streams are characterized as “receivables” and could be the original encumbered asset, if described as such in the security agreement, or proceeds of intellectual property, if the original encumbered asset is intellectual property. However, this treatment of these income streams in the *Guide* does not preclude a different treatment for purposes of law relating to intellectual property. For example, for the purposes of law relating to intellectual property, a right of a licensor to payment of equitable remuneration could be treated as part of the intellectual property right of the licensor.

28. It is also important to note that a licence agreement relating to intellectual property is not a secured transaction and a licence with a right to terminate the licence agreement is not a security right. Thus, secured transactions law does not affect the rights and obligations of a licensor or a licensee under a licence agreement. For example, the owner’s, licensor’s or licensee’s ability to limit the transferability of its intellectual property rights remains unaffected. In any case, it should be noted that, while the question whether an intellectual property owner may grant a licence is a matter of law relating to intellectual property, the question whether the owner’s secured creditor may prohibit by agreement the owner from granting a licence is a matter of secured transactions law addressed in the draft Supplement (see A/CN.9/WG.VI/WP.39/Add.6, para. 1).

(e) Law and law relating to intellectual property

29. As also already mentioned, the commentary also clarifies that references to the term “law” throughout the *Guide* include both statutory and non-statutory law. In addition, the *Guide* clarifies that the expression “law relating to intellectual property” (see recommendation 4, subparagraph (b)) is broader than intellectual property law (dealing, for example, with patents, trademarks or copyrights) but narrower than general contract or property law (see Introduction to the *Guide*, para. 19). In particular, the expression “law relating to intellectual property” means national law or law flowing from international agreements, to which a State is a party, relating to intellectual property that governs specifically security rights in intellectual property, and not law that generally governs security rights in various types of asset and that may happen to govern security rights in intellectual property. An example of a “law relating to intellectual property” might be intellectual property law that applies specifically to pledges or mortgages of copyrights in software, assuming of course that the specific law in question arises as a matter of law relating to intellectual property and is not simply the application of a State’s general law of pledges or mortgages to the intellectual property context.

(f) Licence

30. The *Guide* also uses the term “licence” as a general concept, while recognizing that, under law relating to intellectual property, a distinction may often be drawn: (a) between contractual licences (whether express or implied) and compulsory or statutory licences, in which a licence is not the result of an agreement; (b) between a licence agreement and the licence that is granted by the agreement (for example, the authorization to use or exploit the licensed intellectual property); and (c) between exclusive licences (which, under law relating to intellectual property in some States, may be treated as transfers) and non-exclusive licences. In addition, under the

Guide, a licence agreement does not in itself create a security right and a licence with a right to terminate the licence agreement is not a security right.

31. However, the exact meaning of these terms is left to law relating to intellectual property, as well as to contract and other law that may be applicable (such as the Joint Recommendation Concerning Trademark Licences, adopted by the Paris Union Assembly and the WIPO General Assembly (2000)¹¹ and the Singapore Treaty on the Law of Trademarks (2006)).¹² In particular, the *Guide* does not interfere with the limits or terms of a licence agreement that may refer to the description of the specific intellectual property, the authorized or restricted uses, geographic area of use, and the duration of use. For example, an exclusive licence to exercise the “theatrical rights” in Film A in Country X for “10 years starting 1 Jan. 2008” may be given and it will be different from an exclusive licence to exercise the “video rights” in Film A in Country Y for “10 years starting 1 Jan. 2008”.

32. In addition, the *Guide* does not affect in any way the particular characterization of rights under a licence agreement given by law relating to intellectual property. For example, the *Guide* does not affect the nature of rights created under an exclusive licence agreement as rights in rem or the nature of an exclusive licence as a transfer, as is the case under some laws relating to intellectual property. Moreover, the *Guide* does not affect any limitations included in the licence agreement as to the transferability of licensed rights.

(g) Receivable and assignment

33. The term “receivable” is used in the *Guide* and in the United Nations Convention on the Assignment of Receivables in International Trade (hereinafter referred to as the “United Nations Assignment Convention”)¹³ to reflect a right to payment of a monetary obligation and thus, for the purposes of the *Guide*, includes the right of a licensor (that may be an owner or not) or a licensee/sub-licensor to obtain payment of licence royalties (without affecting the terms and conditions of the licence agreement, such as an agreement between the licensor and the licensee that the licensee will not create a security right in its right to payment of sub-royalties). The exact meaning and scope of licence royalties are subject to the terms and conditions of the licence agreement relating to the payment of royalties, such as that payments are to be staggered or that there might be percentage payments depending on market conditions or sales figures (for a discussion of the term “secured creditor”, see paras. 35-37 below; for a discussion of the distinction between a secured creditor and an intellectual property owner, see A/CN.9/WG.VI/WP.39/Add.2, paras. 10-12).

34. The term “assignment” is used in the *Guide* with respect to receivables to denote not only outright assignments but also assignments for security purposes (treated under the *Guide* as secured transactions) and transactions creating a security right in a receivable. To avoid creating the impression that the recommendations of the *Guide* relating to assignments of receivables apply also to “assignments” of intellectual property, the term “transfer” (rather than the term “assignment”) is used in the Supplement to denote the transfer of the rights of an intellectual property

¹¹ www.wipo.int/export/sites/www/about-ip/en/development_iplaw/pdf/pub835.pdf.

¹² www.wipo.int/treaties/en/ip/singapore.

¹³ United Nations publication Sales No. E.04.V.14.

owner. While the *Guide* applies to all types of assignment of receivables, it does not apply to outright transfers of any right other than a receivable (see recommendations 2, subparagraph (d), and 3). It should also be noted that, while what is a “transfer” or a “licence” is left to the relevant property or contract law, the term “transfer” is not used in the *Guide* to denote a licence agreement.

(h) Owner

35. The *Guide* does not explain the term “owner” of an encumbered asset, whether that asset is intellectual property or not. This is a matter of the relevant property law. Accordingly, the *Guide* uses the term “intellectual property owner” referring to the understanding of this term under law relating to intellectual property, generally denoting the person that is entitled to enforce the exclusive rights flowing from intellectual property or its transferee, that is, the creator, author or inventor or their successor in title (as to whether a secured creditor may exercise the rights of an intellectual property owner, see para. 37).

(i) Secured creditor

36. The *Guide* recognizes that a security agreement creates a security right, that is, a limited property right, not an ownership right, in an encumbered asset, provided, of course, that the grantor has the right to create a security right in the asset. Thus, in the *Guide*, the term “secured creditor” (which includes a transferee by way of security) is not used to denote a transferee or an owner. In other words, a secured creditor that acquires a security right under the *Guide* is not presumed to acquire ownership thereby. This approach is mainly intended to protect the grantor/owner that retains ownership and often possession or control of the encumbered asset, while sufficiently securing the secured creditor if the grantor or other debtor defaults on the payment of the secured obligation. In any case, secured creditors normally do not wish to accept the responsibilities and costs of ownership, and the *Guide* does not require that the secured creditor do so. This means, for example, that, even after the creation of a security right, the owner of the encumbered asset may exercise all its rights as an owner (subject, of course, to any limitations it may have agreed to with the secured creditor). Accordingly, when the secured creditor disposes of the encumbered asset enforcing its security right after default, the secured creditor does not necessarily become an owner. In this case, the secured creditor merely exercises its security right. Only where, after default, the secured creditor becomes the owner after exercising the remedy of proposing to acquire the grantor’s ownership rights in the encumbered asset in total or partial satisfaction of the secured obligation (in the absence of any objection by the debtor and the debtor’s other creditors), or acquires the grantor’s ownership rights by purchasing the asset at a public sale in the context of an enforcement, will the secured creditor ever become an owner.

37. For the purposes of secured transactions law, this characterization of a security agreement and the rights of a secured creditor applies to situations where the encumbered asset is intellectual property. However, the *Guide* does not affect different characterizations under law relating to intellectual property law with respect to matters specific to intellectual property. Under law relating to intellectual property, a security agreement may be characterized as a transfer of the intellectual property rights of an owner and the secured creditor may have the rights of an

owner, a licensor or a licensee), such as the right to preserve the encumbered intellectual property and thus to deal with State authorities, grant licences or pursue infringers. So, for example, nothing in secured transactions law prevents a secured creditor from agreeing with the grantor/owner, licensor or licensee to become an owner, licensor or licensee of the encumbered intellectual property. If the agreement does or is intended to secure the performance of an obligation and intellectual property law permits a secured creditor to become an owner, licensor or licensee, the term “secured creditor” may denote an owner, licensor or licensee to the extent permitted under law relating to intellectual property. In such a case, secured transactions law will apply with respect to issues normally addressed in that law, such as the creation, third-party effectiveness, priority and enforcement of a security right (subject to the limitation of recommendation 4, subparagraph (b)); and law relating to intellectual property will apply with respect to issues that are normally addressed in that law, such as dealing with State authorities, granting licences or pursuing infringers.

(j) Security right

38. The *Guide* uses the term “security right” to refer to all types of property right in a movable asset that are created by agreement to secure payment or other performance of an obligation, irrespective of how they are denominated (see definition of the term “security right” in the Introduction to the *Guide*, para. 20 and recommendations 2, subparagraph (d), and 8). Thus, the term “security right” would cover the right of a pledgee or mortgagee of intellectual property, as well as of a transferee in a transfer for security purposes. States that adopt the recommendations of the *Guide* may wish to review their law relating to intellectual property and coordinate the terminology used in that law with the terminology used in the law recommended in the *Guide*.

(k) Transfer

39. While the *Guide* uses the term “outright transfer” to denote transfer of ownership (see chapter I of the *Guide* on scope, para. 25), the exact meaning of this term is a matter of property law. The *Guide* also uses the term “transfer for security purposes” to refer to a transaction that is in name only a transfer but functionally a secured transaction. In view of the functional, integrated and comprehensive approach it takes to secured transactions (see recommendations 2, subparagraph (d), and 8), for the purposes of secured transactions law, the *Guide* treats a transfer for security purposes as a secured transaction. To the extent that a different characterization of a transfer for security purposes in other law would apply to all assets, this is not an issue with respect to which the *Guide* would defer to law relating to intellectual property (see recommendation 4, subparagraph (b), and paras. 12-17 above). However, this approach does not affect a different characterization of a transfer other than an outright transfer for the purposes of law relating to intellectual property. For example, under intellectual property law, the expression “transfer other than an outright transfer” may denote a transfer of parts of exclusive rights from a licensor to a licensee where the licensor retains some rights.

D. Valuation of intellectual property to be encumbered

[Note to the Working Group: For paras. 40-52, see A/CN.9/WG.VI/WP.37, paras. 33-46, A/CN.9/670, paras. 21-26, A/CN.9/WG.V/WP.35, paras. 22-41, A/CN.9/667, paras. 23 and 24, A/CN.9/WG.VI/WP.33, paras. 8-21, and A/CN.9/649, para. 108.]

40. The valuation of assets to be encumbered is an issue that any prudent grantor and secured creditor have to address irrespective of the type of asset to be encumbered. However, valuation of intellectual property is harder at least to the extent it raises the issue whether intellectual property is an asset that may be exploited economically to generate income. For example, once a patent is created, the question arises whether it has any commercial application and, if so, what would be the amount of income that could be generated from the sales of any patented product.

41. Secured transactions law cannot answer this question. However, insofar as it affects the use of intellectual property as security for credit, some of the complexities involved in appraising the value of intellectual property need to be understood and addressed. For example, one issue is that, although the appraisal must take into account the value of the intellectual property itself and the expected cash flow, there are no universally accepted formulae for making this calculation. However, because of the increasing importance of intellectual property as security for credit, in some States, lenders and borrowers are often able to seek guidance from independent appraisers of intellectual property. In addition, parties in some States may be able to rely on valuation methodologies developed by national institutions, such as bank associations. Moreover, parties may be able to rely on training for valuation of intellectual property in general or for the purpose of licence agreements in particular provided by international organizations, such as WIPO. Parties may also be able to rely on standards for the valuation of intellectual property as assets that can be used as security for credit developed by other international organizations, such as the Organization for Economic Cooperation and Development.

E. Examples of financing practices relating to intellectual property

42. Secured transactions relating to intellectual property can usefully be divided into three broad categories. The first category consists of transactions in which the intellectual property rights themselves serve as security for the credit (that is, the rights of an owner, the rights of a licensor or the rights of a licensee). In these transactions, the provider of credit is granted a security right in patents, trademarks, copyrights or other intellectual property rights of the borrower. Examples 1 through 4 below each involve such a situation. In example 1, the encumbered assets are the rights of an owner. In examples 2 and 3, the encumbered assets are the rights of a licensor, and, in example 4, the encumbered assets are the rights of a licensee.

43. The second category of transactions involves situations in which assets other than intellectual property, such as inventory or equipment, serve as security for credit, but the value of these assets is based to some extent upon the intellectual

property with which they are associated. This category of transactions is illustrated by examples 5 and 6.

44. The third category of transaction involves financing transactions that combine the elements of the first two categories. An illustration of this type of transaction is found in Example 7, which involves a credit facility to a manufacturer, secured by a security right covering substantially all of the manufacturer's assets, including its intellectual property rights.

45. Each of the examples illustrates how owners, licensors and licensees of intellectual property, or owners of assets, the value of which depends significantly on associated intellectual property, can use these assets as security for credit. In each case, a prudent prospective lender will engage in due diligence to ascertain the nature and extent of the rights of the owners and licensees of the intellectual property involved, and to evaluate the extent to which the proposed financing would or would not interfere with such rights. The ability of a lender to address these issues in a satisfactory manner, obtaining consents and other agreements where necessary from the owners of the intellectual property, will affect the lender's willingness to extend the requested credit and the cost of such credit. Each of these categories of transaction involves not only different types (or combinations) of encumbered asset, but also presents different legal issues for a prospective lender or other credit provider.¹⁴

Example 1 (rights of an owner in a portfolio of patents and patent applications)

46. Company A, a pharmaceutical company that is constantly developing new drugs, wishes to obtain a revolving line of credit from Bank A secured in part by Company A's portfolio of existing and future drug patents and patent applications. Company A provides Bank A with a list of all of its existing patents and patent applications, as well as their chain of title. Bank A evaluates which patents and patent applications it will include in the "borrowing base" (that is, the pool of patents and patent applications to which Bank A will agree to attribute value for borrowing purposes), and at what value they will be included. In connection therewith, Bank A obtains an appraisal of the patents and patent applications from an independent appraiser of intellectual property. Bank A then obtains a security right in the portfolio of patents and patent applications and registers a notice of its security right in the appropriate national patent registry (assuming that the applicable law provides for registration of security rights in the patents registry). When Company A obtains a new patent, it provides its chain of title and valuation to Bank A for inclusion in the borrowing base. Bank A evaluates the information, determines how much additional credit it will extend based on the new patent, and adjusts the borrowing base. Bank A then makes appropriate registrations in the patent registry reflecting its security right in the new patent.

¹⁴ Some of these questions might be addressed in asset-specific intellectual property legislation. For example, article 19 of the Council Regulation (EC) No. 40/94 on the Community Trademark provides that a security right may be created in a community trademark and, on request of one of the parties, such a right may be registered in the community trademark registry.

Example 2 (rights of a licensor in royalties from the licence of visual art)

47. Company B, a publisher of comic books, licenses its copyrighted characters to a wide array of manufacturers of clothing, toys, interactive software and accessories. The licensor's standard form of licence agreement requires licensees to report sales, and pay royalties on such sales, on a quarterly basis. Company B wishes to borrow money from Bank B secured by the anticipated stream of royalty payments arising under these licence agreements. Company B provides Bank B with a list of the licences, the credit profile of the licensees, and the status of each licence agreement. Bank B then requires Company B to obtain an "estoppel certificate" from each licensee verifying the existence of the licence, the absence of default and the amount due, and confirming the licensee's agreement to pay future royalties to appropriate party (for example, Company B, Bank B or an escrow account) until further notice.

Example 3 (rights of a licensor in royalties from the licence of a motion picture)

48. Company C, a motion picture company, wishes to produce a motion picture. Company C sets up a separate company to undertake the production and hire the individual writers, producers, directors and actors. The production company obtains a loan from Bank C secured by the copyright, service contracts and all revenues to be earned from the exploitation of the motion picture in the future. The production company then enters into licence agreements with distributors in multiple countries who agree to pay "advance guarantees" against royalties upon completion and delivery of the picture. For each licence, the production Company C, Bank C and the distributor/licensee enter into an "acknowledgement and assignment" agreement under which the licensee acknowledges the prior security right of Bank C and the assignment of its royalty payments to Bank C, while Bank C agrees that, in case of enforcement of its security right in the licensor's rights, it will not terminate the licence so long as the licensee makes payments and otherwise abides by the terms of the licence agreement.

Example 4 (authorization of a licensee to use or exploit licensed software)

49. Company D is a developer of sophisticated software used in various architectural applications. In addition to certain software components created by the company's in-house software engineers (which the company licenses to its customers), Company D also incorporates into its products software components that it licenses from third parties (and then sub-licenses to its customers). Company D wishes to borrow money from Bank D secured by a security right in its rights as licensee of intellectual property from third parties, that is, its right to use and incorporate into its software some software components that it licenses from third parties. For evidence, the software developer can provide Bank D with a copy of its software components licence agreement.

Example 5 (rights of a manufacturer of trademarked inventory)

50. Company E, a manufacturer of designer jeans and other high-fashion clothing, wishes to borrow money from Bank E secured in part by Company E's inventory of finished products. Many of the items manufactured by Company E bear well-known trademarks licensed from third parties under licence agreements that give Company E the right to manufacture and sell the products. Company E provides

Bank E with its trademark licence agreements evidencing its right to use the trademarks and its obligations to the trademark owner. Bank E extends credit to Company E against the value of the inventory.

Example 6 (rights of a distributor of trademarked inventory)

51. 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 Company E evidencing that the jeans distributed by Company F are genuine. Bank F extends credit to Company F against the value of the inventory.

Example 7 (security right in all assets of an enterprise)

52. Company G, a manufacturer and distributor of cosmetics, wishes to obtain a €200 million credit facility to provide ongoing working capital for its business. Bank G is considering extending this facility, provided that the facility is secured by an "enterprise mortgage" granting to the bank a security right in substantially all of Company G's existing and future assets, including all existing and future intellectual property rights that it owns or licenses from third parties.

F. Key objectives and fundamental policies

[*Note to the Working Group: For paras. 53-59, see A/CN.9/WG.VI/WP.37, paras. 47-53, A/CN.9/670, para. 27, A/CN.9/WG.VI/WP.35, paras. 42-45, A/CN.9/667, paras. 25-28, A/CN.9/WG.VI/WP.33, paras. 61-75, and A/CN.9/649, paras. 88-97.*]

53. The overall objective of the *Guide* is to promote secured credit. In order to achieve this general objective, the *Guide* elaborates and discusses several additional objectives, including the objectives of predictability and transparency (see Introduction to the *Guide*, section D.2). The *Guide* also rests on and reflects several fundamental policies. These include providing for comprehensiveness in the scope of secured transactions laws, the integrated and functional approach to secured transactions (under which all transactions performing security functions, however denominated, are considered to be security devices) and the possibility of granting a security right in future assets (see Introduction to the *Guide*, section D.3).

54. These key objectives and fundamental policies are equally relevant to secured transactions relating to intellectual property. Accordingly, the overall objective of the *Guide* with respect to intellectual property is to promote secured credit for businesses that own or have the right to use intellectual property, by permitting them to use rights pertaining to intellectual property as encumbered assets, while not interfering with the legitimate rights of the owners, licensors and licensees of intellectual property under law relating to intellectual property, as well as under contract or general property law. Similarly, all the objectives and fundamental policies mentioned above apply to secured transactions in which the

encumbered asset is or includes intellectual property. For example, the *Guide* is designed to:

- (a) Allow persons with rights in intellectual property to use intellectual property as security for credit (see Key objective 1, subparagraph (a));
- (b) Allow persons with rights in intellectual property to use the full value of their assets to obtain credit (see Key objective 1, subparagraph (b));
- (c) Enable persons with rights in intellectual property to create a security right in such rights in a simple and efficient manner (see Key objective 1, subparagraph (c));
- (d) Allow parties to secured transactions relating to intellectual property maximum flexibility to negotiate the terms of their security agreement (see Key objective 1, subparagraph (i));
- (e) Enable interested parties to determine the existence of security rights in intellectual property in a clear and predictable way (see Key objective 1, subparagraph (f));
- (f) Enable secured creditors to determine the priority of their security rights in intellectual property in a clear and predictable way (see Key objective 1, subparagraph (g)); and
- (g) Facilitate efficient enforcement of security rights in intellectual property (see Key objective 1, subparagraph (h)).

55. A general policy objective of law relating to intellectual property law is to prevent unauthorized use of intellectual property or to protect the value of intellectual property and thus to encourage further innovation and creativity. To accomplish this general policy objective, law relating to intellectual property accords certain exclusive rights to intellectual property owners, licensors or licensees. To ensure that the key objectives of secured transactions law will be achieved in a way that does not interfere with the objectives of intellectual property law and thus provide mechanisms to fund the development and dissemination of new works, the *Guide* states a general principle for dealing with the interaction of secured transactions law and law relating to intellectual property. The principle is set out in recommendation 4, subparagraph (b) (see paras. 13-18 above and A/CN.9/WG.VI/WP.39/Add.1, section II, A.4).

56. At this stage, it is sufficient to note that the regime elaborated in the *Guide* does not, in itself, in any way define the content of any intellectual property right, describe the scope of the rights that an owner, licensor or licensee may exercise or impede their rights to preserve the value of their intellectual property rights by preventing their unauthorized use. Thus, the key objective of promoting secured credit with respect to intellectual property will be achieved in a way that does not interfere with the objectives of law relating to intellectual property to prevent unauthorized use of intellectual property or to protect the value of intellectual property and thus to encourage further innovation and creativity.

57. Similarly, this key objective of promoting secured credit without interfering with the objectives of law relating to intellectual property means that neither the existence of the secured credit regime nor the creation of a security right in intellectual property should diminish the value of intellectual property. Thus, for

example, the creation of a security right in intellectual property should not be misinterpreted as constituting an inadvertent abandonment of intellectual property (for example, failure to use a trademark properly, to use it on all products or services or to maintain adequate quality control may result in loss of value to, or even abandonment of, the intellectual property) by the owner or the secured creditor.

58. In addition, this key objective means, in the case of products or services associated with marks, that secured transactions law should avoid causing consumer confusion as to the source of products or services. For example, if a secured creditor replaces the manufacturer's name and address on the products with a sticker bearing its name and address or retains the trademark and sells the products in a jurisdiction where the trademark is owned by a different person, confusion as to the source of the products is bound to arise.

59. Finally, this key objective means that secured transactions law should not provide that a security right in the rights of a licensee that are non-transferable without the consent of the licensor may be created without the consent of the licensor.

A/CN.9/WG.VI/WP.39/Add.1 (Original: English)

**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security rights
in intellectual property, submitted to the Working Group on Security
Interests at its sixteenth session**

ADDENDUM

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II. Scope of application and party autonomy

[Note to the Working Group: For paras. 1-24, see A/CN.9/WG.VI/WP.37/Add.1, paras. 1-24, A/CN.9/670, paras. 28-34, A/CN.9/WG.VI/WP.35, paras. 46-67, A/CN.9/667, paras. 29-31, A/CN.9/WG.VI/WP.33, paras. 82-108, and A/CN.9/649, paras. 81-87.]

A. Broad scope of application

1. The *Guide* applies to security rights in all types of movable asset, including intellectual property (for the meaning of the term “intellectual property”, see A/CN.9/WG.VI/WP.39, paras. 24-26). A security right covered in the *Guide* may be created or acquired by a legal or natural person, or secure any type of obligation (see recommendation 2). The *Guide* applies to all transactions serving security purposes, regardless of the form of the transaction or the terminology used by the parties (see recommendations 2, subparagraph (d), and 8). The Supplement has an equally broad scope with respect to security rights in intellectual property.

1. Encumbered assets covered

2. The question of characterization of types of intellectual property and the question of whether each type of intellectual property is transferable and may thus be encumbered are matters of law relating to intellectual property. However, the *Guide* and the Supplement are based on the general assumption that a security right may be created in any type of intellectual property, such as a patent, a trademark or a copyright. The *Guide* and the Supplement are also based on the assumption that the encumbered asset may be any of the various exclusive rights of an owner, the rights of a licensor, the rights of a licensee or the rights in intellectual property used with respect to a tangible asset.

3. However, there is an important limitation to the scope of the *Guide* and the Supplement as just set out. In line with general rules of property law, the right to be encumbered has to be transferable under general property law and law relating to intellectual property. For example, typically, under law relating to intellectual property, only the economic rights under a copyright may be transferred (and thus encumbered), but not the moral rights of an author. The *Guide* does not affect such limitations. More specifically, the law recommended in the *Guide* does not override provisions of any other law (including law relating to intellectual property) to the extent that they limit the creation or enforcement of a security right in or the transferability of specific types of asset, including intellectual property (see recommendation 18). The only exception to this rule relates to statutory limitations to the assignability of future receivables and receivables assigned in bulk (see recommendation 23).

2. Transactions covered

4. As mentioned, the *Guide* applies to all transactions serving security purposes, regardless of how they are denominated by the parties or by law relating to intellectual property. In other words, even if law relating to intellectual property characterizes a transfer of intellectual property to a creditor for security purposes as a conditional transfer or even as an “outright” transfer, the *Guide* treats this transaction as giving rise to a security right and thus applies to it as long as it serves security purposes.

3. Outright transfers of intellectual property

5. To some extent, the *Guide* applies to an outright transfer (that is, a transfer of ownership) of a receivable (see recommendation 3). As the *Guide* treats royalties payable by the licensee of intellectual property to its licensor as receivables of the licensor, it applies, to some extent, to the outright transfer of the right to the payment of royalties (without affecting the terms and conditions of the licence agreement, such as an agreement between the licensor and the licensee that the licensee will not create a security right in its right to payment of sub-royalties). The inclusion of outright transfers of receivables in the scope of the *Guide* reflects the fact that such transfers are usually seen as financing transactions and are often difficult in practice to distinguish from loans against the receivables. However, simply because the *Guide* generally applies to outright transfers of receivables, this does not mean that the *Guide* re-characterizes an outright transfer of a receivable as a secured transaction as this could negatively affect important receivables financing practices, such as factoring (for outright transfers of receivables, see chapter I of the *Guide* on scope, paras. 25-31; for an example of a factoring transaction, see Introduction to the *Guide*, paras. 31-34).

6. The *Guide* also applies to transfers of all movable assets for security purposes, which it treats as security devices (see recommendations 2, subparagraph (d), and 8). Thus, if a State enacts the recommendations of the *Guide*, a transfer of intellectual property (whether of full title or rights limited in scope, time or territory) for security purposes would be treated as a secured transaction. This approach of the *Guide* is based on the principle that, in determining whether a transactions is a secured transaction or not, substance prevails over form. Accordingly, parties will be able to simply create a security right in intellectual

property using the methods provided in the law recommended in the *Guide* without the need to adopt other formalities of a “transfer” for purposes of secured transactions law. This result will not affect licence practices as, under the *Guide*, a licence agreement does not in itself create a security right and a licence with the right to terminate the licence agreement is not a security right (see A/CN.9/WG.VI/WP.39, para. 30).

7. However, the *Guide* does not apply to outright transfers of any movable asset other than receivables, including intellectual property (the term assignment is used in the *Guide* only with respect to receivables to avoid that the recommendations that apply to the assignment of receivables apply to security rights in intellectual property; see Introduction to the *Guide*, footnote 24). The *Guide* may, however, affect the rights of an outright transferee of an encumbered asset to the extent that there is a priority conflict between the rights of that transferee and a secured creditor with a security right in the asset. The reason for the exclusion of outright transfers of any movable asset other than receivables, including intellectual property, is that they are sufficiently covered by other law, including law relating to intellectual property.

4. Limitations on scope

8. The *Guide* assumes that, in order to facilitate access to financing based on intellectual property, States enacting the recommendations of the *Guide* will include rules on security rights in intellectual property in their modern secured transactions regime. Accordingly, States enacting the recommendations of the *Guide* may wish to review their laws relating to intellectual property with a view to replacing all devices by way of which a security right in intellectual property may be created (including pledges, mortgages and conditional transfers) with the general concept of a security right. However, the *Guide* also recognizes that this must be done in a manner that is consistent with the policies and infrastructure of law relating to intellectual property of each enacting State.

9. The potential points of intersection between secured transactions law and law relating to intellectual property are dealt with in detail in the introduction (see A/CN.9/WG.VI/WP.39, Introduction, section B) and in various chapters of this Supplement. To provide a context for this more detailed discussion of the implications of recommendation 4, subparagraph (b), it is helpful at this point to delineate: (a) issues that are clearly the province of law relating to intellectual property and are not intended to be affected in any way by the *Guide*; and (b) issues on which the rules set out in the *Guide* may be pre-empted or supplemented by a rule of the law relating to intellectual property that regulates the same issue in a different manner from the *Guide*.

(a) Distinction between intellectual property rights and security rights in intellectual property rights

10. The *Guide* addresses only legal issues unique to secured transactions law as opposed to issues relating to the nature and legal attributes of the asset that is the object of the security right. The latter are the exclusive province of the body of property law that applies to the particular asset (with the partial unique exception of receivables to the extent that outright transfers of receivables are also covered in the *Guide*).

11. In the context of intellectual property financing, it follows that the *Guide* does not affect and does not purport to affect issues relating to the existence, validity, enforceability and content of a grantor's intellectual property rights. These issues are determined solely by law relating to intellectual property. Of course, the secured creditor will need to pay attention to those rules in order to assess the existence and quality of the assets to be encumbered, but this would be the case with any type of encumbered asset (for example, whether a right to payment of funds credited to a bank account exists, its exact content and enforceability are matters for law other than secured transactions law). What follows is an indicative, non-exhaustive list of issues that may be addressed by law relating to intellectual property relevant to that assessment. Law relating to intellectual property may deal with issues not included in the following list.

Copyright:

- (a) The determination of who is the author or joint author;
- (b) The duration of copyright protection;
- (c) The economic rights granted under the law and limitations on and exceptions to protection;
- (d) The nature of the protected subject matter (expression embodied in the work, as opposed to the idea behind it, and the dividing line between these);
- (e) The transferability of economic rights as a matter of law and the right to grant a licence;
- (f) The possibility to terminate a transfer or licence of copyright, or otherwise regulate a transfer or licence;
- (g) The scope and non-transferability of moral rights;
- (h) Presumptions relating to the exercise and transfer of rights and limitations relating to who may exercise rights;
- (i) Attribution of original ownership in the case of commissioned works and works created by an employee within the scope of employment.

Neighbouring (allied or related) rights:

- (a) The meaning and extent of neighbouring rights, including whether a State may recognize certain neighbouring rights within copyright or other law;
- (b) The persons entitled to claim neighbouring rights;
- (c) The type of protected expression;
- (d) The relationship between holders of neighbouring rights and holders of copyright;
- (e) The extent of exclusive rights or rights of equitable remuneration with respect to neighbouring rights;
- (f) Any connecting factors or formalities for protection, such as fixation, publication, or notice;
- (g) Any limitations and exceptions to protection for neighbouring rights;

- (h) The duration of protection for neighbouring rights;
- (i) The transferability of any neighbouring rights as a matter of law and the right to grant licences;
- (j) The possibility to terminate a transfer or licence of neighbouring rights, or otherwise regulate a transfer or licence;
- (k) The scope, duration and non-transferability of any related moral rights.

Patents:

- (a) The determination of who is the patent owner or co-owner;
- (b) The validity of a patent;
- (c) The limitations on and exceptions to protection;
- (d) Scope and duration of protection;
- (e) The grounds for invalidity challenges (obviousness or lack of novelty);
- (f) Whether certain prior publication is excluded from prior art and thus may not preclude patentability;
- (g) Whether protection is granted to a person who first invented the patent or to a person who first filed an application.

Trademarks and service marks:

- (a) The determination of who is the first user or the owner of the mark;
- (b) Whether protection of the mark is granted to a person that uses the mark first or to a person that files an application first and whether protection is granted to a subsequently registered mark if it conflicts with a previously registered mark;
- (c) Whether ex ante use is a prerequisite to registration in a mark registry or whether the right is secured by initial registration and maintained by later use;
- (d) The basis of protection of the right (distinctiveness);
- (e) The basis for losing protection (holder's failure to ensure that mark retains its association with the owner's products in the marketplace), as in the case of:
 - (i) Licensing without the licensor directly or indirectly controlling the quality or character of the products or services associated with the mark (so called "naked licensing"); and
 - (ii) Altering the mark so its appearance does not match the mark as registered;
- (f) Whether the mark may be transferred with or without goodwill.

(b) Areas of potential overlap between secured transactions law and law relating to intellectual property

12. The issues just addressed do not create any necessity for deference to law relating to intellectual property, since the *Guide* does not purport to address these

issues. In other words, they are not issues where the principle of recommendation 4, subparagraph (b), has any application. The deference issue arises when the law relating to intellectual property of the enacting State provides an intellectual-property-specific rule on an issue falling within the scope of the *Guide*, namely, an issue relating to the creation, third-party effectiveness, priority, enforcement of or law applicable to a security right in intellectual property (see A/CN.9/WG.VI/WP.39, Introduction, Section B).

13. The precise scope and implications of deference to law relating to intellectual property cannot be stated in the abstract since there is great variation among States on the extent to which intellectual-property-specific rules have been established, and indeed even within the same State depending on which category of intellectual property is at issue. In addition, the harmonization and modernization of the secured financing law achieved through the *Guide* has its limitations, since the *Guide* addresses issues of secured transactions law only and, under certain conditions defers to law relating to intellectual property (see recommendation 4, subparagraph (b)). Another fact that limits the impact of the *Guide* is that law relating to intellectual property in the various States does not address all secured transactions law issues in a comprehensive or coordinated way. For this reason, optimal results can only be obtained if the harmonization and modernization of secured transactions law achieved through the *Guide* is accompanied by a review of intellectual property financing law to ensure compatibility and coordination with the secured transactions law recommended in the *Guide*. The following examples illustrate some typically encountered patterns.

Example 1

14. In some States, in which security rights are created by a transfer of title to the encumbered asset, a security right may not be created in a trademark. The reason is a concern that the secured creditor's title would impair the quality control required of the trademark holder. Adoption of the recommendations of the *Guide* by such a State would make transfers of title unnecessary to create a security right in a trademark and eliminate the rationale for this prohibition, since the grantor retains ownership of the encumbered trademark under the *Guide*'s concept of security right. Whether the secured creditor may become the owner, licensor or licensee of rights in the trademark for the purposes of law relating to intellectual property is a different matter (under secured transactions law, a secured creditor does not become the owner, licensor or licensee). Nonetheless, adoption of the recommendations of the *Guide* would not automatically eliminate the prohibition, because, to the extent it is inconsistent with law relating to intellectual property, the *Guide* defers to that law. As a result, a specific amendment to the relevant law relating to intellectual property would be needed to harmonize it with the law recommended in the *Guide*.

Example 2

15. In some States, only transfers of intellectual property (whether outright or for security purposes) may be registered in a specialized intellectual property registry and such registration is mandatory for the effectiveness of a transfer. In other States, a security right in intellectual property may also be registered and such registration has constitutive or third-party effects. In view of the principle of deference to law relating to intellectual property embodied in recommendation 4, subparagraph (b),

adoption of the *Guide*'s recommendations would not affect the operation of such a rule and such specialized registration will continue to be required. However, deference to law relating to intellectual property will not always be sufficient to address the issue of coordination between the general security rights registry and intellectual property registries (see A/CN.9/WG.VI/WP.39/Add.3, paras. 15-20) or the question whether a security right may be created in and a notice may refer to a future intellectual property right (see A/CN.9/WG.VI/WP.39/Add.2, paras. 37-41, and A/CN.9/WG.VI/WP.39/Add.3, paras. 21-23).

Example 3

16. In some States, law relating to intellectual property provides for registration of both outright transfers and security rights in various intellectual property registries, but registration is not a mandatory precondition to effectiveness. However, registration has priority consequences in that rights arising from an unregistered transaction can be subject to rights arising from a registered transaction. In the case of such a State, recommendation 4, subparagraph (b), would preserve that rule of law relating to intellectual property of the State and, accordingly, a secured creditor desiring optimal protection may need to register both a notice of its security right in the general security rights registry and the security agreement or a notice thereof in the relevant intellectual property registry (although, if the intellectual property registry permits registration of security rights, registration there would be sufficient for all purposes). This is because: (a) registration in that State's general security rights registry is a necessary prerequisite to third-party effectiveness under secured transactions law (unless law relating to intellectual property allows registration of a security right in the relevant intellectual property registry to achieve third-party effectiveness); and (b) registration in the intellectual property registry will be necessary to protect the secured creditor against the risk of finding its security right affected by the rights of a competing transferee or secured creditor registered in the intellectual property registry pursuant to the priority rules of law relating to intellectual property.

17. In some States, registration of transfers and security rights in the relevant intellectual property registry provides protection only against a prior unregistered transfer or security right and only if the person with the registered right took without notice of the prior unregistered right (the *Guide* would defer to this rule as it is a rule of law relating to intellectual property rather than a general rule of secured transactions law present throughout the State's legal system; see recommendation 4, subparagraph (b)). In those States, adoption of the *Guide*'s recommendation will raise the further question as to whether registration of a notice of a security right in intellectual property in the general security rights registry constitutes constructive notice to a subsequent transferee or secured creditor that registers its transfer or security right in the intellectual property registry. If so, under the law of such a State, it would be unnecessary for a secured creditor that has registered a notice of its security right in the general security rights registry to also register a document or notice thereof in the intellectual property registry in order to prevail as against subsequent transferees and secured creditors. Otherwise, under the law of that State, registration of a document or notice of the security right in the intellectual property registry may be required to gain priority over subsequent transferees and secured creditors.

Example 4

18. As a matter of law relating to intellectual property, some States provide for registration in the relevant intellectual property registry of a document or notice of a transfer of, but not of a security right in, intellectual property. In such situations, registration has priority consequences only as between transferees, and not as between a transferee and a secured creditor. In States that adopt this approach, a secured creditor will need to ensure that a document or notice of all transfers of intellectual property to its grantor is duly registered in the intellectual property registry so as to avoid the risk of the grantor's title being defeated by the subsequently registered rights of a transferee. In all other respects, however, the secured creditor's rights will be determined by the secured transactions regime. Likewise, the secured creditor will need to ensure that a document or notice of a transfer for security purposes made to it by the grantor is duly registered in the intellectual property registry in order to avoid the risk that the rights of a subsequent transferee of the grantor will defeat the rights arising from the security transfer in favour of the secured creditor.

Example 5

19. As a matter of law relating to intellectual property, in some States, registration of a document or notice of a transfer and a security right in an intellectual property registry is purely permissive and intended only to facilitate identification of the current owner. Failure to register neither invalidates the transaction nor affects its priority (although it might create evidentiary presumptions). In States that adopt this approach, the position is essentially the same as when no specialized registry exists at all, as is often the case for copyright. Where these issues are dealt with by law relating to intellectual property, the *Guide* defers to it. Where, however, these issues are left to be determined by general property law, no issue of deference arises since the pre-*Guide* rules were not derived from the law relating to intellectual property but rather from property law generally. Thus, adoption of the *Guide* will replace the existing rules on creation, third-party effectiveness, priority and so forth for security rights in intellectual property. Of course, the old rules on these issues will continue to apply to outright transfers of intellectual property since the *Guide* only covers security rights in intellectual property. Consequently, the secured creditor will need to verify whether a purported transfer is actually an outright transfer or a disguised secured transaction (that is, a transaction which, although not called a secured transaction by the parties, serves security purposes). However, this type of risk management is no different from that necessary for any other type of encumbered asset for which a specialized registry does not exist.

Example 6

20. The question of who is the intellectual property owner in a chain of transferees of intellectual property is a matter of law relating to intellectual property. At the same time, the question of whether a transfer is an outright transfer or a transfer for security purposes is a matter of general property and secured transactions law. Finally, the rights and obligations flowing from a licence agreement is a matter of law relating to intellectual property and contract law.

Example 7

21. If law relating to intellectual property has specialized rules governing specifically the enforcement of a security right in intellectual property, these rules will prevail over the enforcement regime of the *Guide*. However, if there is no specific rule of law relating to intellectual property on the matter and the enforcement of security rights in intellectual property is a matter left to general civil procedure law, the enforcement regime for security rights elaborated in the *Guide* would take precedence. Similarly, if there is no specific rule of law relating to intellectual property on extrajudicial enforcement, the relevant regime of the *Guide* on extrajudicial enforcement of security rights would apply (see A/CN.9/WG.VI/WP.39/Add.6, chapter IX on enforcement).

B. Application of the principle of party autonomy to security rights in intellectual property

22. The *Guide* generally recognizes the principle of party autonomy, although it does elaborate a number of exceptions (see recommendations 10 and 111-113). This principle applies equally to security rights in intellectual property to the extent that law relating to intellectual property does not limit party autonomy (see A/CN.9/WG.VI/WP.39/Add.6, para. 1). It should be noted that recommendations 111-113 apply only to tangible assets, as they refer to the possession of encumbered assets and intangible assets are by definition not subject to possession.

23. An example of the application of the principle of party autonomy in secured transactions relating to intellectual property would be the following: if not prohibited by law relating to intellectual property, under secured transactions law, a grantor and a secured creditor may agree that the secured creditor may acquire certain rights of an owner, licensor or licensee and thus become an owner, licensor or licensee entitled to deal with public authorities (for example, to register or renew registrations), as well as to sue infringers, make further transfers or grant licences. This agreement could take the form of a special clause in the security agreement or a separate agreement between the grantor and the secured creditor, since, under the *Guide*, a secured creditor does not, by the mere fact of obtaining a security right, become an owner, licensor or licensee.

24. Another example of the application of the principle of party autonomy would be the following: if not prohibited by law relating to intellectual property, under secured transactions law, a grantor and a secured creditor may agree that damages for infringement, as well as for lost profits and devaluation of the encumbered intellectual property, are included in the original encumbered assets. In the absence of such an agreement, such damages may still be treated as proceeds under the *Guide*, provided that that treatment is not inconsistent with law relating to intellectual property (see recommendation 4, subparagraph (b)). However, the right to pursue infringement claims (as opposed to the right to the payment of damages for infringement) is a different matter. Typically, this right cannot be used a security for credit and it would not constitute proceeds as it would not fall under the words “whatever is received in respect of encumbered assets” in the definition of proceeds (see Introduction to the *Guide*, para. 20).

A/CN.9/WG.VI/WP.39/Add.2 (Original: English)

**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security rights
in intellectual property, submitted to the Working Group on Security
Interests at its sixteenth session**

ADDENDUM

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III. Creation of a security right in intellectual property

[Note to the Working Group: For paras. 1-43, see A/CN.9/WG.VI/WP.37/Add.1, paras. 25-64, A/CN.9/670, paras. 35-55, A/CN.9/WG.VI/WP.35, paras. 68-102, A/CN.9/667, paras. 32-54, A/CN.9/WG.VI/WP.33, paras. 112-133, and A/CN.9/649, paras. 16-28.]

A. The concepts of creation and third-party effectiveness

1. With respect to all types of encumbered asset (including intellectual property), the *Guide* draws a distinction between the creation of a security right (its effectiveness as between the parties) and its effectiveness against third parties, providing different requirements to achieve each of these outcomes. In effect, this means that the requirements for the creation of a security right can be kept to a minimum, while any additional requirements are aimed at addressing the rights of third parties. The main reason for this distinction is to achieve three of the key objectives of the law recommended in the *Guide*, namely, establishing a security right in a simple and efficient way, enhancing certainty and transparency, and establishing clear priority rules (see recommendation 1, subparagraphs (c), (f) and (g)).

2. Under the *Guide*, a security right may be created by an agreement between the grantor and the secured creditor (see recommendation 13 and paras. 5-8 below). For the security right to be effective against third parties, an additional step is required. For intangible assets this step is notice to third parties of the possible existence of the security right, which establishes an objective criterion for determining priority between a secured creditor and a competing claimant (see recommendation 29; for the term “competing claimant”, see A/CN.9/WG.VI/WP.39, paras. 19 and 20). Accordingly, if a security right has been created in accordance with the requirements set out in the *Guide*, the security right is effective between the grantor and the secured creditor even if the additional steps necessary to make the security right effective against third parties have not been taken (see recommendation 30). As a result, the secured creditor may enforce the security right in accordance with the procedures set out in chapter IX of the *Guide*, subject to the rights of competing claimants in accordance with the priority rules set out in chapter V.

3. This distinction between creation and effectiveness against third parties applies equally to security rights in intellectual property. Thus, under the *Guide* a security right in intellectual property can be effective between the grantor and the secured creditor even if it is not effective against third parties. In some States, law relating to intellectual property draws such a distinction. In other States, however, such a distinction is not drawn in law relating to intellectual property, which provides that the same actions are required for both the creation of a security right and its effectiveness against third parties. In such a case, as required by recommendation 4, subparagraph (b), the *Guide* defers to that law. To ensure better coordination between secured transactions law and law relating to intellectual property, States enacting the recommendations of the *Guide* may wish to consider reviewing their law relating to intellectual property. Such a review should make it possible for States to determine whether: (a) the fact that law relating to intellectual property does not draw a distinction between creation and third-party effectiveness of a security right in intellectual property serves specific policy objectives of law relating to intellectual property (rather than other law, such as general property law, contract law or secured transactions law) and should be retained; or (b) the distinction should be introduced in law relating to intellectual property so as to harmonize it with the relevant approach of the law recommended in the *Guide*.

B. Functional, integrated and unitary concept of a security right

4. To the extent law relating to intellectual property permits the creation of a security right in intellectual property, it may do so by referring to outright or conditional transfers of intellectual property, mortgages, pledges, trusts or similar terms. The *Guide* uses the term “security right” to refer to all transactions that serve security purposes. This is referred to as the “functional, integrated and unitary approach” to secured transactions (see chapter I of the *Guide* on the scope of application, paras. 110-112, and recommendation 8). Although the *Guide* contemplates, by exception, that States may adopt a non-unitary approach in the limited context of acquisition financing and may retain transactions denominated as retention of title or financial lease, this exception only applies to tangible assets (see chapter IX of the *Guide* on acquisition financing), and would, consequently, not be relevant in an intellectual property context (see,

however, A/CN.9/WG.VI/WP.39/Add.5, para. 19, note to the Working Group). Thus, States enacting the recommendations of the *Guide* may wish to review their law relating to intellectual property with a view to: (a) replacing all terms used to refer to the right of a secured creditor with the term “security right”; or (b) providing that, whatever the term used, rights performing security functions are treated in the same way and that such a way is not inconsistent with the treatment of security rights in the *Guide*.

C. Requirements for the creation of a security right in intellectual property

5. Under the *Guide*, the creation of a security right in an intangible asset requires a written document, which by itself or in conjunction with the course of conduct between the parties evidences the agreement of the parties to create a security right. In addition, the grantor must have rights in the asset to be encumbered or the power to encumber it either at the time of the conclusion of the security agreement or thereafter. The agreement must reflect the intent of the parties to create a security right, identify the secured creditor and the grantor, and describe the secured obligation and the encumbered assets in a manner that reasonably allows their identification (see recommendations 13-15). As already mentioned, no additional step is required for the creation of a security right in an intangible asset. The additional steps (for example, registration of a notice in a general security rights registry) required for third-party effectiveness of that security right are not required for the security right to be created effectively as between the grantor and the secured creditor.

6. However, law relating to intellectual property in many States imposes different requirements for the creation of a security right in intellectual property. For example, registration of a document or notice of a security right in intellectual property (for example, a transfer for security purposes, a mortgage or pledge of intellectual property) in the relevant intellectual property registry may be required for the creation of the security right. In addition, under law relating to intellectual property, the intellectual property to be encumbered may need to be described specifically in a security agreement. Similarly, as some intellectual property registries index registered transactions by the specific intellectual property to which they relate, and not the grantor’s name or other identifier, registration of a document that merely states “all intellectual property of the grantor” would not be sufficient to create a security right. It would instead be necessary to identify each intellectual property right in the security agreement or in any other document to be registered in the intellectual property registry for the purposes of creating the security right.

7. Specific identification of the encumbered intellectual property right will, in particular, be necessary for copyright. This is so because, in some States, copyright is conceptualized as comprising a bundle of rights and, unless the parties intended to encumber all those rights, they would need to describe the assets to be encumbered specifically in the security agreement. In such a case, law relating to copyright requires a specific description for certainty as to assets that are subject to a security right. Under such an approach, the copyright owner may use non-encumbered rights to obtain credit from another credit provider. It should also be noted, however, that the divisibility of intellectual property rights always allows parties to divide them

and encumber them separately, if they wish. Thus, if the parties wish to describe the encumbered intellectual property rights in a specific way, they are always entitled to do so and will probably do so in most cases; but this should not deprive the parties of the right to describe the encumbered intellectual property rights in a general way. In any case, the standard reflected in recommendation 14, subparagraph (d), is sufficiently flexible to accommodate all different situations in that it refers to a description of the encumbered assets “in a manner that reasonably allows their identification”. Thus, this standard could vary depending on what is a reasonable description under the relevant law and practice.

8. Furthermore, in all these situations, under the principle embodied in recommendation 4, subparagraph (b), the law recommended in the *Guide* would apply only insofar as it is not inconsistent with law relating to intellectual property. Of course, States enacting the *Guide* may wish to consider reviewing their laws relating to intellectual property to determine whether the different concepts and requirements with respect to the creation of security rights in intellectual property serve specific policy objectives of law relating to intellectual property and should be retained or whether they should be harmonized with the relevant concepts and requirements of the law recommended in the *Guide*.

D. Rights of a grantor with respect to the intellectual property to be encumbered

9. As already mentioned a grantor of a security right must have rights in the asset to be encumbered or the power to encumber it at the time of the security agreement or at a later time (see recommendation 13). This is a principle of secured transactions law that applies equally to intellectual property. A grantor may encumber its full rights or only limited rights. So, an intellectual property owner, licensor or licensee may encumber its full rights or rights limited in time, scope or territory. In addition, as a matter of general property law, a grantor may encumber its assets only to the extent that the assets are transferable under general property law (the *Guide* does not affect such limitations; see recommendation 18 and paras. 42 and 43 below). This principle also applies to secured transactions relating to intellectual property. So, an owner, licensor or licensee may only encumber its rights to the extent these rights are transferable under law relating to intellectual property.

E. Distinction between a secured creditor and an owner with respect to intellectual property

10. For the purposes of secured transactions law under the *Guide*, the secured creditor does not become an owner, licensor or licensee (depending on the rights of the grantor) on the sole ground that it acquired a security right in intellectual property (this may be the case though under law relating to intellectual property; see A/CN.9/WG.VI/WP.39, Introduction to the Supplement, section C, terms “owner” and “secured creditor”).

11. However, the exercise of the secured creditor’s rights upon default of the grantor will often result in the grantor’s encumbered intellectual property rights

being transferred and, thus, the identity of the owner, licensor or licensee (depending on the rights of the grantor), as determined by law relating to intellectual property, might change. This may happen in situations in which the enforcement of the security right in the intellectual property results in acquisition of the encumbered intellectual property by the secured creditor in a disposition (see recommendations 141 and 148) or in an acquisition of the encumbered intellectual property by the secured creditor in satisfaction of the secured obligation (see recommendations 156 and 157).

12. In any case, the question of who is the owner, licensor or licensee with respect to intellectual property and whether the parties may determine it for themselves is a matter of law relating to intellectual property. Under law relating to intellectual property, a secured creditor may be treated as an owner, licensor or licensee. Should intellectual property law so permit, the secured creditor could, for example, renew registrations or pursue infringers or agree with the owner, licensor or licensee that the secured creditor will become the owner, licensor or licensee.

F. Types of encumbered asset in an intellectual property context

13. Under the *Guide*, a security right may be created not only in the rights of an intellectual property owner but also in the rights of a licensor or licensee under a licence agreement (see A/CN.9/WG.VI/WP.39, Introduction to the Supplement, section C, term “encumbered asset”, and A/CN.9/WG.VI/WP.39/Add.1, paras. 2 and 3). In addition, a security right may be created in a tangible asset with respect to which intellectual property is used (for example, designer watches or clothes bearing a trademark). As already mentioned, the intellectual property to be encumbered needs to be described in the security agreement in a manner that reasonably allows its identification (see recommendation 14, subparagraph (d), and paras. 5-8 above).

14. It should be noted that the *Guide* does not override any provisions of law relating to intellectual property (or other law) that limit the creation or enforcement of a security right or the transferability of an intellectual property (or other) asset (see recommendation 18). The only exception in the *Guide* refers to legal limitations to the assignability of future receivables or of receivables assigned in bulk or in part on the sole ground that they are future receivables or are assigned in bulk or in part (see recommendation 23). Similarly, the *Guide* does not affect contractual limitations to the transferability of intellectual property rights. Under certain conditions, it does affect, however, contractual limitations to the assignability of receivables (see paras. 22-28 below and recommendation 24). As a result, if, under law relating to intellectual property, a security right may not be created or enforced in an intellectual property right or if that intellectual property right is non-transferable, the law recommended in the *Guide* will not interfere with these limitations.

1. Rights of an owner

15. The *Guide* applies to secured transactions in which the encumbered assets are the rights of an owner. Typically the essence of the rights of an owner is the right to enjoy its intellectual property, the right to prevent unauthorized use of its

intellectual property and to sue infringers, the right to register intellectual property, the right to authorize others to use or exploit the intellectual property and the right to collect royalties.

16. If, under law relating to intellectual property, a security right may be created and enforced in these rights or these rights are transferable, the owner may encumber all or some of them with a security right under the law recommended in the *Guide* and that law will apply to such a security right subject to recommendation 4, subparagraph (b). In such a case, all these rights would constitute the original encumbered assets (any royalties would be proceeds of the owner's rights, unless of course included in the description of the encumbered assets in the security agreement). If these rights may not be encumbered or transferred under law relating to intellectual property, they may not be encumbered by a security right under the law recommended in the *Guide*, since, as already mentioned, the *Guide* does not affect legal provisions that limit the creation or enforcement of a security right, or the transferability of assets, with the exceptions of provisions relating to the assignability of future receivables and receivables assigned in bulk (see recommendation 18).

17. Whether the right of an owner to preserve its intellectual property and thus, for example, to pursue infringers and obtain an injunction and compensation, is a movable asset that may be transferred separately from the other rights of the owner is a matter for law relating to intellectual property. Typically, under law relating to intellectual property, the right to pursue infringers is part of the owner's rights and cannot be transferred separately from the owner's rights. However, the benefits from the exercise of this right to pursue infringers (such as damages arising from an infringement once collected) may be a movable asset that may be transferred or encumbered separately from the owner's rights.

18. If, under law relating to intellectual property, the owner's right to pursue infringers is a transferable movable asset, whether a security right may be created in that right is a matter of secured transactions law, which would apply only if law related to intellectual property does not address that matter in a different way (see recommendation 4, subparagraph (b)). Thus, unless not permitted by law relating to intellectual property, the owner/grantor and the secured creditor may agree that the right of the owner to pursue infringers and obtain an injunction and compensation would be part of the original encumbered intellectual property.

19. For example, if, after the creation of a security right in the rights of an intellectual property owner, an infringement has been committed, the owner has sued infringers and infringers have paid compensation to the owner (for an infringement that occurred before or after the creation of the security right), the secured creditor may claim the compensation paid as proceeds of the original encumbered intellectual property. If the compensation has not been paid at the time of creation of the security right, but is paid later after default of the owner/grantor, the secured creditor could again claim the compensation paid as proceeds of the original encumbered intellectual property. To the contrary, the right to pursue infringers and obtain an injunction and compensation would normally not constitute proceeds of the original encumbered intellectual property, unless permitted under law relating to intellectual property and certain conditions are met (see Introduction to the *Guide*, section B, "proceeds"). However, if the owner/grantor has filed a suit against an infringer and the lawsuit is still pending at the time of creation of the

security right, a person that bought the encumbered intellectual property in a sale in the context of enforcement of a security right should be able to take over the lawsuit and obtain any compensation granted (again, if permitted under law relating to intellectual property).

20. Similar considerations apply to the question of whether the right to deal with authorities in the various stages of the registration process (for example, the right to file an application for or register intellectual property, or the right to renew a registration) or the right to grant licences may be encumbered or transferred, and thus be part of the encumbered intellectual property. Whether the right to deal with authorities or to grant licences may be encumbered or is an inalienable right of the owner is a matter of law relating to intellectual property. Whether it is part of the encumbered rights of the owner is a matter of the description of the encumbered asset in the security agreement (for a discussion of whether the secured creditor may preserve the encumbered assets by pursuing infringers or dealing with authorities before default of the owner/grantor, see A/CN.9/WG.VI/WP.39/Add.6, paras. 2-5).

2. Rights of a licensor

21. Under the *Guide*, a security right may be created in a licensor's rights under a licence agreement. If a licensor is an owner, it can create a security right in (all or part of) its rights as mentioned above (see paras. 15-20 above). If a licensor is not an owner but a licensee that grants a sub-licence, typically, it may create a security right in its right to the payment of royalties owed under the sub-licence agreement. In such a case where the grantor creating a security right in sub-royalties is a licensor but not the intellectual property owner, the sub-royalties would be the original encumbered assets, while, where the grantor creating a security right in the intellectual property itself is the intellectual property owner, the sub-royalties would be proceeds of the original encumbered intellectual property, unless the sub-royalties were included in the description of the original encumbered assets in the security agreement (for the licensee's rights, see paras. 30 and 31 below). Such a licensor may also create a security right in other contractual rights of value that the licensor might have under the licence agreement and the relevant law. These other contractual rights might include, for example, the licensor's right to compel the licensee to advertise the licensed intellectual property or product with respect to which the intellectual property is used, or the right to compel the licensee to market the licensed intellectual property only in a particular manner, as well as the right to terminate the licence agreement on account of the licensee's breach.

22. Following the approach taken in most legal systems and reflected in the United Nations Assignment Convention, the *Guide* treats rights to the payment of royalties arising from the licence of intellectual property as receivables. This means that the general discussion and recommendations dealing with security rights, as modified by the receivables-specific discussion and recommendations, apply to rights to the payment of royalties. Thus, under the *Guide*, statutory prohibitions that relate to the assignment of future receivables or receivables assigned in bulk or partial assignments on the sole ground that they are future receivables or receivables that are assigned in bulk or in part are rendered unenforceable (see recommendation 23). However, other statutory prohibitions or limitations are not affected (see recommendation 18). In addition, a licensee could raise against an assignee of the

royalties all defences or rights of set-off arising from the licence agreement or any other agreement that was part of the same transaction (see recommendation 120).

23. In this context, it is important to note that the statutory prohibitions set aside refer to future receivables only as future receivables, or receivables assigned in bulk or in part. They do not affect statutory prohibitions based on the nature of receivables, for example, as wages or royalties that may by law be payable directly only to authors or collecting societies. Many countries have “author-protective” or similar legislation that designates a certain portion of income earned from exploitation of the intellectual property rights as “equitable remuneration” or the like which must be paid to authors or other entitled parties or their collecting societies. These laws often make such payment rights expressly non-assignable. The *Guide*’s recommendations with respect to limitations to the assignment of receivables do not apply to these or other legal limitations.

24. Furthermore, it is important to note that the treatment of the right to the payment of royalties as receivables for the purposes of the secured transactions law recommended in the *Guide* does not affect the different treatment of this right to the payment of royalties for the purposes of law relating to intellectual property.

25. Finally, it is equally important to note that the treatment of rights to receive payment of royalties in the same way as any other receivable does not affect the terms and conditions of the licence agreement relating to the payment of royalties, such as that payments are to be staggered or that there might be percentage payments depending on market conditions or sales figures.

26. Under the *Guide*, if a licence (or a sub-licence) agreement, under which royalties are payable, includes a contractual provision that restricts the ability of the licensor (or a sub-licensor) to assign the right to the payment of royalties to a third party (“assignee”), an assignment of the right to the payment of royalties by the licensor (or sub-licensor) is nonetheless effective and the licensee (or sub-licensee) cannot terminate the licence agreement (or sub-licence agreement) on the sole ground of the assignment of the royalties (see recommendation 24). However, under the *Guide*, the rights of a licensee (as a debtor of the assigned receivables) are not affected except as otherwise provided in the secured transactions law recommended in the *Guide* (see recommendation 117, subparagraph (a)). Specifically, the licensee is entitled to raise against the assignee all defences or rights of set-off arising from the licence agreement or any other agreement that was part of the same transaction (see recommendation 120, subparagraph (a)). In addition, the *Guide* does not affect any liability that the licensor (or sub-licensor) may have under other law for breach of the anti-assignment agreement (see recommendation 24).

27. It is important to note that recommendation 24 applies only to receivables, and not to intellectual property rights. This means that it does not apply to an agreement between a licensor and a licensee according to which the licensee does not have the right to grant sub-licences. It is equally important to note that recommendation 24 applies only to an agreement between a creditor of a receivable and the debtor of the receivable that the receivable owed to the creditor by the debtor may not be assigned. It does not apply to an agreement between a creditor of a receivable and the debtor of the receivable that the debtor may not assign receivables that may be owed to the debtor by third parties. Thus, recommendation 24 does not apply to an agreement between a licensor and a licensee that the licensee will not assign its

right to receive payment of sub-licence royalties from third-party sub-licensees. Such an agreement may exist, for example, where the licensor and the licensee agree that sub-licence royalties will be used by the licensee to further develop the licensed intellectual property. Thus, recommendation 24 does not affect the right of the licensor to negotiate the licence agreement with the licensee so as to control by agreement who can use the intellectual property or the flow of royalties from the licensee and sub-licensees. However, a licensor, while entitled to claim the payment of royalties, might not be able to control by agreement the flow of royalties in situations where the licensee in its capacity as a sub-licensor creates a security right in its right to the payment of sub-royalties (unless, of course, the licensor prohibits sub-licences).

28. In addition, recommendation 24 does not apply to an agreement between a licensor and a licensee that the licensor will terminate the licence agreement if the licensee violates the agreement not to assign the right to the payment of royalties payable to the licensee by sub-licensees. In this context, it should be noted that the right of the licensor to terminate the licence agreement if the licensee breaches this agreement gives the sub-licensees a strong incentive to make sure that the licensor will receive payment. Moreover, recommendation 24 does not affect the right of the licensor to: (a) agree with the licensee that part of the licensee's royalties (representing a source for the payment of the royalties the licensee owes to the licensor) be paid by sub-licensees to an account in the name of the licensor; or (b) obtain a security right in the licensee's future royalties to be paid by sub-licensees, register a notice in that regard in the general security rights registry (or the relevant intellectual property registry) and thus obtain a security right with priority over the licensee's other creditors (subject to the recommendations of the *Guide* for obtaining third-party effectiveness and priority of security rights; see A/CN.9/WG.VI/WP.39/Add.5, paras. 15-19).

29. Under the *Guide*, a secured creditor with a security right in a receivable has the benefit of a security right in intellectual property securing payment of the receivable (see recommendation 25). However, this does not mean that legal limitations to the transferability of intellectual property rights are set aside (see recommendation 18). Similarly, this does not mean that contractual limitations to the transferability of intellectual property rights are affected, as recommendation 24 applies to assignment of receivables and not to transfers of intellectual property rights.

3. Rights of a licensee

30. A licensee may have the right to grant sub-licences and to receive as a sub-licensor the payment of any royalties flowing from a sub-licence agreement, unless the licence agreement or law relating to intellectual property provides otherwise. The discussion above with respect to the rights of a licensor would apply equally to the rights of a licensee as a sub-licensor (see paras. 21-29 above).

31. Typically, a licensee is authorized to use or exploit the licensed intellectual property in line with the terms of the licence agreement. Some laws relating to intellectual property provide that the licensee may not create a security right in its authorization to use or exploit the licensed intellectual property without the licensor's consent (although in many States an exception may arise where the licensee sells its business as a going concern). The reason is that it is important for

the licensor to retain control over the licensed intellectual property and who can use it. If such control cannot be exercised, the value of the licensed intellectual property may be materially impaired or lost completely. If, however, the rights of a licensee under a licence agreement are transferable and the licensee grants a security right in them, the secured creditor will take the licensee's rights subject to the terms and conditions of the licence agreement. If the licence is transferable and the licensee transfers it, the transferee will take the licence subject to the terms and conditions of the licence agreement. The *Guide* does not affect these licensing practices.

4. Rights in tangible assets with respect to which intellectual property is used

32. Intellectual property may be used with respect to a tangible asset. For example: a tangible asset may be manufactured according to a patented process or through the exercise of patented rights; jeans may bear a trademark or cars may contain a chip which includes a copy of copyrighted software; or a CD may contain a software programme or a heat pump may contain a patented product.

33. Where intellectual property is used in connection with a tangible asset, two different types of asset are involved. One is the intellectual property; another is the tangible asset. These assets are separate. Law relating to intellectual property allows an intellectual property owner the ability to control many but not all uses of the tangible asset. For example, law relating to copyright allows an author to prevent unauthorized duplication of a book, but typically not to prevent an authorized bookstore that bought the book in an authorized sale to re-sell it or the end-buyer to make notes in the margin while reading. As such, a security right in intellectual property does not extend to the tangible asset with respect to which intellectual property is used, and a security right in a tangible asset does not extend to the intellectual property used with respect to the tangible asset.

34. However, the parties to the security agreement may always agree that a security right is granted both in a tangible asset and in intellectual property used with respect to that asset. For example, a security right may be taken in inventory of trademarked jeans and in the trademark giving the right to the secured creditor in the case of default of the grantor to sell both the encumbered trademarked jeans and the right to produce other jeans bearing the encumbered trademark. In such a case, where the manufacturer/grantor is the trademark owner, the encumbered assets are the owner's rights. Where the manufacturer/grantor is a licensee, the encumbered assets are the licensee's rights under a valid licence agreement.

35. The exact extent of the security right depends on the description of the encumbered asset in the security agreement. In this regard, the question arises as to whether the description of the encumbered tangible assets should be specific (for example, "my entire inventory with all associated intellectual property rights and other rights") or whether a general description ("my entire inventory") would suffice. As already noted (see paras. 5-8 above), under the *Guide*, a description that reasonably allows the identification of the encumbered assets is sufficient (see recommendation 14, subparagraph (d)). It would thus seem that a general description of the encumbered tangible asset would be in line with the principles of the *Guide* and the reasonable expectations of the parties, with the realization that separate assets are involved. At the same time, key principles of law relating to intellectual property with respect to a specific description of intellectual property to be encumbered in a security agreement are accommodated.

36. As already mentioned, a security right in a tangible asset, in connection with which an intellectual property right is used, does not extend to the intellectual property used with respect to the tangible asset, but does apply to the tangible asset itself, including those characteristics of the asset that use the intellectual property (for example, the security right applies to a television set as a functioning television set). Thus, a security right in such an asset does not give the secured creditor the right to manufacture additional assets using the intellectual property. Upon default, however, the secured creditor with a security right in the tangible assets could exercise the remedies recognized under secured transactions law, provided that such exercise of remedies did not interfere with rights existing under law relating to intellectual property. It may be that, under applicable law relating to intellectual property, the “exhaustion doctrine” (or similar concepts) might apply to the enforcement of the security right (for a discussion of enforcement issues, see A/CN.9/WG.VI/WP.39/Add.6, paras. 24-27).

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The law should provide that, in the case of a tangible asset with respect to which intellectual property is used, unless otherwise specified in the security agreement, a security right in intellectual property does not extend to the tangible asset with respect to which it is used, and a security right in such a tangible asset does not extend to the intellectual property. However, nothing in this recommendation limits the remedies that a secured creditor with a security right in such intellectual property has with respect to the tangible asset to the extent permitted by law relating to intellectual property. Similarly, nothing in this recommendation limits the enforcement remedies that a secured creditor with a security right in the tangible asset has with respect to the tangible asset to the extent permitted by law relating to intellectual property.

G. Security rights in future intellectual property

37. The *Guide* provides that a person may grant a security right in a future asset, namely an asset created or acquired by the grantor after the creation of a security right (see recommendation 17). Like any other recommendation of the *Guide*, this recommendation too applies to intellectual property, except insofar as it is inconsistent with law relating to intellectual property (see recommendation 4, subparagraph (b)). Accordingly, under the *Guide*, a security right can be created in future intellectual property (as to legislative limitations in that regard, see recommendation 18 and paras. 42 and 43 below). This approach is justified by the commercial utility in allowing a security right to extend to future intellectual property.

38. Many laws relating to intellectual property follow the same approach, allowing owners to obtain financing useful in the development of new works, provided that their value can be reasonably estimated in advance. For example, it is usually possible to create a security right in a copyrighted motion picture or software (the

¹ If it could be included in the *Guide*, this recommendation would be included in chapter II on the creation of a security right as recommendation 28 bis.

security right is created when the copyrighted work is created). In some States, a security right may be created in a patent application before the patent right is granted.

39. However, in certain cases, law relating to intellectual property may limit the transferability of various types of future intellectual property to achieve specific policy goals. For example, in some cases, a transfer of rights in new media or technological uses that are unknown at the time of the transfer may not be effective in view of the need to protect authors. In other cases, transfers of future rights may be subject to a statutory right of cancellation after a certain period. In other cases, the notion of “future intellectual property” may include registrable rights created but not yet registered. Statutory prohibitions may also take the form of a requirement for a specific description of intellectual property. Finally, as is the case with assets other than intellectual property, statutory prohibitions may be the result of the *nemo dat* principle, in accordance with which a creditor obtaining a security right does not obtain any rights greater than the rights of the grantor. In this connection, it should be noted that, if the grantor were a licensee, the licensee could not give anything more than the right granted to the licensee from the licensor (in other words, these rights would be subject to the terms and conditions of the licence agreement).

40. Other limitations on the use of future intellectual property as security for credit may be the result of the meaning of the concepts of “improvements” or “adaptations” under law relating to intellectual property. The secured creditor should understand how these concepts are interpreted under law relating to intellectual property and how they may affect the concept of “ownership”, which is essential in the creation of a security right in intellectual property. This determination is of particular relevance in the case of software subject to a copyright, for example. In some States a security right in a version of software which exists at the time of the financing may extend to modifications made to that version following the financing. However, in other States, this may not be the case, if it is determined that, under law relating to intellectual property, the modifications to such version are considered to be new works (adaptations) for which a new transfer is required. In any case, the *Guide* does not affect these limitations (see recommendation 18).

41. If law relating to intellectual property limits the transferability of future intellectual property, the law recommended in the *Guide* does not apply to this matter insofar as it is inconsistent with law relating to intellectual property (see recommendation 4, subparagraph (b)). Otherwise, the *Guide* applies and permits the creation of a security right in future assets (see recommendation 17). States enacting the *Guide* may wish to review their law relating to intellectual property with a view to establishing whether the benefits from these limitations (for example, the protection of the owner from undue commitments) outweigh the benefits from the use of such assets as security for credit (for example, the financing of research and development activities).

H. Legal or contractual limitations on the transferability of intellectual property

42. Specific rules of law relating to intellectual property may limit the ability of an intellectual property owner, licensor or licensee to create an effective security right in certain types of intellectual property. In many States, only the economic rights of an author are transferable; the moral rights are not transferable. In addition, legislation in many States provides that an author's right to receive equitable remuneration may not be transferable. Moreover, in many States, trademarks are not transferable without their associated goodwill. The *Guide* respects all these limitations on the transferability of intellectual property (see recommendation 18).

43. The only limitations on the transferability of certain assets that the *Guide* may affect are the legislative limitations on the transferability of future receivables, receivables assigned in bulk and parts of or undivided interests in receivables, as well as to contractual limitations on the assignment of receivables arising for the sale or licence of intellectual property rights (see articles 8 and 9 of the United Nations Assignment Convention and recommendations 23-25). In addition, the *Guide* may affect contractual limitations, but only with respect to receivables (not intellectual property) and only in a certain context, that is, in an agreement between the creditor of a receivable and the debtor of that receivable (see paras. 37-41 above).

A/CN.9/WG.VI/WP.39/Add.3 (Original: English)

**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security rights
in intellectual property, submitted to the Working Group on Security
Interests at its sixteenth session**

ADDENDUM

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IV. Effectiveness of a security right in intellectual property against third parties

[Note to the Working Group: For paras. 1-9, see A/CN.9/WG.VI/WP.37/Add.2, paras. 1-9, A/CN.9/670, paras. 56-61, A/CN.9/WG.VI/WP.35/Add.1, paras. 1-14, A/CN.9/667, paras. 55-63, A/CN.9/WG.VI/WP.33, paras. 137-145, and A/CN.9/649, paras. 29-31.]

A. The concept of third-party effectiveness

1. As already noted, the *Guide* distinguishes between the creation of a security right (effectiveness of the security right as between the parties) and its effectiveness

against third parties. Subject to recommendation 4, subparagraph (b), this distinction applies equally to security rights in intellectual property (see A/CN.9/WG.VI/WP.39/Add.2, paras. 1-3).

2. In some States, there are no special rules governing the creation and third-party effectiveness of security rights in intellectual property and those issues are governed by the same rules that apply to security rights in other types of intangible asset. In other States, however, law relating to intellectual property may provide for particular methods in which a security right in some types of intellectual property may be created and made effective against third parties. The rules often differ for rights in intellectual property that are subject to a specialized registration system (such as patents, trademarks and, in some States, copyrights), and rights in intellectual property that are not subject to such registration (such as trade secrets, industrial designs and, in some States, copyrights). These matters are addressed in sections B and C below.

3. In the *Guide*, the concept of “effectiveness against third parties” refers to whether a security right in an encumbered asset as a property right is effective against parties other than the grantor and the secured creditor that have at that time or may acquire in the future a security or other right in that encumbered asset. Such third parties (“competing claimants”) include creditors of the grantor, the insolvency representative in the insolvency of the grantor, as well as transferees, lessees and licensees of the encumbered asset. In law relating to intellectual property, by contrast, the phrase “third-party effectiveness” is often used to refer to the effectiveness of ownership or other similar rights in intellectual property itself, rather than to the effectiveness of a security right. These two sorts of references should not be confused. While effectiveness of a security right in intellectual property as against competing claimants is a matter of secured transactions law, effectiveness of ownership rights or rights of a licensor or licensee against transferees of those rights is a matter of law relating to intellectual property. In this context, it should be noted that, for purposes of secured transactions law, infringers are not competing claimants. Thus, the *Guide* does not apply to a “conflict” between a secured creditor and a purported infringer and, if, for example, the infringer asserts as a defence against a secured creditor that the infringer is a transferee or a licensee of the encumbered intellectual property, the matter is to be determined in accordance with the law relating to intellectual property.

B. Third-party effectiveness of security rights in intellectual property that are registered in an intellectual property registry

4. Under the *Guide*, security rights in intangible assets may be made effective against third parties by registration of a notice in the general security rights registry or of a document or notice in a specialized registry. The *Guide* assumes that where a State maintains a specialized registry, it will permit registration of a notice of a security right as a method of achieving third-party effectiveness of the security right (see recommendations 34, subparagraph (a) (iii), and 38, subparagraph (a)) (see also paras. 12-14 below).

[Note to the Working Group: At its fifteenth session, the Working Group considered that: “With respect to paragraph 4, it was suggested that it should be

revised to clarify that only registries that ensured third-party effectiveness of security rights qualified as specialized registries under the Guide. There was support for the principle reflected in that suggestion. However, it was widely felt that it should be expressed not in narrow technical terms of third-party effectiveness but broader notions of public accessibility of registered information so as to ensure, for example, that specialized ship, aircraft or intellectual property registries that provided for effectiveness in general were not undermined, while registries serving purely administrative purposes would not qualify as specialized registries under the Guide.” (see A/CN.9/670, para. 57)

The Working Group may wish to note that the preparatory work of the Guide (reports of the Working Group and the Commission, and the various drafts of the Guide) and the Guide (commentary and recommendations, in particular recommendation 38) do not define a specialized title registry. Nor do they require that the legal consequence of registration in a specialized title registry under specialized registration law has to be third-party effectiveness of a security right. Nor, finally, do they address the question whether a document or a notice has to be registered. The Guide does not do so as the approaches taken to all these issues vary widely from State to State and, in any case, these are all matters of specialized registration law. The only reference that the Guide makes in this regard is the following: “Consequently, the Guide assumes that where a State maintains a specialized registry, it will permit registration of a notice of a security right as a method of achieving third-party effectiveness of the security right (see recommendations 34, subparagraph (a) (iii), and 38, subparagraph (a)).” (see chapter V on third-party effectiveness of a security right, para. 70 at the end)

This sentence was added in paragraph 4 above. The Working Group may wish to consider that it does not need an elaboration or explanation in particular as to whether the third-party effects have to be provided in the specialized registration law or in the law recommended in the Guide that would be applicable unless specialized registration law provided otherwise. The Working Group may thus consider that the Supplement is not the appropriate place to explain or interpret the Guide, unless an issue arises that is specific to intellectual property or a different approach is to be taken with respect to intellectual property. In any case, paragraph 69 of the commentary of chapter V makes clear that immovable property, ship and aircraft registries, many of which do not distinguish between general effectiveness and third-party effectiveness, are specialized registries under specialized registration law and thus under the Guide.]

5. Registration in a specialized intellectual property registry differs from State to State in many respects, including: (a) whether transfers, licences or also security rights may be registered; (b) whether rights in patents, trademarks, copyrights or other types of intellectual property may be registered; (c) whether a document, summary or notice need be registered; and (d) what are the legal consequences of registration. In some cases, the answers to all these questions are not easy to obtain even in one and the same legal system.

6. For example, under law relating to intellectual property, in some States, a security right is not created or made effective against third parties, unless and until a document or notice of it is registered in the relevant intellectual property registry. In other States, law relating to intellectual property provides that a security right is created and, at the same time, becomes effective against third parties when the

security agreement is entered into between the parties, even without registration. In these cases, registration in the relevant intellectual property registry allows certain third parties (typically transferees that are not aware that the asset is encumbered; “good faith transferees”), to invoke a priority rule, according to which a registered security right takes precedence over an unregistered prior security right, but the unregistered security right still remains effective against other third parties. In still other States, a security right is created when the security agreement is entered into between the parties, but registration in the relevant intellectual property registry is necessary to make the security right effective against third parties, for example, by way of an evidentiary rule that prohibits evidence of unregistered security rights. In still other States, the registration system does not readily accommodate registration of documents or notices of security rights, and creation and third-party effectiveness of security rights must be achieved outside the intellectual property registration system. Finally, in some States that distinguish between creation and third-party effectiveness, it is possible to achieve third-party effectiveness of a security right by using either the intellectual property registry or an available general security rights registry. If any of these methods existing under law relating to intellectual property is intended to be the exclusive method of obtaining effectiveness of a security right against third parties, in accordance with recommendation 4, subparagraph (b), it takes precedence over any of the methods provided in the law recommended in the *Guide*.

7. The *Guide* recommends a general security rights registry and, where specialized registries exist that permit registration of a notice of a security right as a method of achieving third-party effectiveness of the security right, avoids undermining them by accepting registration in such registries as method of achieving third-party effectiveness of a security right and attributing priority results to such a registration (see recommendations 38, 77 and 78). As this matter is beyond the scope of secured transactions law and, in any case, would require additional effort and expense by States, the *Guide* does not recommend that States that currently do not have a specialized registry for certain types of intellectual property create such registries in order to permit the registration of a notice of a security right in intellectual property. For the same reason, the *Guide* does not recommend that States that currently do not permit the registration of a notice of a security right in an intellectual property registry amend their laws to permit such registrations. Finally, to avoid duplication of effort and expense, the *Guide* does not recommend a rule that requires registration of a notice of a security right in both the relevant intellectual property registry and in the general security rights registry. However, if States enacting the recommendations of the *Guide* have specialized intellectual property registries and wish to use them for registration of security rights in intellectual property, making use of the options offered in recommendation 38 of the *Guide*, they may wish to review their law relating to intellectual property and consider whether to permit the registration of notices of security rights with third-party effects in such already existing intellectual property registries. States that do not have specialized intellectual property registries or have such registries but do not wish to use them for registration of security rights in intellectual property, may always use the general security rights registry for registration of notices of security rights in all types of movable asset, including intellectual property.

C. Third-party effectiveness of security rights in intellectual property that are not registered in an intellectual property registry

8. As already mentioned, under the *Guide*, a security right in intellectual property may become effective against third parties by registration of a notice in the general security rights registry (see recommendation 32). This is possible even if the encumbered intellectual property rights may not be registered in an intellectual property registry (as is typically the case, for example, with copyrights, industrial designs or trade secrets). The same rule would apply in cases where a document or notice of a security right in intellectual property may be registered in an intellectual property registry but it is not actually registered. In these cases, registration of a notice in the general security rights registry is sufficient and the legal consequence of registration is to make the security right effective against third parties (see recommendations 29, 32, 33 and 38). However, in the particular case where law relating to intellectual property provides that a security right in intellectual property may be made effective against third parties only by registration in an intellectual property registry, a security right cannot not be made effective against third parties by registration in the general security rights registry (see recommendation 4, subparagraph (b)).

9. As already mentioned, there are different approaches in law relating to intellectual property to the question of registration of a document or notice of a security right in intellectual property. In some States, often those whose secured transactions law derives from non-possessory pledge concepts, either no rights at all may be registered in some types of intellectual property or only outright transfers of intellectual property may be registered. This means that a security right in such intellectual property cannot be made effective against third parties by registration in an intellectual property registry. In other States, often those whose secured transactions law utilizes mortgage concepts, a security right is treated as another type of (outright or conditional) transfer and is, therefore, created and made effective against third parties to the same extent as any other transfer. Consequently, in those States, a document or notice of title-based security rights must often be registered in the relevant intellectual property registry in order for it to be created and made effective against third parties, but non-title-based security rights cannot be so registered. In some of those States, such registration has third-party effects. Finally, in a few States, there are additional requirements. These commonly include payment of a stamp duty or other transaction tax, or a requirement to give notice to an administrative body, such as a national authors association or collecting society. If States enacting the recommendations of the *Guide* harmonize their secured transactions laws and their laws relating to intellectual property, replacing all existing security devices with an integrated notion of a security right, or, at least, subjecting title-based security rights to the same rules that are applicable to security rights (see A/CN.9/WG.VI/WP.39/Add.2, para. 4), in those jurisdictions that permit registrations of transfers of intellectual property, it would be possible to register a security right in intellectual property.

V. The registry system

[*Note to the Working Group: For paras. 10-42, see A/CN.9/WG.VI/WP.37/Add.2, paras. 10-42, A/CN.9/670, paras. 62-72, A/CN.9/WG.VI/WP.35, paras. 15-31, A/CN.9/667, paras. 64-85, A/CN.9/WG.VI/WP.33, paras. 149-161, and A/CN.9/649, paras. 32-40.*]

A. The general security rights registry

10. As already noted, the *Guide* recommends that States establish a general security rights registry (see recommendations 54-75). In general, the purpose of the registry system in the *Guide* is to: (a) provide an efficient method for making a security right in existing or future assets effective against third parties; (b) establish an effective point of reference for priority rules based on the time of registration; and (c) 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 (see purpose section of chapter IV of the *Guide* on the registry). Under this approach, registration is accomplished through registration of a notice of a security right, as opposed to registration of the security agreement or other document (see recommendation 54, subparagraph (b)). The notice need only provide basic information concerning the security right, that is: (a) the identifier of the grantor and the secured creditor or its representative; (b) a description of the encumbered asset; (c) the duration of registration; and (d) a statement of the maximum amount for which the security right may be enforced, if so provided in a State enacting the recommendations of the *Guide* (see recommendation 57).

11. The *Guide* provides precise rules for identifying the grantor of the security right, whether an individual or a legal person. This is because notices are indexed and can be retrieved by searchers according to the name or some other reliable identifier of the grantor (see recommendations 54, subparagraph (h), and 58-63). The *Guide* contains other recommendations to simplify the operation and use of the registry. For example, the *Guide* provides that, to the extent possible, the registry should be electronic and permit registration and searching by electronic means (see recommendation 54, subparagraph (j)). The *Guide* also provides that fees for registration and searching, if any, should be set at a level no higher than necessary to permit cost recovery (see recommendation 54, subparagraph (i)).

B. Asset-specific intellectual property registries

12. As discussed above, many States maintain registries for registering (or recording) transactions (such as transfers) relating to intellectual property. In some of those registries, security rights may also be initially filed (that is, an application for registration may be made) and then registered. For example, patent and trademark registries exist in most States, but not all provide for the registration of a document or notice of a security right. In addition, in some States, the registration of a notice (whether of a security right or some other right) does not produce third-party effects. Moreover, a number of States have similar registries for copyrights, but the practice is not universal.

13. While some States have notice-based intellectual property registries, a larger number of States use recording act structures or “document registration” systems. In those systems, it is necessary to record the entire instrument of transfer, or, in some cases, a memorandum describing essential terms of the transfer. A more modern approach is to simplify the registration process by registering a limited amount of information (such as the names of the parties and a general description of the encumbered assets). For example, the registration requirements for trademarks are simplified by the Trademark Law Treaty (1994), the Singapore Treaty on the Law of Trademarks, as well as by the Madrid Agreement (1891), the Madrid Protocol (1989) and the model international registration forms attached to both treaties. Similarly, the Patent Law Treaty (Geneva, 2000) and the Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community Trademark simplify registration requirements. The reason for requiring registration of the transaction document or a memorandum stating the essential terms of the transaction is the need for transparency. Thus, it is essential for a transfer instrument or memorandum to identify the precise right being transferred in order to give effective notice to searchers and to allow efficient utilization of assets. In addition, the intellectual property registries sometimes index registrations by the specific intellectual property, and not by the grantor’s identifier. This is because the central focus is on the intellectual property itself, which may have multiple co-owners or co-authors and may be subject to multiple changes in ownership as transfers are made.

14. In addition to national registries, there are a number of international intellectual property registries and registration in these registries is subject to relatively modern treaties or other international legislative texts that simplify the registration process. For example, under the Community Trademark regulation, a statement may be registered referring not only to ownership but also to security rights with third-party effects. Another example is the treaty on the International Registration of Audiovisual Works (“Film Register Treaty”), adopted at Geneva on April 18, 1989, under the auspices of WIPO. The Film Register Treaty creates an international registry, which permits the registration of statements concerning audiovisual works and rights in such works, including, in particular, rights relating to their exploitation (the records of the diplomatic conference indicate statements concerning security rights were also contemplated). The Film Register Treaty provides an evidentiary presumption of validity for registered statements. The international registry allows two types of application. A work-related application identifies an existing or future work at least by title or titles. A “person-related application” identifies one or more existing or future works by the natural person or legal entity that makes or owns, or is expected to make or own, the work or works. The international registry maintains an electronic database that allows cross indexing between the different types of registrations. There is also a procedure to request removal of contradictory filings.

C. Coordination of registries

15. As already mentioned (see paras. 4 and 5 above), the *Guide* neither recommends the creation of a specialized registration system (for intellectual property or for other assets), if one does not exist, nor interferes with existing specialized registration systems. However, where, under law relating to intellectual

property, a document or notice of a security right in intellectual property may be registered in an intellectual property registry and, at the same time, under the law recommended in the *Guide*, that security right may also be registered in the general security rights registry, there is a need to address the issue of coordination between these two registries. In order to avoid interfering with law relating to intellectual property, the *Guide* addresses it through the general deference to law relating to intellectual property (see recommendation 4, subparagraph (b)) and appropriate priority rules.

16. Thus, the *Guide* does not address or purport to address whether a security right in intellectual property may be registered in an intellectual property registry, the requirements for such registration (for example, document or notice registration) or its legal consequences (for example, effectiveness or presumption of effectiveness against all parties or only against third parties). Even if an intellectual property registry does not provide for the registration of security rights, provides for the registration of a document rather than a notice thereof or, having provided for such registration, does not give registration third-party effects, the *Guide* provides no recommendation to the contrary and takes the specialized registration system, if any, as is.

17. However, the *Guide* does make recommendations concerning the registration of a notice of a security right in intellectual property in the general security rights registry. For this reason, to the extent that law relating to intellectual property addresses the effects of registration of security rights in an intellectual property registry in a way that would be inconsistent with the third-party effects given to such registration by the *Guide* (see recommendation 38), the *Guide* defers to that law (recommendation 4, subparagraph (b)). By contrast, if law relating to intellectual property does not address these issues, there is no overlap or conflict with law relating to intellectual property, the issue of deference to law relating to intellectual property will not arise and thus the *Guide* will apply giving such specialized registration third-party effects.

18. In addition, the *Guide* addresses the issue of coordination between a specialized registry (including an intellectual property registry) and the general security rights registry recommended in the *Guide* through appropriate priority rules. Thus, in order to preserve the reliability of intellectual property (and other specialized) registries (in particular, in cases where law relating to intellectual property provides no rule for determining priority), the *Guide* provides that a security right in intellectual property, a document or notice of which is registered in the relevant intellectual property registry, has priority over a security right in the same intellectual property, a notice of which is registered in the general security rights registry (see recommendation 77, subparagraph (a)). For the same reason, the *Guide* provides that a transferee of intellectual property acquires it, in principle, free of a previously created security right in that property, unless a document or notice of the security right is registered in the intellectual property registry (see recommendations 78 and 79). Under recommendation 4, subparagraph (b), this rule would apply only if it was not inconsistent with a rule of law relating to intellectual property (see A/CN.9/WG.VI/WP.39/Add.4, paras. 12-15).

19. If States enacting the recommendation of the *Guide* have specialized intellectual property registries and wish to use them for registration of security rights in intellectual property, making use of the options offered in

recommendation 38 of the *Guide*, they may wish to consider ways aimed at coordinating their existing intellectual property registries with the general security rights registry introduced by the *Guide*. For example, States may wish to consider permitting the registration of a notice of a security right in intellectual property in an intellectual property registry with third-party effects. In addition, States may wish to consider whether asset-based intellectual property registries should also have a debtor-based index (and vice versa). Moreover, States may wish to consider requiring the transmission of a notice about a registration in an intellectual property registry to the general security rights registry (or vice versa). Of course, coordination of registries in this way would be easier, simpler, quicker and less expensive in an electronic registration system rather than in a paper-based registration system.

20. An alternative to a system permitting the forwarding of notices from one registry to the other might be a system implementing a common gateway to both the general security rights registry and to various specialized registries. Such a common gateway would enable registrants to enter the notice simultaneously in both registries. Several steps would have to be taken in order to ensure the efficiency and effectiveness of a common gateway, including that a simple notice should be enough, the notice should include the identifiers of both the grantor and the secured creditor (or its representative) and an asset-specific description of the encumbered assets, searches in both registries should be possible with a single request and both grantor-based and asset-based indices should be maintained with cross references in each registry to the other registry (see chapter III of the *Guide* on the effectiveness of a security right against third parties, paras. 80-82).

D. Registration of notices about security rights in future intellectual property

21. An essential feature of the general security rights registry recommended in the *Guide* is that a notice of a security right can refer to future assets of the grantor. This means that the security right can cover assets to be later produced or acquired by the grantor (see recommendation 17) and the notice may cover assets described in a manner that allows their identification (see recommendation 63). Thus, if the encumbered assets are described in the security agreement as all existing and future inventory, the notice may so identify such inventory. Since priority is determined by date of registration, the priority of the security rights extends to future inventory. This approach greatly facilitates revolving credit arrangements, since a lender extending new credit under such a facility knows that it can maintain its priority position in new assets that are included in the borrowing base.

22. Existing intellectual property registries, however, in many States, do not readily accommodate registration of rights in future intellectual property. As transfers of or security rights in intellectual property are indexed against each specific intellectual property right, they can only be effectively registered after the intellectual property is first registered in the intellectual property registry. This means that a blanket registration of a security right in future intellectual property in an intellectual property registry would not be effective and a new registration of the security right would be required each time new intellectual property is acquired.

23. If, under law relating to intellectual property, intellectual property may not be acquired, transferred or encumbered before it is actually registered in an intellectual property registry, the *Guide* does not interfere with that prohibition and does not make the grant of a security right in such future intellectual property possible. However, if the creation of a security right in future intellectual property is not prohibited under law relating to intellectual property (as is the case, for example, with a patent or trademark while the application for its registration in the patent or trademark registry is pending), a security right in such an asset could be created and made effective against third parties under the *Guide*. States enacting the recommendations of the *Guide* may wish to consider reviewing their law relating to intellectual property to determine whether a notice of a security right may refer to future intellectual property.

E. Dual registration or search

24. As already mentioned, the *Guide* leaves to law relating to intellectual property the details of registration of a document or notice of a security right in an intellectual property registry and expressly gives priority, as a matter of secured transactions law, to rights with respect to which a registration is made in such a registry (see paras. 4, 17 and 18 above). As also noted above, this means that the *Guide* often obviates the need for dual registration or search. In particular, registration only in the general security rights registry would seem to be necessary and useful for secured transactions purposes: (a) where the encumbered asset is a type of intellectual property with respect to which no registration is required under law relating to intellectual property (for example, copyrights or trade secrets in many States); (b) where a document or notice of security right in intellectual property may not be registered in an intellectual property registry; (c) where a notice of security right in intellectual property may be registered in an intellectual property registry, but such registration has effects that are inconsistent with third-party effects; and (d) where there are other secured creditors that register only in the general security rights registry. On the other hand, registration in the relevant intellectual property registry may be preferable, for example: (a) where the encumbered asset is a type of asset for which a registration system exists and allows registration of documents or notices of security rights (for example, patents or trademarks in many States); or (b) where the secured creditor needs to ensure priority over other secured creditors or transferees under the relevant law relating to intellectual property.

25. Before a security agreement is entered into, a secured creditor exercising normal due diligence will typically conduct a search to determine whether there are prior competing claimants that have priority over the proposed security right. As a first step, the secured creditor will search the chain of title to identify prior transfers and to determine whether the grantor actually has rights in the intellectual property so that the security right can become effective in the first instance (this due diligence requirement applies to all movable assets). Unlike intellectual property registries, the general security rights registry does not record title and, as a result, a search of the chain of title will involve a search of the relevant intellectual property registry, provided that rights in intellectual property may be registered in that registry. As a next step, the secured creditor will search to determine whether each

prior party in the chain of title has granted a security right which might have priority over the proposed security right. Finally, the secured creditor will determine the applicable priority as between rights registered in one of the two registries. In cases where the priority is determined solely by registration in the relevant intellectual property registry, as provided in the *Guide*, a search of only that registry may be sufficient. Otherwise, a secured creditor may have to search in both registries.

26. Under the *Guide*, it is envisaged that the general security rights registry will be electronic and will accept registration of notices of possible security rights with third-party effects at a nominal cost (based on cost recovery), if any, for registration and searching (see recommendation 54, subparagraph (i)). This means that, in States that enact the recommendations of the *Guide*, registration and searching in the general security rights registry is likely to be simple, quick and inexpensive. However, under law relating to intellectual property, registries may not necessarily be fully electronic (although an increasing number of intellectual property registries allow online searching for a small fee). In addition, the document of a transaction or a summary thereof may need to be filed (instead of a notice). Moreover, the document filed may have to be checked by the registry staff at least to the extent that the legal consequence of registration may be conclusive or presumptive evidence of the existence of a right in intellectual property.

27. Thus, while the relevant fees vary widely from State to State, the cost of registration of a document of a security right in an intellectual property registry may reasonably be assumed to be higher than the cost of registration of a notice of a security right in the general security rights registry. As to the cost and time of searching, again searching in a document registry (whether electronic or not) is likely to be more time-consuming and costly than searching in an electronic notice-based general security rights registry. These differences, of course, will be minimized to the extent that an intellectual property registry permits the online registration of a notice of a security right, for a nominal fee, with third-party effects by and is organized in a way that also permits searching in a time- and cost-efficient way. At the same time though, registration in the relevant intellectual property registry would provide more information (for example, because of the specific description of the encumbered assets and the information about transfers) and probably more certain information (for example, because registration may constitute or provide firm evidence as to the existence of a right).

[Note to the Working Group: At its fifteenth session, the Working Group agreed that, to assess the impact of registration in an intellectual property registry or in a general security rights registry, it could consider an analysis of costs involved in the registration of a security right in one or the other type of registry (see A/CN.9/670, para. 69). The Working Group may wish to consider that paragraphs 26 and 27, which discuss the cost of registering and searching in one or the other registry, may be usefully supplemented by the text below.]

“The differences in cost of registration and searching may be illustrated by the following examples (which are based on the assumption that there is an intellectual property registry that accepts registration of security rights in intellectual property):

1. A grantor, who is the initial owner of an intellectual property right, grants a secured creditor a security right in that intellectual property right. Whether registration is made in the general security rights registry or in the relevant intellectual property registry, the secured creditor needs to register only one notice. A searcher though may need to search in both registries. Of course, the intellectual property registration system may require registration of a document and the registrar may have to check the document and issue a certificate that may constitute evidence of the existence of the security right. These characteristics are likely to affect the time- and cost-efficiency of the registration process. On the other hand, while the notice-based registration system of the general security rights registry may be more protective of the confidentiality of a transaction than the document-based registration system of the intellectual property registry, it will not provide a searcher as much information as a document-based registration system.
2. A grantor, who is the initial owner of 10 intellectual property rights, grants a secured creditor a security right in all 10 intellectual property rights. If registration is made in the general security rights registry, the secured creditor needs to register only one notice and a searcher needs to conduct only one search against the name of the grantor to find competing security rights (although it may be necessary to search against each intellectual property right to find other competing claimants). However, if registration is made in an intellectual property registry for each intellectual property right (although if all intellectual property rights are of the same type, for example, patents, it may be possible to register one document that refers to all 10 patents). Similarly, the secured creditor may need to register a document or notice for each intellectual property right and a searcher needs to conduct a search against each intellectual property right to find both prior security rights and other competing claimants. In this case too, both registration and search in the general security rights registry would be more efficient in terms of time and cost involved.
3. In the example under paragraph 2 above, if the grantor is not the initial owner but a transferee in a chain of transferees, registration in the general security rights registry may still be more efficient than registration in an intellectual property registry, if the secured creditor need not register an amendment notice each time the intellectual property right is transferred. However, the situation may be different with respect to searching. If each of the 10 intellectual property rights has 10 prior owners, a searcher would have to conduct 10 searches outside the security rights registry to identify the transferees of each intellectual property right and then 100 searches (10 owners x 10 intellectual property rights) to identify all prior security rights. If a security right is registered in an intellectual property registry, the secured creditor need only conduct 10 searches, that is, one for each intellectual property right. In this case, the efficiency of the registration in the general security rights registry will depend on the approach taken in the relevant State to the issue of the effectiveness of registration in the case of a transfer of the encumbered intellectual property. As to searching, it would seem that searching in the intellectual property registry would be more cost-efficient.
4. Again in example 2, the secured creditor need register only one notice in the general security rights registry. Moreover, if a security right granted by a prior party is not effective against the grantor unless there is a specific notice registered in the name of the grantor as a transferee of the encumbered intellectual property,

the secured creditor need conduct only one search in the general security rights registry. If a document or notice is registered in an intellectual property registry, however, the secured creditor must make 10 registrations and 10 searches for each intellectual property right in each intellectual property registry. In this case, registration and searching in the general security rights registry should be more cost-efficient than registration in the intellectual property registry.

5. *However, the situation may be different if a grantor is a start-up company that seeks to earn income from exploiting its intellectual property rights through transfers (for example, an entertainment company that makes numerous exclusive licences each of which is treated as a “transfer”). The grantor intends to grant 5 exclusive licences. The secured creditor wants its security right to be effective against each of the exclusive licensees and their potential secured creditors. If registration is made in the intellectual property registry, the secured creditor needs to make only 10 registrations, one for each intellectual property right. If registration is made in the general security rights registry, however, the secured creditor must register one notice against its grantor and one notice against each of the 5 licensees for each of the 10 intellectual property rights (that is, $5 \times 10 = 50$ notices). This may require that a secured creditor make a substantial effort to monitor not only the actions of its grantor, but also exclusive licensees and sub-licensees with whom the secured creditor may not have any direct contractual relationship. This situation might discourage secured financing for start-up companies.*

6. *These examples indicate that, while the general security rights registry in the Guide may better accommodate some types of intellectual property financing, this may not always be the case and would depend on the circumstances of each case and the law applicable (see section G below).*

7. *The law applicable to third-party effectiveness and priority will also have an impact on the time- and cost-efficiency of registration. If the law applicable to these matters is the law of the State in which the encumbered intellectual property is protected, in the case of a portfolio of intellectual property rights, registration and searching will involve several States. The result would be different if third-party effectiveness and priority were to be governed by the law of the State in which the grantor is located. However, in any case, the main cause of the difference would be the applicable law and not the type of registration. Therefore, this matter is discussed in chapter X on the law applicable to a security right in intellectual property.”*

The Working Group may also wish to consider that the above-mentioned analysis is useful in cases where registration or search take place in one or the other registry. The Working Group may also wish to consider, however, that, in view of the priority of a security right registered in an intellectual property registry and the need to establish a chain of transferees, registration and search may need to take place in the intellectual property registry in most cases (of course, where registration of a security right in an intellectual property registry is possible).]

F. Time of effectiveness of registration

28. Under the *Guide*, registration of a notice of a security right becomes effective against third parties when the information in the notice is entered into the registry records and becomes available to searchers (see recommendation 70). Where the registry is electronic, registration of a notice will become effective immediately upon registration. However, where the registry is paper-based, registration of a notice will become effective sometime after registration.

29. Under law relating to intellectual property, specialized registration systems may have different rules with respect to the time of effectiveness of registration of a security right. For example, under law relating to patents and trademarks in many States, third-party effectiveness of a registered security or other right in a patent or a trademark dates back to the date of filing (that is, submission to the registry of an application for registration). Such an approach is useful where the registry takes time to actually register the security right in the patent or trademark, but may mislead a searcher as to whether specific intellectual property is encumbered.

30. As already mentioned, the *Guide* deals with coordination issues by giving priority to a security right a document or notice of which is registered in a specialized registry (or with respect to which a notation is made on a title certificate) irrespective of the time of registration (see recommendations 77 and 78). Thus, the difference in the approach as to the time of effectiveness of registration may not cause any problems in determining the priority of a security right in intellectual property registered in the relevant intellectual property registry.

G. Impact of a transfer of encumbered intellectual property on the effectiveness of registration

31. The *Guide* recommends that the secured transactions law should address the impact of a transfer of an encumbered asset on the effectiveness of registration of a notice in the general security rights registry (see recommendation 62). This recommendation is equally applicable to security rights in intellectual property made effective against third parties by registration of a notice in the general security rights registry. However, this recommendation does not apply if:

(a) The transferee of an encumbered asset acquires it free of the security right, as is the case, for example, where the transfer is authorized by the secured creditor free of the security right (see recommendation 80);

(b) A document or notice of the security right has been registered in an intellectual property (or other specialized) registry;

(c) The grantor has transferred all its rights in the encumbered asset before granting a security right in that asset (in such situations, under the *Guide*, no security right is created; see recommendation 13); and

(d) There is no transfer of ownership, but a licence in intellectual property.

32. With respect to subparagraph (a) in the preceding paragraph, it should be noted that, if the secured creditor did not authorize a licence (that is, if the licensee did not acquire the asset free of the security right) and enforced its security right

enforcement would amount to termination of the licence and any sub-licence, which would make all the “licensees” infringers. Thus, the secured creditor could disregard security rights granted by unauthorized licensees. With respect to subparagraph (d), it should be noted that recommendation 62 might apply to a licence, if, under law relating to intellectual property, it is treated as a transfer of ownership (although, under the *Guide*, a licence is not a transfer).

33. The commentary discusses three ways in which an enacting State may wish to address the matter. One way is to provide that, where the encumbered asset is transferred and the transferee does not acquire it free of the security right, the secured creditor must register an amendment identifying the transferee within a certain specified period after the transfer. If the secured creditor fails to do so, the original third-party effectiveness is maintained in principle. However, the security right is subordinated to intervening secured creditors and transferees whose rights arise after the transfer of the encumbered asset and before the amendment notice is registered. A second way in which enacting States may wish to address this issue is to provide that the grace period for the registration of an amendment is triggered only once the secured creditor acquires actual knowledge of the transfer of the encumbered asset by the grantor. A third way might be to provide that a transfer of an encumbered asset has no impact on the third-party effectiveness of a registered security right.

34. If an enacting State adopts the third approach, a secured creditor of the transferor need not register a notice of its security right again identifying the transferee. In such a case, the security right in the asset now owned by the transferee would remain effective against third parties. However, transferees down in the chain of transferees might not be able to discover, through a search in the general security rights registry, a security right granted by any person other than their immediate transferor. In such cases, they would still have to search the chain of title and status of an encumbered asset outside the general security rights registry. On the other hand, if an enacting State adopts the first or the second approach discussed above, a secured creditor will have to register a new notice identifying the transferee. In such a case, the secured creditor will have the burden of monitoring the status of the encumbered asset (to a different degree, depending on whether the first or the second approach is followed). At the same time, however, transferees down the chain of title will be able to identify a security right granted by a person other than their immediate transferor.

35. States enacting the *Guide* will have to consider the relative advantages and disadvantages of these different approaches mentioned above and, in particular, their impact on rights in intellectual property. For example, under the first approach, a secured creditor extending credit against the entire copyright in a movie would need to make continuous registrations against tiers of licensees and sub-licensees (if the applicable law relating to copyrights treated a licence as a transfer that may be registered) to maintain its priority against them or their own secured creditors. This would be a significant burden on such lenders and might discourage credit against such assets. On the other hand, such an approach would make it easier for a lender to a sub-licensee to find a security right created by its sub-licensor by a simple search only against the identifier of the sub-licensor. Here, the trade-off is between the relative costs of monitoring and multiple registrations by the lender to the “upstream” party as against the costs of conducting a search of the entire chain of

title for security rights created by the “downstream” party. In this regard, it should be noted that typically under law relating to intellectual property a prior transfer retains its priority over later transfers without the need for an additional registration in the name of a transferee of an encumbered asset.

36. As already mentioned, if a State does not follow the third option, a secured creditor would have to register a notice of amendment in the general security rights registry each time the encumbered intellectual property became the subject of an unauthorized transfer, licence or sub-licence (if licences are treated as transfers under the relevant law relating to intellectual property), at the risk of losing its priority if it were not informed and had not acted promptly.

[Note to the Working Group: At its fifteenth session, the Working Group requested the Secretariat to prepare and place within square brackets a recommendation implementing the third way in which a State might address the matter covered in recommendation 62, providing that a registration is effective without the need for a new registration in the case of a transfer of the encumbered assets (see A/CN.9/670, para. 71).

Such a recommendation could read as follows: “The law should provide that the transfer of intellectual property that is subject to a security right does not affect the third-party effectiveness of the security right. As a result, the secured creditor does not have to register an amendment notice indicating the name of the transferee of the encumbered intellectual property.”

In considering this recommendation, the Working Group may wish to take into account the following examples:

- 1. If a grantor of a security right in an intellectual property right is not the initial owner but a transferee with 10 prior transferees and if a secured creditor need not register an amendment notice in the name of each transferee of the encumbered intellectual property right, the secured creditor need only register one notice in a general security rights registry (however, a searcher would have to conduct 10 searches outside the security rights registry to identify each owner and any security right granted by any owner).*
- 2. If, however, the law requires a new notice each time the encumbered intellectual property is transferred, the secured creditor must register one notice against its grantor and one for each of the 10 prior owners. This may require that the secured creditor make a substantial effort to monitor not only the actions of its grantor, but also transferees (and licensees, if a licence is treated as a transfer).*
- 3. These examples indicate that, if the law requires the secured creditor to register a new notice each time the encumbered intellectual property is transferred or licensed, intellectual property financing would be discouraged or become more expensive.]*

H. Registration of security rights in trademarks

37. The International Trademark Association (“INTA”) issued a series of recommendations with respect to the registration of security rights in trademarks

and service marks (collectively referred to a “marks”).¹ More specifically, INTA endorsed uniformity and best practice in registration mechanisms and methods regarding security rights in trademarks, recognizing that: intellectual property rights, including marks, are a major and growing factor in commercial lending transactions; lack of consistency in the registration of security rights in marks fosters commercial uncertainty, and also poses a risk that a mark owner may forfeit or otherwise endanger its mark-related rights; many States have no recording mechanisms (or have insufficient mechanisms) for the registration of security rights in marks; many countries apply different and conflicting criteria for determining what can and will be recorded; and international initiatives on security rights in intellectual property rights by organizations such as UNCITRAL will have broad implications for the way secured financing laws are implemented to deal with registration and other aspects of trademark security rights, especially in developing countries. It should be noted that the recommendations do not address issues relating to the registration of security rights in marks that may not be registered in a trademark office, leaving those issues to domestic secured transactions law (including the law recommended in the *Guide*). In addition, the recommendations address third-party effectiveness issues but do not set out priority rules, leaving them to domestic secured transactions law (including the law recommended in the *Guide*).

38. The main features of such best practices are the following:

(a) A security right in a mark covered by a pending application or registration should be registrable in the national Trademark Office;

(b) For purposes of giving notice of a security right, registration in the applicable national Trademark Office or in any applicable commercial registry is recommended, with free public accessibility, preferably through electronic means;

(c) The grant of a security right in a mark should not have the effect of a transfer of legal or equitable title to the mark that is subject to the security right, and should not confer upon the secured creditor a right to use the mark;

(d) The security agreement creating the security right should clearly set forth provisions acceptable under local law enabling the renewal of the marks by the secured creditor, if necessary to preserve the mark registration;

(e) Valuation of marks for purposes of security rights should be made in any manner that is appropriate and permitted under local law and no particular system or method of valuation is preferred or recommended;

(f) Registration of security rights in the local Trademark Office should suffice for purposes of perfecting a security right in a mark; at the same time, registration of a security right in any other place allowed under local law, such as a commercial registry, should also suffice;

(g) If local law requires that a security right be registered in a place other than the local Trademark Office in order to be perfected, such as in a commercial registry, dual registration of the security right should not be prohibited;

¹ See www.inta.org/index.php?option=com_content&task=view&id=1517&Itemid.

(h) Formalities in connection with registration of a security right and the amount of any government fees should be kept to a minimum; a document evidencing: (i) existence of a security right, (ii) the parties involved, (iii) the mark(s) involved by application and/or registration number, (iv) a brief description of the nature of the security right, and (v) the effective date of the security right, should suffice for purposes of making a security right effective against third parties;

(i) Regardless of the procedure, enforcement of a security right through foreclosure, after a judgement, administrative decision or other triggering event, should not be an unduly burdensome process;

(j) The applicable Trademark Office should promptly record the entry of any judgement or adverse administrative or other decision against its records and take whatever administrative action is necessary; the filing of a certified copy of the judgement or decision should be sufficient;

(k) In the event that enforcement is triggered by means other than a judgement or administrative decision, local law should provide for a simple mechanism enabling the holder of the security right to achieve registration, with free public accessibility, preferably through electronic means;

(l) In cases where the mark owner is bankrupt or otherwise unable to maintain the marks which are subject to a security right, absent specific contract provisions, the holder of the security right (or the administrator or executor, as the case may be) should be permitted to maintain the marks, provided that nothing shall confer upon the secured creditor the right to use the marks; and

(m) The relevant government agency or office should promptly record the filing of documentation reflecting release of the security right in its records, with free public accessibility, preferably through electronic means.

39. Recommendations (a), (b), (f) and (g), dealing with third-party effectiveness of a security right in a mark, are compatible with the *Guide* in that they promote the objectives of certainty and transparency (see recommendation 1, subparagraph (f)).

40. Recommendation (c), providing that the creation of a security right in a mark does not result in a transfer of the mark or confer upon the secured creditor the right to use the mark, is also compatible with the *Guide*. It should be noted that, under the *Guide*, the secured creditor has a right, but no obligation, to preserve an encumbered intangible asset (such an obligation is foreseen only for tangible assets; see recommendation 111). If, in the case of the owner's insolvency, neither the owner nor the insolvency representative nor the secured creditor takes the necessary steps to preserve the encumbered mark, the mark may still be preserved under law relating to intellectual property (for example, under the doctrine of the "excusable non-use" of a mark).

41. In addition, recommendation (d) is compatible with the *Guide* in that it sets forth a default rule for the rights of the parties within the limits of the applicable law. Recommendation (e) is also compatible with the *Guide* to the extent it emphasizes the importance of valuation of marks without suggesting any particular system of valuation. Recommendation (h) is also compatible with the *Guide* in that it recommends notice filing even in relation to mark registries. It should be noted that the reference to "the date of the security right" is a reference to the time of effectiveness of the security right between the parties and not against third parties.

42. Moreover, recommendations (i), (j) and (k) are compatible with the *Guide* in the sense that they provide for efficient enforcement mechanisms and registration of court judgements or administrative enforcement decisions. Finally, recommendation (m), which is subject to approval by the appropriate Government authorities, is compatible with the *Guide's* recommendations with respect to efficient registration procedures.

A/CN.9/WG.VI/WP.39/Add.4 (Original: English)

**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security rights
in intellectual property, submitted to the Working Group on Security
Interests at its sixteenth session**

ADDENDUM

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VI. Priority of a security right in intellectual property

[Note to the Working Group: For paras. 1-15 below and paras. 1-22 of A.CN.9/WG.VI/WP.39/Add.5, see A.CN.9/WG.VI/WP.37/Add.2, paras. 43-55, A.CN.9/WG.VI/WP.37/Add.3, paras. 1-23, A/CN.9/670, paras. 73-95, A/CN.9/WG.VI/WP.35/Add.1, paras. 33-61, A/CN.9/667, paras. 86-103, A/CN.9/WG.VI/WP.33/Add.1, paras. 1-25, and A/CN.9/649, paras. 41-56.]

A. The concept of priority

1. Under the *Guide*, the concept of priority of a security right as against competing claimants refers to the question of whether the secured creditor may derive the economic benefit of its security right in an encumbered asset in preference to a competing claimant (as to the meaning of the term “competing claimant”, see A/CN.9/WG.VI/WP.39, paras. 19-20, and para. 3 below). It should also be noted that a conflict between two persons, neither of whom is a secured creditor, is not a priority conflict under the *Guide*.

2. By contrast, in law relating to intellectual property, the notion of the priority of intellectual property rights may relate to notions of title and basic effectiveness. In most States, once intellectual property is transferred by the intellectual property owner, a second transfer by the same person will normally transfer no rights to the second transferee (except if the first transferee does not comply with statutory

registration requirements or the second transferee is a good faith purchaser; for the relevance of knowledge of prior transfers, see paras. 5-6). In such a case, the issue of priority in the sense that this term is used in the *Guide* does not arise. Accordingly, the *Guide* would not apply and this matter would be left to law relating to intellectual property. In any case, it should be noted that, under the *Guide*, a party that has no rights in, or the power to encumber, an asset may not create a security right in the asset (see recommendation 13).

B. Identification of competing claimants

3. Under the *Guide*, the notion of “competing claimant” with a right in an encumbered asset means another secured creditor with a security right in the same asset (which includes a transferee in a transfer by way of security), a transferee, lessee or licensee of the encumbered asset, a judgement creditor with a right in the encumbered asset and an insolvency representative in the insolvency of the grantor. In particular, the *Guide* applies to priority conflicts: (a) between two security rights in intellectual property, notices of which are registered in the general security rights registry (see recommendation 76, subparagraph (a)); (b) between a security right, a notice of which is registered in the general security rights registry, and a security right, a document or notice of which is registered in the relevant intellectual property registry (see recommendation 77, subparagraph (a)); (c) between two security rights, documents or notices of which are registered in the relevant intellectual property registry (see recommendation 77, subparagraph (b)); (d) between the rights of a transferee or licensee of intellectual property and a security right in that intellectual property that may be registered in an intellectual property registry (see recommendation 78); (e) between the rights of a transferee or licensee of intellectual property and a security right in that intellectual property that may not be registered in an intellectual property registry (see recommendations 79-81); and (f) between two security rights, one of which is granted by the grantor and the other is granted by the transferee, lessee or licensee of the encumbered asset (see recommendations 31, 79 and 82). The last conflict is addressed in the sense that the transferee takes the asset subject to the security right (see recommendations 79 and 82) and the secured creditor of the transferee takes no more rights than the transferee had (see recommendation 31).

4. In an intellectual property context, the notion of “conflicting transferees” is used instead and it includes transferees and licensees competing among themselves. If no conflict with a security right in intellectual property (which includes the right of a transferee by way of security) is involved, the law recommended in the *Guide* does not apply and the matter is left to law relating to intellectual property. If a conflict with such a security right is involved, the law recommended in the *Guide* does not apply insofar as its provisions are inconsistent with the enacting State’s law relating to intellectual property (see recommendation 4, subparagraph (b)). Furthermore, the *Guide* does not apply to a conflict between a transferee of an encumbered asset that acquired the asset from a secured creditor enforcing its security right and another secured creditor that later received a right in the same asset from the same grantor (that no longer had any rights in the encumbered asset). This is not a real priority conflict under the *Guide* (but it may well be a conflict addressed by law relating to intellectual property).

C. Relevance of knowledge of prior transfers or security rights

5. Under the *Guide*, knowledge of the existence of a prior security right on the part of a competing claimant is generally irrelevant for determining priority (see recommendation 93; however, knowledge that a transfer violates the rights of a secured creditor may be relevant; see recommendation 81, subparagraph (a)). Thus, the security right of a secured creditor that has knowledge of a security right created earlier may nonetheless have priority over the earlier-created security right if a notice of the later-created security right was registered before the earlier-created security right was made effective against third parties (see recommendation 76, subparagraph (a)).

6. By contrast, in many States, law relating to intellectual property provides that a later conflicting transfer or security right may only gain priority if it is registered first and taken without knowledge of a prior conflicting transfer. The deference to law relating to intellectual property under recommendation 4, subparagraph (b), should preserve these knowledge-based priority rules to the extent they apply specifically to security rights in intellectual property.

D. Priority of security rights in intellectual property that are not registered in an intellectual property registry

7. As already mentioned, if law relating to intellectual property has priority rules dealing with the priority of security rights in intellectual property that apply specifically to intellectual property and the priority rules of the law recommended in the *Guide* are inconsistent with those rules, the law recommended in the *Guide* does not apply (see recommendation 4, subparagraph (b)). However, if law relating to intellectual property does not have such rules or the priority rules of the law recommended in the *Guide* are not inconsistent with those rules, the priority rules of the law recommended in the *Guide* apply.

8. Under the *Guide*, priority between security rights granted by the same grantor in the same encumbered asset that were made effective against third parties by registration in the general security rights registry is determined by the order of registration of a notice in that registry (see recommendation 76, subparagraph (a)). This rule applies if a notice or document of a security right may not be registered or is not registered in a specialized registry. If such a notice or document may be registered and is registered in a specialized registry, different rules apply (see recommendation 77 and paras. 9-11 below). In addition, if a security right is granted by a different grantor (for example, a transferee of the initial grantor), different rules apply (see recommendation 79-83 and paras. 12-15 below and A/CN.9/WG.VI/WP.39/Add.5, paras. 1-14). All these rules apply equally to security rights in intellectual property.

E. Priority of security rights in intellectual property that are registered in an intellectual property registry

9. The *Guide* recommends that a security right with respect to which a document or notice may be registered and is registered in a specialized registry and thus is

effective against third parties (see recommendation 38) should have priority over a security right, with respect to which a notice was registered in the general security rights registry, regardless of the order of those registrations (see recommendation 77, subparagraph (a)). It also recommends that a security right, with respect to which a document or notice may be registered and is registered in a specialized registry, has priority over a security right that was subsequently registered in the specialized registry (see recommendation 77, subparagraph (b)). In addition, if an encumbered asset is transferred, leased or licensed and, at the time of the transfer, lease or licence, the security right has been made effective against third parties by registration in the relevant intellectual property registry, the transferee or licensee takes its rights subject to the security right. If a security right may be registered but is not registered in a specialized registry, a transferee, lessee or licensee of an encumbered asset will take the asset free of the security right, even if a notice of the security right was registered in the general security rights registry (see recommendation 78). If the security right may not be registered in a specialized registry, a transferee of the encumbered asset takes it subject to the security right, unless certain exceptional conditions are met (see recommendations 79-81). A secured creditor of a transferee takes subject to a security right created by a transferor (see recommendations 31 and 82).

10. These recommendations are equally applicable to security rights in intellectual property. Thus, if there is a conflict between two security rights in intellectual property, one of which is the subject of a notice registered in the general security rights registry and the other is the subject of a document or notice registered in the relevant intellectual property registry, the *Guide* applies and gives priority to the latter security right (see recommendation 77, subparagraph (a)). If there is a conflict between security rights with respect to which documents or notices are registered in the relevant intellectual property registry, the right a document or notice of which is registered first has priority, and the *Guide* confirms that result (see recommendation 77, subparagraph (b)). If there is a conflict between the rights of a transferee of intellectual property and a security right with respect to which, at the time of the transfer, a document or notice could be registered and was registered in the relevant intellectual property registry, the transferee would take the encumbered intellectual property subject to the security right. However, if a security right in intellectual property may be registered but is not registered, the transferee or licensee of the encumbered intellectual property takes the encumbered intellectual property free of the security right, even if the security right was registered in the general security rights registry (see recommendation 78). In some States, under law relating to intellectual property, a secured creditor would have priority in this case, if the transferee is not a good faith purchaser. Following recommendation 4, subparagraph (b), the *Guide* would defer to that rule if it applied specifically to intellectual property. Finally, a secured creditor of a transferee of intellectual property takes the intellectual property subject to the security right of the transferor (see recommendations 31 and 82).

11. For example, if A creates a security right in a patent in favour of B that registers a notice of its security right in the general security rights registry, and then A transfers title to the patent to C, which registers a document or notice of its transfer in the patent registry, under the *Guide*, C would take the patent free of the security right, because no document or notice of the security right was registered in the patent registry (see recommendation 78). Similarly, if A, instead of making a

transfer, creates a second security right in favour of C and only C registers a document or notice of the security right in the patent registry, under the *Guide*, C would prevail (see recommendation 77, subparagraph (a)). In either case, as registration of a document or notice in the patent registry gives superior rights, under the *Guide*, third-party searchers could rely on a search in that registry and would not need to search in the general security rights registry. In all these examples, the questions of who is a transferee and what are the requirements for a transfer are matters of law relating to intellectual property. It should also be noted that registration in the intellectual property registry would normally refer only to a security right in intellectual property. It would not refer to a security right in tangible assets with respect to which intellectual property is used.

F. Rights of transferees of encumbered intellectual property

12. Under the *Guide*, a transferee of an encumbered asset (including intellectual property) normally takes the asset subject to a security right that was effective against third parties at the time of the transfer (see recommendation 79). There are two exceptions to this rule. The first exception arises where the secured creditor authorizes the disposition free of the security right (see recommendation 80, subparagraph (a) for sales of encumbered assets and subparagraph (b) for leases or licences of encumbered assets). The second exception relates to a transfer in the ordinary course of the seller's, lessor's or licensor's business where the buyer, lessee or licensee has no knowledge that the sale, lease or licence violates the rights of the secured creditor under the security agreement (see recommendation 81, subparagraph (a) for sales of encumbered assets, subparagraph (b) for leases and subparagraph (c) for licences). If a security right may be registered (whether registered or not) in an intellectual property registry, as already mentioned (see paras. 9-11 above), a different rule applies (see recommendation 78).

13. Recommendation 79 applies equally to security rights in intellectual property that may not be registered (whether registered or not) in an intellectual property registry (and recommendation 78 applies to security rights in intellectual property that may be registered (whether registered or not) in an intellectual property registry). Thus, if a notice in respect of a security right is registered in the general security rights registry, a transferee or licensee of intellectual property will take the encumbered intellectual property subject to the security right, unless one of the exceptions set out in recommendations 80-82 applies (with respect to recommendation 81, subparagraph (c), see A/CN.9/WG.VI/WP.39/Add.5, paras. 7-14). These recommendations do not apply, under recommendation 4, subparagraph (b), if there are contrary priority rules of the law relating to intellectual property that apply specifically to intellectual property.

14. It is important to note that, if intellectual property is transferred before the creation of a security right, the secured creditor will have no security right at all on the basis of the generally acceptable *nemo dat* property law rule, the application of which the *Guide* does not affect. This approach is reflected in the general rule in the *Guide* that a grantor can create a security right only in an asset in which the grantor has rights or the power to create a security right (see recommendation 13). This rule would be displaced though by a rule of law relating to intellectual property giving

priority to a good faith purchaser of the encumbered intellectual property (see recommendation 4, subparagraph (b)).

15. It is also important to note that, as already mentioned (see A/CN.9/WG.VI/WP.39/Add.3, paras. 31-36), under the *Guide*, a licence of intellectual property is not a transfer of the licensed intellectual property. Thus, the rules of the *Guide* that apply to transfers of encumbered assets do not apply to licences. However, the *Guide* would defer to law relating to intellectual property treating certain licences (in particular, exclusive licences) as transfers (see recommendation 4, subparagraph (b)).

A/CN.9/WG.VI/WP.39/Add.5 (Original: English)

**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security rights
in intellectual property, submitted to the Working Group on Security
Interests at its sixteenth session**

ADDENDUM

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**VI. Priority of a security right in intellectual property
(*continued*)**

G. Rights of licensees in general

1. Intellectual property is routinely licensed. In such cases, the retained rights of a licensor, such as the ownership right, rights associated with ownership and the rights of a licensor under a licence agreement (such as the right to grant further licences or to obtain payment of royalties) may be used by the licensor as security for credit. Similarly, the licensee's authorization to use or exploit the intellectual property or the licensee's right to grant sub-licences and obtain payment of royalties (in both cases according to the terms of the licence agreement) may be used by the licensee as security for credit (as to the types of encumbered asset in an intellectual property context, see A/CN.9/WG.VI/WP.39/Add.2, paras. 13-36).

2. Under the *Guide*, where the intellectual property owner has created a security right in favour of a secured creditor, the owner may still grant a licence in the encumbered intellectual property as long as it remains the intellectual property owner. However, under general principles of law relating to intellectual property (with which the *Guide* is consistent), the owner may not grant a licence in its encumbered intellectual property if the secured creditor becomes the owner of the intellectual property with authority to grant licences while the security right is in place. In this situation, a licence granted by the original owner would be an unauthorized licence under law relating to intellectual property and the licensee or its secured creditor would obtain nothing based on the *nemo dat* principle.

3. If the owner remains the owner but its ability to grant licences is limited by agreement with the secured creditor (to the extent such agreement is permitted under law relating to intellectual property), the owner may theoretically grant a licence, but the result would normally be the same, because the granting of a licence by the owner in breach of its agreement with the secured creditor would be an event of default. As a result, the owner's secured creditor could enforce its security right and, exercising the rights of the owner sell the licensed intellectual property or grant another licence free of the pre-existing licence (and any security right granted by the licensee) as that licensee would normally have taken its licence subject to the security right of the owner's secured creditor (see recommendations 79 and 161-163). Alternatively, the owner's secured creditor could enforce its security right upon default by collecting the royalties owed by the licensee to the owner as licensor. If the encumbered asset is the owner's rights, the secured creditor may collect the royalties as proceeds of the encumbered intellectual property (see recommendations 19, 39, 40, 100 and 168). If the encumbered asset is the right of the owner as licensor to the payment of royalties, the secured creditor may collect the royalties as the original encumbered asset. In either case, the secured creditor may collect royalties even before default but only if there is an agreement to that effect between the owner and its secured creditor. In any case, if the licensee took the licensed intellectual property free of the security right granted by the owner in the intellectual property (that is, if the secured creditor authorized the granting of the licence or the licence is a non-exclusive licence granted by the owner in its ordinary course of business), the licensee could retain its licence and the secured creditor could only seek to collect the royalties owed by the licensee to the owner (see recommendations 80, subparagraph (b), and 81, subparagraph (c)).

4. If the licensee also creates a security right in its rights under the licence agreement (for example, the authorization to use or exploit the licensed intellectual property), that security right would be in a different asset (that is, not in the owner's rights). If the security right created by the licensee were in the same asset, it would be subject to the security right created by the owner (and made effective against third parties). The reason for this result is that the licensee would have taken its rights subject to the security right created by the owner (see recommendation 79) and the licensee could not have given to its secured creditor more rights than the licensee had (based on the *nemo dat* principle). So, if the secured creditor of the owner enforced its security right and disposed of the encumbered intellectual property free of the licence, the licence would terminate upon that disposition and the licensee's encumbered asset would cease to exist. Likewise, whether or not the owner had granted a security right to one of its creditors, if the licensee defaults on the licence agreement, the owner as licensor can terminate it to the extent permitted under law relating to intellectual property and the licensee's secured creditor would be again left without an asset encumbered by its security right.

5. The rights of the licensor and the licensee under the licence agreement and the relevant law relating to intellectual property would remain unaffected by secured transactions law. So, if the licensee defaulted on the licence agreement, the licensor could exercise any available right to terminate it and the licensee's secured creditor would be again left without security. Similarly, secured transactions law would not affect an agreement between the licensor and the licensee prohibiting the licensee from granting sub-licences or assigning to the licensor the licensee's rights to the payment of royalties owed by sub-licensees to the licensee as sub-licensor.

6. Under the *Guide*, as a matter of secured transactions law, there are two exceptions to the rule that a licensee of encumbered intellectual property takes the licence subject to a pre-existing security right (see recommendation 79). The first exception arises where the secured creditor authorizes the licence free of the security right (see recommendation 80, subparagraph (b)). The second exception relates to a non-exclusive licence in the ordinary course of the licensor's business (see recommendation 81, subparagraph (c), and paras. 8-10 below).

H. Rights of certain licensees

7. As already mentioned, the first exception to the principle of the *Guide* that a licensee of an encumbered asset takes the asset subject to the security right (see recommendation 79) arises where the secured creditor approved the granting of licences by the grantor free of the security right (see recommendation 80, subparagraph (b)). Thus, under the *Guide*, in the case of the grantor's default, the secured creditor could collect any royalties owed by the licensee to the grantor as licensor, but not sell the licensed intellectual property free of the rights of the existing licensee or grant another licence with the effect of terminating the rights of the existing licensee as long as the licensee performs the terms of the licence agreement.

8. The second exception to the principle embodied in recommendation 79 is that a non-exclusive licensee that takes a licence in the ordinary course of business of the licensor without knowledge that the licence violated the rights of the secured creditor in the licensed intellectual property, takes its rights under the licence agreement unaffected by a security right previously granted by the licensor (see recommendation 81, subparagraph (c)). The result of this rule is that, in the case of enforcement of the security right in the licensed intellectual property by the secured creditor of the licensor, the secured creditor could collect any royalties owed by the licensee to the licensor, but not sell the licensed intellectual property free of the rights of the existing licensee or grant another licence with the effect of terminating the rights of the existing licensee as long as the licensee performs the terms of the licence agreement. This rule is intended to protect everyday, legitimate transactions, such as off-the-shelf purchases of copies of copyrighted software with end-user licence agreements. In such transactions, purchasers should not have to do a search in a registry or acquire the software subject to security rights created by the software developer or its distributors.

9. Recommendation 81, subparagraph (c), is based on the assumption that the grantor retains ownership of the encumbered intellectual property. This means that recommendation 81, subparagraph (c), does not apply if, under law relating to intellectual property, the grantor is no longer authorized to grant a licence because it has transferred the owner's rights to the secured creditor. In addition, recommendation 81, subparagraph (c), does not affect the relationship between the licensor and the licensee and does not mean that the licensee would obtain a licence free of the terms and conditions of the licence agreement and the law applicable to it (nor does it affect limitations in the licence agreement on the licensee entering into sub-licence agreements). Moreover, this recommendation and the *Guide* as a whole do not interfere with the enforcement of provisions as between the secured creditor and the grantor/licensor (or between the licensor and its licensee) that the

grantor/licensor place in all of the non-exclusive ordinary-course-of-business licences a provision that the licence will terminate if the licensor's secured creditor enforces its security right.

10. The secured creditor may elect to avoid extending any credit until it has an opportunity to review and approve the terms of the sub-licences. For example, the secured creditor may wish to ensure that expected royalties are paid upfront, termination is permitted in the case of non-payment of royalties and assignment of sub-royalties is prohibited. In addition, if the secured creditor of the licensor does not want to encourage non-exclusive licences, it can, in its security agreement (or elsewhere), require the grantor (the licensor) to place in all of the non-exclusive licences a provision that the licence will terminate if the licensor's secured creditor enforces its security right. Similarly, if the licensor does not want its licensee to grant any sub-licences, it can include in the licence agreement a provision that the granting of a sub-licence by the licensee is an event of default under the licence agreement that would entitle the licensor to terminate the licence. Nothing in the *Guide* would interfere with the enforcement of such provisions as between the secured creditor and its borrower (or as between the licensor and its licensee). Ordinarily, the secured creditor will have no interest in doing that, since the licensor (and any licensee) is in the business of granting non-exclusive licences and the secured creditor expects the grantor to use the fees paid under those licence agreements to pay the secured obligation.

11. From the discussion above it becomes clear that the scope of application of recommendation 81, subparagraph (c), is very limited for a number of reasons. First, secured creditors typically have no interest in limiting the ability of an owner/grantor to grant licences in its intellectual property and collect royalties. As a matter of fact, a secured creditor is normally interested in permitting licensing so that the owner/grantor may repay the secured obligation. Second, by its wording, recommendation 81, subparagraph (c), applies only where there is a non-exclusive licence, one that includes a legitimate "off-the-shelf" purchase of copies of copyrighted software or patent pools used with respect to equipment and only where the licensee had no knowledge that the licence violated the rights of the secured creditor under the security agreement. Such off-the shelf licences may be described without reference to the ordinary-course-of-business concept.

12. In addition, the impact of the application of recommendation 81, subparagraph (c), is very limited. The effectiveness, priority and enforceability of the security right against competing claimants (other than the specific licensee) under secured transactions law are not affected. At the same time, if the secured creditor has other rights under law relating to intellectual property law (for example, the rights of an owner), these rights are not affected by recommendation 81, subparagraph (c). The extent of such rights or remedies is a matter of law relating to intellectual property.

13. However, the concept of ordinary course of business is rarely used in intellectual property law and may create confusion in an intellectual property financing context. In many States, a different rule applies that provides that a licensee of encumbered intellectual property takes the licence subject to a security right created by the licensor, unless the secured creditor (to whom the grantor has given the right to authorize licences) authorized the granting of the licence free of the security right. To the extent that a State has such a rule recommendation 81,

subparagraph (c), would not apply (see recommendation 4, subparagraph (b)). As a result, unless the secured creditor authorized the grantor to grant licences unaffected by the security right (which will typically be the case as the grantor will rely on its royalty income to pay the secured obligation), the licensee would take the licence subject to the security right. Thus, if the grantor defaults, the secured creditor would be able to enforce its security right in the licensed intellectual property and sell or licence it free of the licence. In addition, a person obtaining a security right from the licensee will not obtain an effective security right as the licensee would have received an unauthorized licence and would have no right to give.

14. If law relating to intellectual property does not address this matter at all or does not address it inconsistently with recommendation 81, subparagraph (c), recommendation 81, subparagraph (c), will apply in the limited cases and with the limited impact described above (see recommendation 4, subparagraph (b)).

[Note to the Working Group: At its fifteenth session, the Working Group requested the Secretariat to prepare a revised version of alternative A of this recommendation with appropriate commentary. This revised recommendation and commentary are set out below. The Working Group may wish to consider whether the bracketed language is necessary as it states the obvious. The Working Group may also wish to consider whether subparagraph (d) should be retained as it appears to be too restrictive. If the Working Group decides to delete subparagraph (d) and considers that it is somehow useful, it could consider including it in the commentary as an explanation.]

Recommendation 244¹

Priority of rights of certain licensees of intellectual property

Alternative A

The law should provide that[, in cases that are not covered by recommendation 80, subparagraph (b),] the right of a[n end-user] licensee of intellectual property to use or exploit the licensed intellectual property pursuant to the terms and conditions of the licence agreement is not limited by the enforcement of a security right in the licensed intellectual property created by the licensor before the licence was granted, provided that:

- (a) The licence is granted by a party that, under law relating to intellectual property, is authorized to grant a licence in the relevant intellectual property;*
- (b) The licence is non-exclusive;*
- (c) The licensed intellectual property and the rights and obligations under the licence agreement are not customized for the licensee;*
- (d) The licence covers copies of copyrighted software or patent pools used with respect to equipment; and*
- (e) At the time of the conclusion of the licence agreement:*

¹ If this recommendation could be included in the *Guide*, it would be placed in the chapter on the priority of a security right as recommendation 81 bis. As an asset-specific recommendation, this recommendation would modify the general recommendation 81, subparagraph (c), which refers to non-exclusive licensees of intangible assets in general.

- (i) *The licensor is generally in the business of granting non-exclusive licences in the licensed intellectual property;*
- (ii) *The licensor grants licences of the licensed intellectual property on substantially the same terms to any person that agrees to perform in accordance with such terms, and the licence agreement is on such terms; and*
- (iii) *The licensee does not have knowledge that the licence violates the rights of the secured creditor under the security agreement.*

Commentary

1. This recommendation does not affect:

(a) *The effectiveness of a security right in licensed intellectual property, its priority as against a competing claimant other than a licensee as described in this recommendation or the enforcement remedies of the secured creditor that do not affect the right of the licensee to use or exploit the licensed intellectual property;*

(b) *Any right that the licensor may have to terminate the licence for non-compliance of the licensee with the licence agreement; or*

(c) *The rights of a secured creditor as an owner under law relating to intellectual property.*

2. *It should also be noted that the rights of the licensee under this recommendation may be derogated from by agreement of the licensee in the licence agreement or otherwise. Like any other recommendation of the Guide, this recommendation is subject to recommendation 4, subparagraph (b).*

3. *The following examples are mentioned to clarify the situations to which this recommendation would apply and the impact from its application. In each example, it should be assumed that:*

(a) *O owns intellectual property;*

(b) *O grants a security right in the intellectual property to SC;*

(c) *O's security right is effective against third parties either in accordance with the recommendations of the Guide or, pursuant to recommendation 4, subparagraph (b), under the law relating to intellectual property;*

(d) *SC has not agreed, in the security agreement or otherwise, that any licensee of the intellectual property from O will enjoy its rights free of SC's security right; and*

(e) *Except as indicated, the transaction satisfies each provision of recommendation 244.*

4. *After SC takes the steps necessary to make its security right effective against third parties, O, who is in the business of granting non-exclusive licences of the intellectual property on substantially the same terms to any person who agrees to perform in accordance with such terms, offers to license the intellectual property to L. L enters into a licence agreement with O on those terms. O defaults on the obligation secured by the security right and SC sets out to enforce its security right. The right of L to use the intellectual property is protected by recommendation 244 against enforcement by SC of its security right because the licence and the*

transaction satisfy each provision of recommendation 244. However, SC still has whatever rights it may have against L under law relating to intellectual property.

5. After SC takes the steps necessary to make its security right effective against third parties, O grants a licence in the intellectual property to L. The licence agreement provides that L may grant sub-licences in the intellectual property only for educational markets. L grants a sub-licence in a commercial market to S. O defaults on the obligation secured by the security right, and SC sets out to enforce its security right. If, under the law relating to intellectual property, the sub-licence to S is not authorized, the right of S to use the intellectual property is not protected by recommendation 244 against enforcement by SC of its security right (and, as rights and obligations under the licence agreement go together, L is no longer bound by the obligations set out in the licence agreement).

6. After SC takes the steps necessary to make its security right effective against third parties, O grants a licence in the intellectual property to L. The licence agreement provides that L has exclusive rights to use the intellectual property in State Z. O defaults on the obligation secured by the security right, and SC sets out to enforce its security right. The right of L to use the intellectual property is not protected by recommendation 244 against enforcement by SC of its security right because the licence is exclusive.

7. After SC takes the steps necessary to make its security right effective against third parties, O, who is in the business of granting non-exclusive licences of the intellectual property on substantially the same terms to any person who agrees to perform in accordance with such terms, offers to license the intellectual property to L on such terms. L declines to enter into a licence agreement with O on those terms. Instead, O grants a licence in the intellectual property to L, pursuant to which L has greater rights in the intellectual property than under the licences generally offered to others. O defaults on the obligation secured by the security right, and SC sets out to enforce its security right. The right of L to use the intellectual property is not protected by recommendation 244 against enforcement by SC of its security right because the licence is not on substantially the same terms as other licences of the same intellectual property.

8. Before O and L enter into the licence agreement, L discovers the notice filed to make SC's security right effective against third parties and, accordingly, asks to see a copy of the security agreement relating to that notice. The security agreement is furnished to L by O. Upon reading the security agreement, L discovers that the licence to it would violate the rights of SC. Nonetheless, L enters into the licence agreement with O. O defaults on the obligation secured by the security right, and SC sets out to enforce its security right. The right of L to use the intellectual property is not protected by recommendation 244 against enforcement by SC of its security right because L had knowledge that the licence agreement would violate SC's rights.

9. After SC takes the steps to make its security right effective against third parties, O offers to license the intellectual property — but only to parties who have experience in using this type of intellectual property. O grants a licence to L, who has that experience. O defaults on the obligation secured by the security right, and SC sets out to enforce its security right. The right of L to use the intellectual property is not protected by recommendation 244 against enforcement by SC of its

security right because O did not make a licence of the intellectual property available on substantially the same terms to any person who agreed to perform the obligations of the licensee under the licence agreement in accordance with such terms.

10. Same facts as under para. 8 above, except that, O does not furnish a copy of the security agreement to L and, as a result, L does not know that the licence would violate the rights of SC. O defaults on the obligation secured by the security right, and SC sets out to enforce its security right. The right of L to use the intellectual property is protected by recommendation 244 against enforcement by SC of its security right because the licence and the transaction satisfy each provision of recommendation 244.

11 After SC registers its security right, O grants a non-exclusive licence to a patent pool. The patent pool will grant a non-exclusive licence to any interested person. SC forecloses on the intellectual property. The licence is not discharged as a result of the foreclosure because the licence and the transaction satisfy each provision of recommendation 244.

Alternative B

The law should provide that, if the security agreement between a licensor and its secured creditor does not address the question whether the licensor may grant licences in the encumbered intellectual property free of the security right, the licensor is deemed to have been authorized by the secured creditor to grant licences free of the security right.]

I. Priority of a security right in intellectual property granted by a licensor as against a security right granted by a licensee

15. The licensor's right to the payment of the royalties owed to the licensor by the licensee under a licence agreement is not affected by any security right granted by the licensee in any royalties due to the licensee under any sub-licence agreement. Such a security right, though, can have an impact on the licensee's ability to pay the licensor if the licensee is in default with respect to its secured creditor inasmuch as that secured creditor may seek to collect the sub-royalties itself. In addition, if the licensee, in payment of royalties owed by the licensee to the licensor, assigns to the licensor the right to the payment of a percentage of the sub-royalties that the licensee will obtain as sub-licensor from sub-licensees, then a priority conflict may arise between a secured creditor of the licensor and a secured creditor of the licensee. In such a case, if the assignment of sub-royalties takes place before a licence is granted and a security right is created and made effective by the licensee, the licensee does not have a right in the assigned sub-royalties at the time it creates a security right and thus a secured creditor of the licensee takes its security right in the sub-royalties subject to the security right of the licensor's secured creditor. If, however, the assignment takes place after a licence is granted and a security right is created and made effective by the licensee in all its future royalties, the licensor takes the assignment subject to the security right of the licensee's secured creditor and thus the licensor's secured creditor takes its security right also subject to the security right of the licensee's secured creditor (see recommendations 13 and 31).

16. The following example may be useful in illustrating the problem. A creates a security right in all its future assets or royalties in favour of secured creditor SC1. A then takes an intellectual property licence from licensor B and, in payment of royalties owed to B, licensee A assigns to licensor B the right to payment of a percentage of the sub-royalties payable to licensee A as a sub-licensor. Licensor B creates and makes effective against third parties a security right in these royalties in favour of secured creditor SC2. Licensee A's secured creditor SC1 will prevail as licensor B took the assignment of the sub-royalties subject to licensee A's secured creditor SC1 security right and licensor B's secured creditor SC1 can have no greater rights than licensor B.

17. If, however, licensee B first creates a security right in its right to the payment of sub-royalties and then assigns to licensor A the right to payment of a percentage of the sub-royalties, SC2 (that is, the licensee's secured creditor) will prevail. The licensor has numerous ways to protect itself in this circumstance. For example, the licensor can protect its rights by: (a) ensuring that its secured creditor registers first in the relevant intellectual property registry or requiring the secured creditor of the licensee to enter into a subordination agreement with the licensor's secured creditor before granting a licence; (b) prohibiting the licensee from granting a security right in its right to the payment of sub-royalties; (c) terminating the licence in cases where the licensee created a security right in its sub-royalties in breach of such a prohibition; or (d) agreeing that any sub-licensee pay its sub-royalties directly to the licensor. The *Guide* does not interfere with any agreements of this kind between licensor and licensee, if they are effective under law relating to intellectual property and the law of obligations. In addition, the licensor could insist that the licensee grant to the licensor a security right in its right to the payment of sub-royalties.

18. However, these steps may protect the licensor to a certain extent only, because, for example, rights in the encumbered intellectual property may not be subject to registration in an intellectual property registry or it may not be commercially practicable for the licensor to prohibit sub-licensing, terminate the licence agreement or obtain a subordination agreement. In addition, the priority of a security right created by the licensor as against another security right created by the licensee in its right to the payment of sub-royalties would be subject to the general rules explained above (see para. 15).

19. In situations where the encumbered asset is a tangible asset with respect to which intellectual property is used, in certain circumstances, a security right may qualify as an acquisition security right. This means that a secured creditor of a lessor may obtain priority over a secured creditor of a lessee, even if the lessor's secured creditor registers second. However, as discussed in the chapter on enforcement, that right encumbers the tangible asset and not the intellectual property. The right of the acquisition secured creditor to dispose of the encumbered assets as they are (that is, including the application of the intellectual property in that specific encumbered asset) is treated as a matter of enforcement and, as discussed below, is subject either to the exhaustion of the rights of the owner of the intellectual property used in the specific tangible encumbered assets or to the authorization given to the secured creditor by the owner to dispose of the encumbered assets as they are (see A/CN.9/WG.VI/WP.39/Add.6, paras. 24-27 below).

[Note to the Working Group: The Working Group may wish to note that, in accordance with historical commercial and legal practices in many States, the discussion of acquisition financing in the Guide is limited to tangible assets (other than negotiable instruments and negotiable documents). The Guide does not address explicitly the question whether an acquisition security right in tangible assets with respect to which software is used extends to the software. However, under the Supplement, that result would be possible under the same conditions under which a security right in tangible assets extends to intellectual property used with respect to those assets (see A/CN.9/WG.VI/WP.39/Add.2, paras. 32-36).

It is argued though that, in modern credit economies, it would be useful to have the same rules apply to security rights securing amounts used for the acquisition (but not the original creation) of intellectual property. It is also argued that this would provide parity in the treatment of tangible assets and intellectual property assets. Thus, the Working Group agreed to consider a proposal that would apply the principles of the Guide on acquisition security rights in tangible assets to security rights in intellectual property securing amounts used for the acquisition of that intellectual property (see A/CN.9/670, paras. 89-93). The following text has been prepared so as to assist the Working Group in its consideration of that proposal.

In some legal systems, an acquisition security right in software is possible but only if: (a) the security right accompanies a security right in a tangible asset, (b) the software is acquired by the grantor in a transaction integrated with the transaction in which the grantor acquired the tangible asset, and (c) the grantor acquires the software for the principal purpose of using the software in the tangible asset. In other legal systems, it is possible for a secured creditor to obtain an acquisition security right in intangible assets (including intellectual property, whether or not the intellectual property is used in connection with tangible assets). In yet other legal systems, where the law (for example a civil code) does not contain the concept of an acquisition security right, a similar result may be achieved through a reservation of title, a financial lease or a hypothec securing the sale price of a movable asset. In each case, the transaction may relate to an intangible asset, although this is rarely seen. In yet other legal systems, a “mortgage” or “fixed charge” securing the acquisition of intellectual property is possible and it can prevail over a pre-existing “floating charge”.

The existing rules in the Guide with respect to acquisition security rights in tangible assets could be made to apply to similar rights in intellectual property by:

(a) Providing that acquisition security rights can exist in intellectual property, as well as in tangible assets;

(b) In cases in which the intellectual property that is subject to an acquisition security right is held by the grantor for sale, lease or licence in the ordinary course of the grantor’s business, the acquisition security right is treated as an acquisition security right in inventory;

(c) In cases in which the intellectual property subject to an acquisition security right is used or intended by the grantor to be used for personal, family or household purposes, the acquisition security right is treated as an acquisition security right in consumer goods;

(d) *In cases in which the intellectual property that is subject to an acquisition security right is not held by the grantor for sale, lease or licence in the ordinary course of the grantor's business or to be used for personal, family or household purposes, the acquisition security right is treated as an acquisition security right in tangible assets other than inventory or consumer goods;*

(e) *Deleting references to possession and delivery of the encumbered asset.*

Terminology and recommendations

The Working Group may wish to consider terminology (to be added to the terminology part of the Supplement) and recommendations (to be added to a new chapter of the Supplement on acquisition financing) along the following lines:

“Acquisition security right” also includes a security right in intellectual property and a licence in intellectual property, provided that the security right secures the obligation to pay any unpaid portion of the acquisition price of the encumbered asset or an obligation incurred or credit otherwise provided to enable the grantor to acquire the encumbered asset.

“Consumer goods” for the purposes of the Supplement includes intellectual property or a licence used or intended by the grantor to be used for personal, family or household purposes.

“Inventory” for the purposes of the Supplement includes intellectual property or a licence used or intended by the grantor to be used for sale or licence in the ordinary course of the grantor's business.

- 1. The law should provide that all references to acquisition security rights in tangible assets also refer to an acquisition security right in intellectual property or a licence in intellectual property.*
- 2. The law should provide that, if intellectual property or a licence in intellectual property that is subject to an acquisition security right is held for sale or licence in the ordinary course of the grantor's business, the acquisition security right is treated as an acquisition security right in inventory.*
- 3. The law should provide that, if intellectual property or a licence in intellectual property that is subject to an acquisition security right is used or intended by the grantor to be used for personal, family or household purposes, the acquisition security right is treated as an acquisition security right in consumer goods.*
- 4. The law should provide that, if intellectual property or a licence in intellectual property is subject to an acquisition security right, any reference in such recommendations to possession of the encumbered asset by the secured creditor does not apply.*
- 5. The law should provide that, if intellectual property or a licence in intellectual property is subject to an acquisition security right, any reference in such recommendations to the time of possession of the encumbered asset by the grantor refers to the time the grantor obtains the encumbered intellectual property or licence.*
- 6. The law should provide that, if intellectual property or a licence in intellectual property is subject to an acquisition security right, any reference in such*

recommendations to time of the delivery of the encumbered asset to the grantor refers to the time the grantor obtains the encumbered intellectual property or licence.

Examples

The following examples have been prepared to assist the Working Group in its consideration of the proposal. In all these examples, the owner or a second secured creditor financing the acquisition of intellectual property or a licence in intellectual property has an acquisition security right with special priority under the conditions described in the examples.

Acquisition security right in intellectual property securing the purchase price of the intellectual property (other than inventory or consumer goods)

1. *B grants a security right in all of its present and future movable assets to SC, who takes the actions necessary to make that security right effective against third parties. Subsequently, B acquires a patent from O to be used in B's business. Pursuant to the agreement between B and O, B agrees to pay the purchase price to O over time and B grants O a security right in the patent to secure B's obligation to pay the purchase price. O makes that security right effective against third parties within a short period of time, such as 20 or 30 days of B obtaining the patent. O's security right is an acquisition security right and has priority over the security right of SC (see recommendation 180, alternative A, subparagraph (a), or alternative B, subparagraph (b)). Whether the priority of O's security right extends to proceeds of the patent in the form of receivables depends on which version of recommendation 185 a State enacts. Under alternative A, the priority of O's security right carries over to the receivables (see recommendation 185, alternative A, subparagraph (a)). Under alternative B, O's security right in the receivables would have only the priority of a non-acquisition security right (see recommendation 185, alternative B).*

Acquisition security right in intellectual property securing the purchase price of the intellectual property (inventory)

2. *B grants a security right in all of its present and future movable assets to SC1, who takes the actions necessary to make the security right effective against third parties. Subsequently, B acquires a patent from O for the purpose of licensing it to third parties in the ordinary course of B's business. B obtains the money necessary to pay the purchase price to O by borrowing money from SC2, to whom B grants a security right in the patent to secure B's repayment obligation. Before B obtains the patent, SC2: (a) takes the actions necessary to make its security right effective against third parties, and (b) notifies SC1 that SC2 will have an acquisition security right. SC2's security right is an acquisition security right and has priority over the security right of SC1 (see recommendation 180, alternative A, subparagraph (b), or alternative B, subparagraph (b)). Under alternative A, this result is brought about by recommendation 180, subparagraph (b), which requires all of the facts listed in this example. Under alternative B, the result is the same. Indeed, under alternative B, the security right of SC2 would have priority over the security right of SC1 so long as SC2 takes the actions necessary to make its security right effective against third parties within a short period of time such as 20 or 30 days of B*

obtaining the patent, and there would be no necessity of notifying SC1. The priority of SC2's security right does not extend to proceeds of the patent in the form of receivables (see recommendation 185). This is the case no matter which alternative version of recommendation 185 a State enacts. Under alternative A, this result is brought about by recommendation 185, subparagraph (b). Under Alternative B, the result is brought about by recommendation 185.

Acquisition security right in an intellectual property licence securing the purchase price of the licence (other than inventory or consumer goods)

3. *B has granted a security right in all of its present and future movable assets to SC, who has taken the actions necessary for that security right to be effective against third parties. Subsequently, B obtains a licence from O to use a patent owned by O in B's business. B agrees to pay the licence fee to O over time and grants O a security right in B's rights as licensee to secure B's payment obligation. O makes that security right effective against third parties within xx days of B obtaining the licence. O's security right in B's rights under the licence agreement is an acquisition security right and has priority over the security right of SC (see recommendation 180, alternative A, subparagraph (a), or alternative B, subparagraph (b)). Whether the priority of O's security right extends to proceeds of B's rights as licensee in the form of receivables depends on which version of recommendation 185 a State enacts. Under alternative A, the priority of O's security right carries over to the receivables (see recommendation 185, alternative A, subparagraph (a)). Under alternative B, O's security right in the receivables would have only the priority of a non-acquisition security right (see recommendation 185, alternative B). It should be noted that O's rights pursuant to its security right are separate from O's rights under the licence agreement to terminate the licence agreement upon B's default in its obligations under the licence agreement.*

Acquisition security right in an intellectual property licence securing the purchase price of the licence (inventory)

4. *B grants a security right in all of its present and future movable assets to SC1, who takes the actions necessary to make the security right effective against third parties. Subsequently, B obtains a licence from O, the patent owner, for the purpose of sub-licensing the patent to third parties in the ordinary course of B's business. B obtains the money necessary to pay its licence fee by borrowing money from SC2, to whom B grants a security right in B's rights as licensee to secure B's repayment obligation. Before B obtains the licence, SC2: (a) takes the actions necessary to make its security right effective against third parties; and (b) notifies SC1 that SC2 will have an acquisition security right. SC2's security right is an acquisition security right and has priority over the security right of SC1 (see recommendation 180, alternative A, subparagraph (b), or alternative B, subparagraph (b)). The priority of O's security right does not extend to proceeds of the licence in the form of receivables (see recommendation 185, alternative A or alternative B). This is the case no matter which alternative version of recommendation 185 a State enacts. Under alternative A, this result is brought about by recommendation 185, subparagraph (b). Under alternative B, the result is brought about by recommendation 185.]*

J. Priority of a security right in intellectual property as against the right of a judgement creditor

20. The *Guide* recommends that a security right that was made effective against third parties before a judgement creditor obtained rights in the encumbered asset has priority as against the right of the judgement creditor. However, if an unsecured creditor obtained a judgement against the grantor and took the steps necessary under the law governing the enforcement of judgements to acquire rights in the encumbered assets before the security right became effective against third parties, the right of the judgement creditor has priority (see recommendation 84).

21. This recommendation applies equally to security rights in intellectual property (subject to the principle embodied in recommendation 4, subparagraph (b)). In such a case, under law relating to intellectual property the judgement creditor may have to obtain a transfer of the intellectual property and a document or notice thereof may have to be registered in an intellectual property registry for the judgement creditor to obtain priority. If this transfer takes place before a security right was made effective against third parties, both under the law recommended in the *Guide* (see recommendation 13) and law relating to intellectual property (*nemo dat*), the transferee of encumbered intellectual property will take the encumbered intellectual property free of the security right.

K. Subordination

22. The *Guide* recognizes the principle of subordination (see recommendation 94). The essence of this principle is that, as long as the rights of third parties are not affected, competing claimants may alter by agreement the priority of their competing claims in an encumbered asset. The principle applies equally to security rights in intellectual property.

A/CN.9/WG.VI/WP.39/Add.6 (Original: English)

**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security rights
in intellectual property, submitted to the Working Group on Security
Interests at its sixteenth session**

ADDENDUM

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**VII. Rights and obligations of the parties to a security agreement
relating to intellectual property**

[*Note to the Working Group: For paras. 1-5, see A/CN.9/WG.VI/WP.37/Add.3, paras. 19-22, A/CN.9/670, paras. 96-103, A/CN.9/WG.VI/WP.35/Add.1, paras. 62-63, A/CN.9/667, paras. 104-108, A/CN.9/WG.VI/WP.33/Add.1, paras. 26-30, and A/CN.9/649, paras. 57-59.*]

A. Application of the principle of party autonomy

1. With few exceptions, the *Guide* generally recognizes the freedom of the parties to the security agreement to tailor their agreement so as to meet their practical needs (see recommendation 10). The principle of party autonomy applies equally to security rights in intellectual property, subject to any limitations specifically introduced by law relating to intellectual property. For example, unless otherwise provided by law relating to intellectual property, an owner that is a grantor and its secured creditor may agree that: (a) the secured creditor may exercise some of the rights of the owner (for example, to deal with authorities and renew registration or sue infringers; see A/CN.9/WG.VI/WP.39/Add.1, para. 23); (b) the grantor may not grant licences (in particular exclusive licences) without the consent of the secured creditor; or (c) the secured creditor may collect royalties owed to the grantor as a licensor even before default on the part of the grantor-licensor.

B. Preservation of the encumbered intellectual property

2. Under secured transactions law, the party in possession of an encumbered asset has the obligation to take reasonable steps to preserve it (see recommendation 111). Similar rules apply to intellectual property. For example, the grantor has an obligation to deal with authorities, pursue infringers and renew registrations. In some States, law relating to patents provides that the patent owner may not revoke or limit the encumbered patent without the consent of the secured creditor.

3. In addition, under secured transactions law, the secured creditor should be able to agree with the intellectual property owner that the secured creditor would be entitled to take steps to preserve the encumbered intellectual property by dealing with authorities, pursuing infringers or renewing registrations even before default on the part of the owner-grantor, provided that this is not prohibited by law relating to intellectual property. Otherwise, the encumbered asset could lose its value, if the owner of the encumbered intellectual property failed to exercise this right in a timely fashion. This result could negatively affect the use of intellectual property as security for credit. This approach would not interfere with the rights of the owner as its consent would be necessary. Similarly, this approach would not interfere with law relating to intellectual property because such an agreement would be null and void, if it were concluded in violation of law relating to intellectual property. Of course, States enacting the recommendations of the *Guide* may wish to consider their law relating to intellectual property so as to determine whether such agreements should be permitted, as this could facilitate the use of intellectual property as security for credit.

4. Moreover, unless prohibited by law relating to intellectual property, the secured creditor should be able to request the owner that is a grantor to allow the secured creditor to protect the value of the encumbered intellectual property, for example, by renewing registration or pursuing infringers. Otherwise, the value of the encumbered intellectual property could diminish; such a result could negatively affect the use of intellectual property as security for credit.

5. If the owner-grantor accepts this request, the secured creditor would be entitled to exercise those rights with the explicit consent of the owner-grantor; if the

owner-grantor did not respond, the secured creditor would be entitled to exercise those rights with the implicit consent of the owner-grantor; and, if the owner-grantor rejected the request, the secured creditor would not be entitled to exercise those rights. In addition, if the grantor failed to pursue infringers or renew registrations, the secured creditor could consider that that failure constitutes an event of default as described in the security agreement and could enforce its security right in the encumbered intellectual property. Again, these results would not interfere with law relating to intellectual property as recommendation 4, subparagraph (b) would defer to that law in case of any inconsistency.

Recommendation 245¹

Alternative A

The law should provide that the grantor of a security right in intellectual property and its secured creditor may agree as to who may preserve the encumbered intellectual property and, for example, deal with authorities, pursue infringers or renew registrations of the encumbered intellectual property, as well as under what circumstances the secured creditor may do so.

Alternative B

The law should provide that, if under other law the grantor of a security right in intellectual property and its secured creditor may agree that the secured creditor is [entitled] [obliged] to preserve the encumbered asset and, for example, deal with authorities, pursue infringers or renew registrations of the encumbered intellectual property, as well as under what circumstances the secured creditor may do so, nothing in the law prevents the grantor and the secured creditor from doing so.

[Note to the Working Group: The Working Group may wish to note that, at its fifteenth session, it requested the Secretariat to prepare an alternative recommendation along the lines of alternative B (see A/CN.9/670, paras. 101 and 103). The Working Group may wish to note that the main difference between alternatives A and B lies in the fact that alternative A provides party autonomy as a matter of secured transactions law, while alternative B provides that secured transactions law does not limit party autonomy if it exists under law outside secured transactions law. If the Working Group decides to retain alternative B, it may wish to determine whether the preservation of the encumbered asset should be formulated as a right or as an obligation.]

VIII. Rights and obligations of third-party obligors in intellectual property financing transactions

[Note to the Working Group: For paras. 6-7, see A/CN.9/WG.VI/WP.37/Add.1, para. 23, A/CN.9/670, para. 104, A/CN.9/WG.VI/WP.35/Add.1, para. 64, A/CN.9/667, para. 109, A/CN.9/WG.VI/WP.33/Add.1, paras. 32, and A/CN.9/649, para. 60.]

¹ If this recommendation could be included in the *Guide*, it would be placed in the chapter on the rights and obligations of the parties to a security agreement as recommendation 116bis.

6. Where a licensor assigns its claim against a licensee for the payment of royalties under a licence agreement, the licensee (as the debtor of the assigned receivable) would be a third-party obligor under the *Guide* and its rights and obligations would be the rights and obligations of a debtor of a receivable. Similarly, where a licensee assigned its claim against a sub-licensee for the payment of royalties under a sub-licence agreement, the sub-licensee would be a third-party obligor in the sense of the *Guide*.

7. As a result, for example, in a claim by an assignee of the right to the payment of royalties, a licensee as a debtor of the assigned receivable may raise against the assignee all defences and rights of set-off arising from the licence agreement or any other agreement, which are part of the same transaction and of which the licensee could avail itself as if the assignment had not been made and such claim had been made by the licensor. In addition, the licensee may raise against the assignee of the right to the payment of royalties any other right of set-off, provided that that right was available to the licensee at the time notification of the assignment was received by the licensee. However, any defences or rights of set-off that may be available to the licensee under law other than secured transactions law for breach of an agreement between the licensor and the licensee that the licensor will not assign its rights to the payment of royalties are not available to the licensee against the assignee (see recommendation 120). This recommendation also is subject to the principle of deference to law relating to intellectual property embodied in recommendation 4, subparagraph (b).

IX. Enforcement of a security right in intellectual property

[*Note to the Working Group: For paras. 8-32, see A/CN.9/WG.VI/WP.35/Add.3, paras. 24-48, A/CN.9/670, paras. 105-114, A/CN.9/WG.VI/WP.35/Add.1, paras. 65-89, A/CN.9/667, paras. 110-123, A/CN.9/WG.VI/WP.33/Add.1, paras. 35-44, and A/CN.9/649, paras. 61-73.*]

A. Intersection of secured transactions law and law relating to intellectual property

8. States typically do not provide for specific enforcement remedies for security rights in intellectual property in their laws relating to intellectual property. The general law of secured transactions normally applies to the enforcement of security rights in intellectual property. To the extent that law relating to intellectual property in some States actually does address the enforcement of security rights in different types of intellectual property, it merely engrafts existing secured transactions enforcement regimes onto the regime governing intellectual property. As a consequence, States that enact the *Guide*'s recommendations will normally be simply substituting the *Guide*'s recommended enforcement regime for the prior enforcement regime derived from, for example, a civil code and code of civil procedure, the common law of floating and fixed charges, a mortgage act or some other general law of enforcement, as the case may be.

9. This approach to the enforcement of security rights applies not only to intellectual property (for example, a patent, a copyright or a trademark), but also to

other rights that are derived from these types of intellectual property. Hence, consistently with the United Nations Assignment Convention, assets, such as royalties and licence fees, are treated as receivables and are subject to the enforcement regime recommended in the *Guide* for assignments (that is, outright transfers, security transfers and security rights) in receivables. Likewise, a licensor's or sub-licensor's other contractual rights as against a licensee or sub-licensee will also be governed by a State's general law of obligations, and security rights in these contractual rights will be enforced under a State's general secured transactions law. And again, a licensee's or sub-licensee's rights of use are treated in the same way as a lessee's or purchaser's rights, and are governed by a State's general law of obligations, except as regards questions of registration (where specifically mentioned in law relating to intellectual property).

10. On occasion, States incorporate special procedural controls on the enforcement of security rights in intellectual property into law relating to intellectual property. In addition, the general procedural norms of secured transactions law in a State may be given a specific content in the context of enforcement of security rights in intellectual property. So, for example, the determination of what is commercially reasonable where the encumbered asset is intellectual property may depend on law and practice relating to intellectual property. This standard of commercial reasonableness may well vary from State to State, as well as from intellectual property regime to intellectual property regime. The *Guide* recognizes this procedural specificity and, in so far as any procedural rules apply specifically to security rights in intellectual property and impose greater obligations on parties than those of the enforcement regime set out in the recommendations of the *Guide*, they will, under the principle set out in recommendation 4, subparagraph (b), displace the general recommendations of the *Guide*. Of course, if these procedural rules and definitional specifications apply to security rights in assets other than intellectual property as well, they will be displaced by the recommendations of the *Guide* in States that enact them.

11. As for substantive enforcement rights of secured creditors, once a State adopts the *Guide*'s recommendations, there is no reason to develop different or unusual remedial principles to govern enforcement of security rights in intellectual property serving as encumbered assets. The *Guide* merely recommends a more efficient, transparent and effective enforcement regime of a secured creditor's rights, without in any way limiting the rights that the owner of intellectual property may exercise to protect its rights against infringement or to collect royalties from a licensee or sub-licensee. As pointed out in the chapter of the Supplement on creation of a security right (see A/CN.9/WG.VI/WP.39/Add.2, para. 9), the secured creditor can never acquire security in more rights than the rights with which the grantor is vested at the time of the conclusion of the security agreement or when the grantor acquires rights in the encumbered asset or the power to encumber it (see recommendation 13).

B. Enforcement of a security right in different types of intellectual property

12. The *Guide* elaborates a detailed regime governing the enforcement of security rights in different types of encumbered asset. Its basic assumption is that

enforcement remedies must be tailored to ensure the most effective and efficient enforcement while ensuring appropriate protection of the rights of the grantor and third parties. This assumption and approach of the *Guide* should apply equally to the enforcement of security rights in the various categories of intellectual property. Currently, the law of most States recognizes a wide variety of rights relating to intellectual property, including:

- (a) The intellectual property in itself;
- (b) Receivables arising under a licence agreement;
- (c) The licensor's other contractual rights under a licence agreement;
- (d) The licensee's rights under a licence agreement;
- (e) The owner's, licensor's and licensee's rights in tangible assets with respect to which intellectual property is used.

13. The enforcement regime recommended in the *Guide*, and applicable to each of these different rights in intellectual property, will be discussed separately in the following sections.

C. Taking “possession” of documents necessary for the enforcement of a security right in intellectual property

14. The right of the secured creditor to take possession of the encumbered asset as set out in recommendations 146 and 147 of the *Guide* is normally not relevant if the encumbered asset is an intangible asset such as intellectual property (as the term “possession”, as defined in the *Guide*, means *actual* possession; see Introduction to the *Guide*, section B on terminology and interpretation). These two recommendations deal only with the taking of possession of tangible assets. However, consistently with the general principle of extrajudicial enforcement, the secured creditor should be entitled to take possession of any documents necessary for the enforcement of its security right where the encumbered asset is intellectual property. Such a right will normally be provided for in the security agreement. In the event that the documents are necessary for the enforcement of a security right in the encumbered intellectual property, the creditor should be able to obtain possession whether or not those documents were specifically mentioned as encumbered assets in the security agreement.

15. It may be thought that, where a secured creditor takes possession of a tangible asset that is produced using intellectual property or in which a chip containing a programme produced using an intellectual property is included, the secured creditor is also taking possession of the encumbered intellectual property. This is not the case. It is important to distinguish properly the asset encumbered by the security right. Even though many tangible assets, whether equipment or inventory, may be produced through the application of intellectual property such as a patent, the security right is in the tangible asset and does not, absent specific language in the security agreement purporting to encumber the intellectual property itself, encumber the intellectual property with the use of which the asset was produced (the use meant here is use consistent with the authorization of the owner or other licensor; if the use is unauthorized, the products are unauthorized and the secured creditor may

be an infringer). So, for example, the secured creditor may take possession of a tangible asset, such as a compact disc or a digital video disc, and may exercise its enforcement remedies against the discs under the *Guide*'s recommendations. In cases where the secured creditor also wishes to obtain a security right in the intellectual property itself (including, to the extent the grantor has the right to sell or otherwise dispose of, or license the intellectual property, the right to sell or otherwise dispose of, or license), it would be necessary for the secured creditor to specifically mention such intellectual property as encumbered assets in the security agreement with the owner of such intellectual property.

D. Disposition of encumbered intellectual property

16. Under the *Guide*, the secured creditor has the right upon the grantor's default to dispose of or grant a licence in the encumbered intellectual property, but always within the limits of the rights of the grantor. As a result, if the grantor is the owner, the secured creditor should, in principle, have the right to sell or otherwise dispose of, or license the encumbered intellectual property. However, if the grantor had previously granted an exclusive licence to a third party free of the security right, upon default, the secured creditor will be unable to grant another licence, as the grantor had no such right at the time the secured creditor acquired its security right (*nemo dat quod non habet*). The situation will be different if, for example, the grantor grants an exclusive licence that is limited geographically. In such a case, the secured creditor may be able to grant another licence outside the geographic limits of the exclusive licence granted by the grantor.

17. In the above-mentioned situation, under the *Guide*, the enforcing secured creditor does not acquire the intellectual property against which the security right is being enforced. Instead, the secured creditor disposes of the encumbered intellectual property (by assigning, licensing or sub-licensing it) in the name of the grantor. Until the assignee or licensee (as the case may be) that acquires the rights upon a disposition by the enforcing creditor registers a notice (or other document) of its rights in the relevant registry (assuming the rights in question may be registered), the grantor will appear on the registry as the owner of the relevant intellectual property.

E. Rights acquired through disposition of encumbered intellectual property

18. Under the *Guide*, rights in intellectual property acquired through judicial disposition would be regulated by the relevant law applicable to the enforcement of court judgements. In the case of an extrajudicial disposition in line with the provisions of secured transactions law, the first point to note is that the transferee or licensee takes its rights directly from the grantor. The secured creditor that chooses to enforce its rights in this manner does not become the owner as a result of this enforcement process, unless the secured creditor acquires the encumbered intellectual property in satisfaction of the secured obligation or at an enforcement sale (see recommendations 148 and 156).

19. The second point is that the transferee or licensee could only take such rights as were actually encumbered by the enforcing creditor's security right. Under the *Guide*, the transferee or licensee would take the intellectual property free of the security right of the enforcing secured creditor and any lower-ranking security rights, but subject to any higher-ranking security rights. Similarly, a good faith transferee or licensee that acquired a right in intellectual property pursuant to an extrajudicial disposition that is inconsistent with the provisions of the secured transactions law would take the intellectual property free of the security right of the enforcing secured creditor and any lower-ranking security rights (see recommendations 161-163).

20. A security right in a tangible asset extends to and may be enforced against attachments to that asset (see recommendation 21 and 166). To ensure that the security right also covers assets produced or manufactured from encumbered assets, the security agreement normally provides expressly that the security right extends to such manufactured assets. Where the encumbered asset is intellectual property, it is important to determine whether the asset that is disposed of to the transferee or licensee is simply the intellectual property as it existed at the time the security right became effective against third parties or whether it is that intellectual property including any subsequent enhancements to it (for example, an improvement to a patent). Generally, laws relating to intellectual property treat such improvements as separate assets and not as integral parts of existing intellectual property. As a result, the prudent secured creditor that wishes to ensure that improvements are encumbered with the security right should describe the encumbered asset in the security agreement in a manner that ensures that enhancements are directly encumbered by the security right.

F. Proposal by the secured creditor to acquire the encumbered intellectual property

21. Under the enforcement regime recommended in the *Guide*, the secured creditor has the right to propose to the grantor that it acquire the grantor's rights in satisfaction of the secured obligation. If the grantor is the owner of intellectual property, the secured creditor could itself become the owner in the way prescribed by law relating to intellectual property, provided that the grantor and its creditors do not object (see recommendations 156-159). Should the owner have licensed its intellectual property to a licensee that acquired its rights under the licence agreement free of the rights of the enforcing secured creditor, when the secured creditor acquires the intellectual property from the grantor, it acquires that right subject to the prior-ranking licence in accordance with the *nemo dat* principle. Once a secured creditor becomes the owner of intellectual property, its rights and obligations are regulated by the relevant law relating to intellectual property. In particular, the secured creditor may need to register a notice or document confirming that it acquired the intellectual property to enjoy the rights of an owner or to obtain any relevant priority. Finally, the secured creditor that acquires the encumbered intellectual property in full or partial satisfaction of the secured obligation would take the intellectual property free of the security right of any lower-ranking security rights, but subject to any higher-ranking security rights (see recommendation 161).

G. Collection of royalties and licence fees

22. Under the *Guide*, where the encumbered asset is the right to receive payment of royalties or other fees under a licence agreement, the secured creditor should be entitled to enforce the security right by simply collecting the royalties and other licence fees upon default and notification to the person that owes the royalties or fees (see recommendation 168). In all these situations, the right to the payment of royalties and other licence fees is, for the purposes of secured transactions laws, a receivable (see A/CN.9/WG.VI/WP.39/Add.2, paras. 22-29). Thus, the rights and obligations of the parties will be governed by the principles pertaining to receivables that are elaborated in the United Nations Assignment Convention and the *Guide* for receivables. Once again, the secured creditor that has taken a security right in the right to the payment of present and future royalties is entitled to enforce only such rights to the payment of royalties as were vested in the grantor (licensor) at the time of the conclusion of the security agreement or when the grantor acquired rights in the encumbered receivable or the power to encumber it (see recommendation 13). In addition, subject to any contrary provision of law relating to intellectual property (see recommendation 4, subparagraph (b)), the secured creditor's rights to collect royalties includes the right to collect or otherwise enforce any personal or property right that secures payment of the royalties (see recommendation 169).

H. Licensor's other contractual rights

23. In addition to the right to collect royalties, the licensor will normally include a number of other contractual rights in its agreement with the licensee (see A/CN.9/WG.VI/WP.39/Add.2, para. 21). These may include, for example, a limitation in the licence agreement on the right of the licensee to grant any sub-licence or a prohibition on the granting of security rights by the licensee in its rights under the licence agreement, including the right to terminate the licence agreement under a set of specified conditions. These rights will remain vested in the licensor if the security right is only in the right to the payment of royalties. However, if the secured creditor also wishes to obtain a security right in these other rights of the licensor, they would have to be included in the description of the encumbered assets in the security agreement. It should also be noted that, if the secured creditor enforces its security right and takes the encumbered and licensed intellectual property subject to a licence, as a matter of contract law, the secured creditor will have to abide by the licence agreement.

I. Enforcement of security rights in tangible assets with respect to which intellectual property is used

24. In principle, except where the so-called "exhaustion doctrine" applies, the intellectual property owner has the right to control the manner and place in which tangible assets, with respect to which intellectual property is used (in line with the authorization of the owner), are sold. That is, in the event that the relevant intellectual property right has not been exhausted, the secured creditor should be able to dispose of the assets upon default, if there is an authorization from the

intellectual property owner. In both these cases, it is assumed that the security agreement does not encumber the intellectual property right itself.

25. There is no universal understanding of the “exhaustion doctrine” (often referred to as “exhaustion of rights” or “first sale doctrine”) and the Supplement makes reference to the doctrine not as a universal concept, but as it is actually understood in each State. Nonetheless, where the exhaustion doctrine applies under law relating to intellectual property, the basic idea is that an intellectual property owner will lose or “exhaust” certain rights when specific conditions are met, such as the first marketing or sale of the product embodying the intellectual property. For example, the ability of a trademark owner to control further sales of a product bearing its trademark is generally “exhausted” following the sale of that product (if, however, the product has not been put onto the market or sold, the trademark has not been exhausted). The rule serves to protect a person that resells that product from infringement liability. However, it is important to note that such protection extends only to the point where the products have not been altered so as to be materially different from those originating from the trademark owner. In addition, the exhaustion doctrine does not apply if a licensee produces products bearing the licensed trademark without complying with the terms and conditions of the licence agreement (for example, as to quality or quantity).

26. In situations where a product is produced with the use of intellectual property that has been licensed to the grantor, the licensor may provide that the licensee cannot grant security rights in such products or that a creditor that takes security may only enforce its rights in a manner agreed to by the licensor. In both these cases, the licensor will typically provide in the licence agreement that the licence may be revoked if the grantor or secured creditor is in breach of the licence agreement. As a consequence, to enforce effectively its security right in the product, in the absence of prior agreement between the secured creditor and the owner-licensor, the secured creditor would either need to obtain the consent of the owner-licensor or rely on the relevant law relating to intellectual property and the operation of the exhaustion doctrine.

27. In cases where the secured creditor also wishes to obtain a security right in the intellectual property itself (including, to the extent the grantor has the right to sell or license the intellectual property, the right to sell or license), it would be necessary for the secured creditor to specifically mention such intellectual property as an encumbered asset in the security agreement. Here, the encumbered asset is not the product produced using the intellectual property, but rather the intellectual property itself (or the licence to manufacture tangible assets using the intellectual property). A prudent secured creditor will normally take a security right in such intellectual property so as to be able to continue the production of partially completed products.

J. Enforcement of a security right in a licensee’s rights

28. In the discussion above, the grantor of the security right has been assumed to be the owner of the relevant intellectual property. The encumbered asset was the intellectual property itself, the right of the owner-licensor to receive royalties and fees or the right of the owner-licensor to enforce other contractual terms relating to the intellectual property. Only in the discussion of security rights in tangible assets

produced by using intellectual property (section I above) were the rights of the owner-licensor and the rights of the licensee treated together. However, most of the issues addressed in sections C to H also are relevant in situations where the encumbered asset is not the intellectual property itself but the rights of a licensee (or sub-licensee) arising from a licence (or sub-licence) agreement (see A/CN.9/WG.VI/WP.39/Add.2, paras. 30-31). In cases where the encumbered asset is merely a licence, the secured creditor obviously may only enforce its security right against the licensee's rights and may do so only in a manner that is consistent with the terms of the licence agreement.

29. In situations where the grantor is a licensee, upon the grantor's default, the secured creditor will have the right to enforce its security right in the licence and to dispose of the licence to a transferee, provided that the licensor consents or the licence is transferable, which is rarely the case. Likewise, the enforcing secured creditor may grant a sub-licence, provided that the licensor consents or the grantor-licensee had, under the terms of the licence agreement, the right to grant sub-licences. In situations where the secured creditor proposes to a grantor-licensee to acquire the licence in full or partial satisfaction of the secured obligation and neither the grantor nor other interested parties (for example, the licensor) object (and the licence agreement does not prohibit the transfer of the licence), the secured creditor becomes vested with the licence according to the terms of the licence agreement between the licensee and the licensor. Assuming that registration of licences is possible under law relating to intellectual property, registration of the licence by the licensee-secured creditor that acquires the licence in full or partial satisfaction of the secured obligation may be a condition of the effectiveness of the licensee's rights or may simply serve information purposes.

30. Where the encumbered asset is the sub-licensor's right to the payment of royalties under a sub-licence agreement, the *Guide* treats the asset as a receivable. This means that the secured creditor may collect the royalties to the extent that these were vested in the grantor-sub-licensor at the time when the security right in the receivable is enforced. If enforcement of the security right in the right to the payment of royalties owed by a sub-licensee constituted a breach of the licence agreement, then the secured creditor would not be able to collect any receivables arising after that breach.

31. Where the encumbered asset is another contractual right stipulated in the sub-licence agreement, the secured creditor may enforce its security right in this contractual right as if it were any other encumbered asset, and the fact that the licensor may have revoked the licence for the future, or may have itself claimed a prior right to receive payment of sub-royalties, has no direct bearing on the right of the secured creditor to enforce these other contractual rights set out in the licence agreement.

32. The rights acquired by a transferee of the licence, a sub-licensee upon disposition by the secured creditor or by a secured creditor that acquires the licence in full or partial satisfaction of the secured obligation may be significantly limited by the terms of the licence agreement. For example, a non-exclusive licensee cannot enforce the intellectual property against another non-exclusive licensee or against an infringer of the intellectual property. Only the licensor (or the owner) may do so, although, in some States, exclusive licensees may join the licensor as a party to the proceedings. In addition, depending upon the terms of the licence agreement and the

description of the encumbered asset in the security agreement, a transferee of the licence may not have access to information such as a source code. In order to ensure the effectiveness of the licence being transferred or sub-licensed, the security agreement will have to include such rights within the description of the assets encumbered by the grantor-licensee, to the extent that the licence agreement and relevant law permits it to encumber these rights as well.

A/CN.9/WG.VI/WP.39/Add.7 (Original: English)

**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security rights
in intellectual property, submitted to the Working Group on Security
Interests at its sixteenth session**

ADDENDUM

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X. Law applicable to a security right in intellectual property

[*Note to the Working Group: For paras. 1-23, see A/CN.9/WG.VI/WP.37/Add.4, paras. 1-21, A/CN.9/670, para. 115, A/CN.9/WG.VI/WP.35/Add.1, paras. 90-98, A/CN.9/667, paras. 124-128, A/CN.9/WG.VI/WP.33/Add.1, paras. 53-57, and A/CN.9/649, paras. 77-80.*]

A. Law applicable to property matters

1. Generally, the conflict-of-laws rules of the *Guide* deal with the law applicable to the creation, effectiveness against third parties, priority as against the rights of competing claimants and enforcement of a security right. They also determine the territorial scope of the substantive rules envisaged in the *Guide*, that is, if and when the substantive rules of the State enacting the regime envisaged in the *Guide* apply (see chapter X on conflict of laws, paras. 1-9 of the *Guide*). In many States, the conflict-of-laws rules that apply to security rights in intangible assets apply also to security rights in intellectual property. Similarly, the conflict-of-laws rules recommended in the *Guide* with respect to security rights in intangible assets would also apply to security rights in intellectual property, if no asset-specific rule is provided for intellectual property.

2. Thus, if a State enacts the conflict-of-laws recommendations of the *Guide*, without making any changes with respect to intellectual property, the law of the

grantor's location would apply to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property (see recommendations 208, and 218, subparagraph (b)). The location of the grantor is defined as its place of central administration, that is, the real rather than the statutory seat, of the grantor (see recommendation 219). Of course, recommendation 4, subparagraph (b), would also apply and defer to any applicable law rule of the law relating to intellectual property that applied specifically to intellectual property.

3. The principal advantage of the grantor's law approach is that it leads to the application of a single law to the creation, third-party effectiveness, priority and enforcement of a security right. So, for example, a secured creditor that obtains a security right in all present and future intangible assets (including intellectual property) of a grantor could obtain a security right, make it effective against third parties, ascertain its priority and have it enforced by referring to the law of only one State, even if the assets have connections with several States. In particular, both registration and searching costs would in most cases be reduced, as a secured creditor would need to register and a searcher would need to search only in the State in which the grantor is located. This would reduce transaction costs and enhance certainty, a result that is likely to have a beneficial impact on the availability and the cost of credit. If the grantor is not the initial owner, the secured creditor would need to establish the chain of title and to conduct a search outside the security rights registry to determine if the initial owner (or, as the case may be, an intermediate transferor) has granted a security right in the same intellectual property. If the initial owner or another transferor is located in a State other than the State of the grantor's location, the secured creditor would have to search in the security rights registry (and possibly in the relevant intellectual property registry, if any) of any such other State.

4. Another important advantage of the law of the grantor's location results from the meaning attributed in the *Guide* to the term "location" in cases where the grantor has places of business in more than one State (see recommendation 219). In this case, "location" refers to the State in which the grantor has its place of central administration (that is, its real, rather than its statutory, seat). This is the law of the State in which the main insolvency proceedings with respect to the grantor are likely to be administered (as to the meaning of a main proceeding, see, for example, articles 2, subparagraph (b), and 16, paragraph 3 of the UNCITRAL Model Law on Cross-Border Insolvency). As a result, the law governing the creation, third-party effectiveness and priority of a security right and the law governing, for example, stays, avoidance proceedings, treatment of assets and ranking of claims are likely to be the law of one and the same jurisdiction. While in some cases the statutory seat may be easier to determine than the real seat, referring to the statutory seat would result to a conflict of the law of the statutory seat with the *lex fori concursus*, a conflict which is likely to be resolved in favour of the application of the *lex fori concursus*.

5. International conventions designed to protect intellectual property generally adopt the principle of territoriality. Thus, in many States, the law applicable to ownership of intellectual property is the law of the State where the intellectual property is protected (*lex protectionis*), while the law applicable to contractual matters is the proper law of the contract (*lex contractus*). Accordingly, the law applicable to issues of protection of intellectual property rights country by country

(such as the comparative rights of an intellectual property owner as against a licensee in a particular country) is the *lex protectionis*. A common example is a licence to copyrighted work transmitted routinely across national borders via satellite.

6. While there is very little precedent on the application of the *lex protectionis* to security rights in intellectual property, a conflict-of-laws rule on security rights in intellectual property must take into account the *lex protectionis*, as this is the law governing ownership in intellectual property and a security right in intellectual property could not be created, made effective against third parties and be enforced in a country where the encumbered intellectual property right does not exist. This would be necessary in particular to the extent that, under law relating to intellectual property, a secured creditor may be treated as a transferee. In the case of a priority conflict between a security right in intellectual property and the ownership right of an outright transferee of the encumbered intellectual property, an approach based on the law of the grantor's location would not refer that priority conflict to one single law as outright transfers would still be governed by the *lex protectionis*.

7. In order for a secured creditor to be able to obtain an effective and enforceable security right in an intellectual property right under the law of a State, the intellectual property right must be protected under the law of that State. So, the principal advantage of the *lex protectionis* is that, in recognition of the principle of territoriality adopted in international conventions for the protection of intellectual property, its application would result in the same law applying to both security rights and ownership rights in intellectual property.

8. However, there are also disadvantages to an approach based on the *lex protectionis* as the applicable law for security rights, especially in transactions in which the encumbered assets are not limited to intellectual property that is used and protected under the law of a single State. The advantages and disadvantages of the two approaches mentioned above may be illustrated with the following examples dealing separately with creation, third-party effectiveness, priority and enforcement issues.

9. Intellectual property owner A located in State X creates, pursuant to a single security agreement, a security right in its patent, trademark and copyright portfolio, protected under the laws of States X and Y, in favour of secured creditor SC1 located in State Y. Under the law of the grantor's location approach, A and SC1 would need to meet the requirements of State X for the creation of its security right (that is, its effectiveness between the grantor and the secured creditor). Under the *lex protectionis* approach, A and SC1 would have to meet the creation requirements of State X with respect to the rights protected under the laws of State X and the requirements of State Y with respect to the rights protected under the laws of State Y. If they fail to do so, the security agreement may achieve only part of its intended purpose, that is, create a security right under the law of State X, but fail to create a security right under the law of State Y.

10. When the differences between the laws of States X and Y with respect to the creation of a security right are only a matter of form (as when, for example, State X that has not enacted the recommendations of the *Guide* requires more formalities in a security agreement than does State Y that has enacted the recommendations of the *Guide*), this difficulty can be overcome by preparing the security agreement so that

it satisfies the requirements of the most stringent State. Even that will create additional costs for the transaction. When States X and Y have inconsistent requirements with respect to formalities, though, this approach will not suffice. Similarly, where the agreement contemplates multiple present and future intellectual property rights as encumbered assets, difficulties cannot be overcome when a State has enacted the recommendations of the *Guide* (allowing a single security agreement to create security rights in multiple present and future assets), while another State does not allow a security agreement to create a security right in assets not yet in existence or not yet owned by the grantor or do not allow multiple assets to be encumbered in one and the same agreement. As creation of a security right means its effectiveness between the grantor and the secured creditor (and not as against third parties), the policy that underlies the *lex protectionis* does not appear to dictate referring the creation of a security right to that law.

11. In order to make its security right effective against third parties, under the law of the grantor's location approach, it would be sufficient for secured creditor SC1 to meet the third-party effectiveness requirements of State X. Any potential creditors of intellectual property owner A would need to search only in the relevant registry in State X. Under the *lex protectionis* approach, however, secured creditor SC1 would need to meet the third-party effectiveness requirements of States X and Y to make its security right in intellectual property rights effective against third parties in States X and Y respectively. This would possibly necessitate the filing of multiple notices with respect to the security right in the relevant registries of those States; and potential creditors would have to search in all those registries. Of course, this disadvantage would be alleviated if there were an international registry in which notices with respect to security rights, the third-party effectiveness of which is governed by different States, could be registered. This situation could be further complicated by the fact that some of those States might utilize the general security rights registry for such notices, other States might provide the option of utilizing a specialized registry, and still other States, might utilize an intellectual property registry that is mandatory under recommendation 4, subparagraph (b). However, if secured creditor SC1 has to register a notice of its security right in a patent registry, such registration can only take place in the patent registry in the State in which the patent is registered. It cannot take place in the patent registry in another State (for example, the law of the State in which the grantor is located) in which the patent is not protected.

12. If intellectual property owner A creates another security right in its patent and trademarks protected in State Y in favour of secured creditor SC2, there will be a priority conflict between the security rights of SC1 and SC2 in the patents and trademarks protected in State Y. Under the law of the grantor's location approach, this priority conflict would be governed by the law of the State in which the grantor is located, that is, State X. Under the *lex protectionis* approach, however, this priority conflict would be governed by the laws of State Y. In particular in situations in which third-party effectiveness is established by way of registration in a specialized registry, the State in which the intellectual property right is registered would be the State whose law would be the most appropriate to resolve priority conflicts.

13. Another example will illustrate how the law of the grantor's location will apply in the case of multiple transfers in a chain of title, where the transferor and

each transferee create security rights. A, located in State X, owns a patent in State X. Owner A grants a security right in the patent to secured creditor SC1. A then transfers the patent to B, located in State Y, grants a security right to SC2. Whether transferee B obtains the patent subject to the security right of SC1 will be determined in accordance with the *lex protectionis*, that is, the law of State X, which happens to be also the law of the grantor's location. If B takes the patent subject to the security right, then SC2 acquires no more rights than B had. If B assigns the patent to C, located in State Z, grants a security right to SC3, C and SC3 will not acquire more rights than B had. This example demonstrates that reliance on the law of the grantor's location is possible to resolve a priority dispute with a transferee only when such law is also the *lex protectionis*.

14. In the example mentioned in the preceding paragraph, if grantor A is located in State X and the patent is protected in State Y, application of the law of the grantor's location will not allow SC1 to obtain an effective security right with priority over the rights of the transferee because the patent does not exist in State X. Only the application of the *lex protectionis* will allow SC1 to obtain an effective security right in the patent with priority over the rights of transferee B.

15. Finally, if intellectual property owner A does business in States X, Y and Z and uses a particular trademark under the laws of each of those States, those trademark rights may well have greater value taken together than they do separately because they operate collectively. Thus, if A grants a security right in those trademark rights, secured creditor SC1 would likely prefer to dispose of them together upon A's default because such a disposition would likely yield greater proceeds (thus also benefitting A). Yet, this is likely to be difficult or impossible if States X, Y and Z have different rules for disposition of encumbered intellectual property rights. If State X allows only a judicial disposition of an encumbered asset, while States Y and Z allow a non-judicial disposition, disposition of the trademark rights in a single transaction might be impossible. Even if all of the relevant States allow non-judicial disposition, the differences in required procedures may make a disposition of the rights in a single transaction inefficient at best.

16. Moreover, enforcement of a security right is not a single event; rather it is a series of actions. So, upon A's default, secured creditor SC1, located in State Y, may notify A, located in State X, that the security right in its trademark rights protected under the laws of States X, Y and Z is in default. Secured creditor SC1 may then advertise the disposition of the trademark right in States X, Y and Z; indeed, it may advertise the disposition worldwide by use of the Internet. Secured creditor SC1 may then identify a buyer located in State Z, who buys the encumbered asset pursuant to a contract governed by the laws of State X. Under the *lex protectionis* approach, secured creditor SC1 would need to enforce its security right in the trademark protected in State X in accordance with the law of State X, its security right in the trademark protected in State Y in accordance with the law of State Y and its security right in the trademark protected in State Z in accordance with the law of State Z. Under the law of the grantor's location approach, enforcement of the security right in the trademark would be governed by the law of the State in which the grantor, that is A, has the place of its central administration. Of course, no matter which approach is followed, if secured creditor SC1 sells the encumbered trademarks, the transferee has to register its rights in the trademark registry of each State in which the trademark is registered and protected, that is, States X, Y and Z.

17. However, another example may illustrate the importance of the *lex protectionis* approach. A (located in State X) may create a security right in a patent registered only in State Y (and not in State X). Under the law of State X (the State of the grantor's location), for a security right in a patent to be effective against third parties, it must be registered in the national patent registry. If State Y follows an approach based on the law of the grantor's location (referring to the law of State X) to determine third-party effectiveness and priority of a security right, A could not grant B an effective and enforceable security right in its patents in State Y because in State X the patent is not protected and registration of a security right in a non-existent patent is not possible. If grantor A were located in State Y, then A could grant B such a security right, because in State Y the patent exists and a security right may be registered in the patent registry. This example illustrates that intellectual property does not exist "in the abstract" but rather is a legal right supported by a specific national legal system, which must of necessity be responsible for its recognition and enforcement against third parties within the borders of a national jurisdiction.

18. Where grantor A, located in State X, grants a security right in a patent registered in the national patent office in State Y and then grantor A becomes insolvent, the law applicable to the creation, third-party effectiveness, priority and enforcement of the security right will be the law of State X or Y, depending on whether an approach based on the law of the grantor's location or an approach based on the *lex protectionis* is followed in the forum State. Under the *Guide*, the application of any of these laws is subject to the *lex fori concursus* with respect to issues such as avoidance, treatment of secured creditors, ranking of claims or distribution of proceeds (see recommendation 223). Where the insolvency proceeding is opened in State X in which the grantor is located, the *lex fori concursus* and the law of the grantor's location will be the law of one and the same jurisdiction. Where the insolvency proceeding is opened in another State, where, for example, the grantor has assets, that may not be the case.

19. To combine consistency with the law applicable to ownership rights and the benefit of the application of a single law for security rights issues, the *lex protectionis* approach could be combined with the law of the grantor's location approach in the sense that creation and enforcement of a security right could be referred to the law of the grantor's location, while third-party effectiveness and priority could be referred to the *lex protectionis*.

20. Other combinations of the two approaches might be possible. For example, the approach based on the law of the grantor's location could be subject to a variation whereby a priority conflict involving the rights of an outright transferee would be governed by the *lex protectionis*. With this variation, a secured creditor would also need to establish its right under the *lex protectionis* only in instances where a competition with an outright transferee is a concern. In the typical case where the insolvency of the grantor is the main concern, it would be sufficient for the secured creditor to rely on the law of the State in which the grantor is located, as would be the case for certain other categories of intangible assets (such as receivables). The problem with this approach would be that, to ensure priority over potential outright transferees, secured creditors would need to establish their rights under the *lex protectionis* in any case.

21. A further variation would be to defer to the *lex protectionis* only where that law provides that the intellectual property concerned may be registered in an intellectual property registry. This further variation might, however, be unsatisfactory for outright transferees of intellectual property not subject to registration under the *lex protectionis*. They would have to investigate the law of the State of the grantor's location to ensure that their transfer is not subject to a previous security right. This approach would not provide sufficient certainty as to the law applicable.

Recommendation 245¹

Alternative A

The law should provide that the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security in intellectual property is the law of the State in which the intellectual property is protected. [However, subject to recommendation 223, the law applicable to a priority conflict between a secured creditor and the grantor's insolvency representative is the law of the State in which the grantor is located.]

Alternative B

The law should provide that the law applicable to the creation of a security right in intellectual property is the law [of the State in which the grantor is located] [chosen by the parties]. However, the law applicable to the effectiveness against third parties, priority and enforcement of a security in intellectual property is the law of the State in which the intellectual property is protected.

Alternative C

The law should provide that the law applicable to the creation and enforcement of a security right in intellectual property is the law of the State in which the grantor is located. However, the law applicable to the third-party effectiveness and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected.

Alternative D

The law should provide that the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property is the law of the State in which the grantor is located. However, the law applicable to the third-party effectiveness and priority of a security right in intellectual property as against the right of a transferee or licensee of the encumbered intellectual property is the law of the State in which the intellectual property is protected.

[Note to the Working Group: The Working Group may wish to note that:

(a) The bracketed text in alternative A was added, since at the fifteenth session of the Working Group the suggestion was made that, for efficiency reasons,

¹ If this recommendation could be included in the *Guide*, it would be placed in chapter X on conflict of laws as recommendation 214 bis.

a priority conflict with an insolvency representative should be governed by the law of a single State, that is, the law of the State in which the grantor is located, and that matter was not clear in the version of alternative C that was before the Working Group at that session (see A/CN.9/670, para. 115). The Working Group may wish to note that, at least to the extent that an insolvency representative may be considered as a transferee, the bracketed text may be inconsistent with alternative A and create uncertainty as to the law applicable.

(b) Alternative B was prepared in accordance with a suggestion made at the fifteenth session of the Working Group. The first sentence deals with the effectiveness of the security right (property effects) as between the parties. It includes two alternatives, one that, in line with the approach taken in the Guide, provides that the law applicable to property effects is the law of the grantor's location and another that refers the matter to party autonomy. Under either of these two approaches, the creation of a security right would be subject to a single law, a result that would enhance certainty and efficiency. The second sentence follows the approach recommended in alternative A (lex protectionis), with respect to all issues except creation of a security right. This approach may result in the application of multiple laws but is consistent with the fundamental principle of territoriality of intellectual property rights.

(c) Alternative C remains unchanged.

(d) Alternative D has been revised to ensure that the third-party effectiveness and priority of a security right as against the right of a transferee or licensee are referred to the law of the same jurisdiction. Otherwise, the third-party effectiveness of a security right would be subject to the law of the grantor's location, while its priority would be subject to the lex protectionis, a result that could create problems and inconsistencies.

(e) The reference to "region", which was intended to refer to regional rules, such as those of the European Union, has been deleted. The Working Group may wish to consider whether a regional economic integration organization which is constituted by sovereign States and has competence over certain matters governed by the Guide and the Supplement should be treated as a State, to the extent that such an organization has competence over matters governed by the Guide and the Supplement. If so, any reference to a "State" in the Guide and the Supplement would apply equally to a regional economic integration organization where the context so requires. Such an approach would ensure that where the lex protectionis is the law of a regional economic integration organization, such as the European Union, reference to the law of the State in which intellectual property is protected would refer to law of a regional economic integration organization.]

B. Law applicable to contractual matters

22. Under the *Guide*, the law applicable to the mutual rights and obligations of the grantor and the secured creditor (the contractual aspects of the security agreement) with respect to the security right is left to party autonomy. In the absence of a choice of law by the parties, the law applicable to these matters is the law governing the security agreement as determined by the conflict-of-laws rules generally applicable

to contractual obligations (see chapter X of the *Guide*, para. 61 and recommendation 216).

23. In view of the wide acceptability of the application of the principle of party autonomy to contractual matters,² the same rule should apply to the mutual rights and obligations of the grantor and the secured creditor in the case of a security right in intellectual property.

XI. The impact of insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a licence agreement

[Note to the Working Group: For paras. 24-42, see A/CN.9/WG.V/WP.87, A/CN.9/WG.VI/WP.37/Add.4, paras. 22-40, A/CN.9/671, paras. 125-127, A/CN.9/670, para. 116-122, A/CN.9/WG.VI/WP.35/Add.1, chapter XI, A/CN.9/667, paras. 129-140, A/CN.9/WG.VI/WP.33/Add.1, paras. 58-72, A/CN.9/649, paras. 98-103 and A/63/17, para. 326.]

A. General

24. A licensor or a licensee of intellectual property under a licence agreement may create a security right in its rights under the licence agreement. If the grantor is the licensor, typically its secured creditor will have a security right in the licensor's right to receive royalties from the licensee as well as the right to enforce non-monetary terms of the licence agreement and the right to terminate the licence agreement upon breach. If the licensee is the grantor, typically its secured creditor will have a security right in the licensee's right to use or exploit the licensed intellectual property subject to the terms of the licence agreement, but not a security right in the intellectual property itself. The secured creditor may then take the steps necessary to make that security right effective against third parties (see recommendation 29).

25. Insolvency law, subject to avoidance actions, will typically respect the effectiveness of such a security right (see recommendation 88 of the Insolvency Guide). Similarly, insolvency law, subject to any limited and clearly stated exceptions, will respect the priority of a security right that is effective against third parties (see recommendations 238-239). However, if the licensor or the licensee becomes subject to insolvency proceedings, there may be an effect on the rights of the parties to the licence agreement that will have an impact on a security right granted by the licensor or the licensee. In the case of a chain of licence and sub-licence agreements, the insolvency of any party in the chain will have an impact on several other parties in the chain and their secured creditors. For example, an insolvency of a party in the middle of the chain will affect the licence of subsequent sub-licensees and sub-licensors, but will not have any legal effect on previous ones. The terms of a licence agreement may provide for different results (for example,

² See www.hcch.net/upload/wop/genaff_concl09e.pdf on the development of a future instrument on the choice of law in international contracts by the Hague Conference on Private International Law.

automatic termination of all licences upon the insolvency of any licensee up or down in the chain from the insolvent licensee), but these results will be subject to limitations under insolvency law (for example, rendering unenforceable automatic termination clauses).

26. Outside of insolvency, there may be statutory or contractual limitations on the ability of the licensor and the licensee to grant and enforce a security right in a right to the payment of royalties. Secured transactions law will typically not affect statutory limitations, other than mainly those relating to a future receivable, or a receivable assigned in bulk or in part on the sole ground that it is a future receivable, or a receivable assigned in bulk or in part (see recommendation 23). Secured transactions law may affect contractual limitations (see recommendations 18 and 24-25). What effect, if any, an insolvency proceeding may have on those limitations on the assignment of receivables independent of secured transactions law is a matter of insolvency law (see recommendations 83-85 of the Insolvency Guide).

27. The Insolvency Guide contains extensive recommendations concerning the impact of insolvency proceedings on contracts with respect to which both the debtor and its counterparty have not fully performed their obligations under the contract (see recommendations 69-86 of the Insolvency Guide). A licence agreement could be such a contract, if it has not been fully performed by both parties and the term of the licence agreement has not been completed (so that there is remaining performance by the licensor). However, a licence agreement is not such a contract, if it has been fully performed by the licensee through an advance payment of the entire amount of the royalties owed by the licensee to the licensor, as may be the case in the event of an exclusive licence agreement, and the absence of any ongoing obligations of the licensor. The insolvent debtor could be the licensor (owing the licensee the right to use or exploit the licensed intellectual property in line with the terms and conditions of the licence agreement) or the licensee (owing payment of royalties and the obligation to use or exploit the licensed intellectual property in accordance with the licence agreement).

28. Under the recommendations of the Insolvency Guide, the insolvency representative may continue or reject a licence agreement as a whole, if it has not been fully performed by both parties (see recommendations 72-73 of the Insolvency Guide). In the case of one licence agreement, continuation or rejection of the licence agreement by the insolvency representative of one party will affect the rights of the other party. In the case of a chain of licence and sub-licence agreements, continuation or rejection of a licence agreement will affect the rights of all subsequent parties in the chain. Finally, in the case of cross-licensing agreements (where a licensor grants a licence, the licensee then further develops the licence and grants a licence in the further developed licensed product to the licensor), continuation or rejection of a licence agreement will affect each party both in its capacity as licensor and licensee.

29. If the insolvency representative chooses to continue a licence agreement, which has not been fully performed by both parties and as to which the insolvent debtor (licensor or licensee) is in breach, the breach must be cured, the non-breaching counterparty must be substantially returned to the economic position that it was in before the breach, and the insolvency representative must be able to perform the licence agreement (see recommendation 79 of the Insolvency Guide). In this case, the insolvency proceedings will have no impact on the legal status of a

security right granted by the licensor or the licensee. However, if the insolvency representative chooses to reject the licence agreement, there will be an impact on a security right granted by the licensor or the licensee (for a full understanding of the treatment of contracts in the case of insolvency, the reader is referred to the text of the Insolvency Guide, part two, chapter II, section E).

B. Insolvency of the licensor

30. If the licensor's insolvency representative decides to continue a licence agreement, there will be no impact on a security right granted by the licensor or the licensee. If the licensor is the insolvent debtor and has granted a security right in its rights under the licence agreement, and the licensor's insolvency representative decides to continue the licence agreement, the licence agreement will remain in place, the licensee will continue to owe royalties under the licence agreement and the licensor's secured creditor will continue to have a security right in those royalty payments. In this case of the licensor's insolvency, if the licensee has granted a security right in its rights under the licence agreement, the licensor will continue to owe the licensee unimpeded use of the licensed intellectual property under the licence agreement and the licensee's secured creditor will continue to have a security right in the licensee's rights under that agreement.

31. However, if the licensor's insolvency representative decides to reject the licence agreement, there will be an impact on a security right granted by the licensor or the licensee. If the licensor has granted a security right in its rights under the licence agreement, the licence agreement will no longer be effective, the licensee will no longer owe royalties under the licence agreement, and, thus, there will be no royalties for the licensor's secured creditor to be able to apply to satisfy the secured obligation. In this case of the licensor's insolvency, if the licensee has granted a security right in its rights under the licence agreement, the licensee will no longer have the authority to use the licensed intellectual property and its secured creditor will lose its security right in the encumbered asset (that is, the licensee's authority to use or exploit the licensed intellectual property).

32. As a practical matter, a secured creditor with a security right in a licensor's rights under a licence agreement may protect itself from the consequences of a rejection of the licence agreement by the licensor's insolvency representative. Such a secured creditor may, for example, protect itself by obtaining and making effective against third parties (in addition to a security right in the licensor's rights under the licence agreement, that is, principally the royalties), a security right in the licensed intellectual property itself. Then, if the insolvency representative of the licensor rejects the licence agreement, the secured creditor of the licensor (subject to the stay and any other limitations imposed by insolvency law on the enforcement of a security right in insolvency proceedings) can enforce its security right in the licensed intellectual property by disposing of it or by entering into a new licence agreement with a new licensee similar to the licence that had been rejected and thus re-establishing the royalty stream (see recommendation 149). The funds received from the disposition of the encumbered intellectual property or the royalties received pursuant to this new licence agreement would then be distributed to the secured creditor pursuant to recommendations 152-155. As a practical matter,

however, this arrangement would be worthwhile only for significant licence agreements.

33. Similarly, a secured creditor with a security right in a licensee's rights under a licence agreement may seek to protect itself from the consequences of a rejection of the licence agreement by the licensor's insolvency representative, by, for example, declining to make the secured loan unless the licensee obtains and makes effective against third parties a security right in the licensed intellectual property to secure the licensee's rights under the licence agreement. Then, if the insolvency representative of the licensor rejects the licence agreement, the licensee (subject to the stay and any other limitations imposed by insolvency law on the enforcement of security rights in insolvency proceedings) can enforce the security right in the licensed intellectual property itself by disposing of it or by entering into a new licence agreement with a new licensor, and the rights thereby obtained would be proceeds in which the secured creditor would have a security right. As a practical matter, this arrangement too would be worthwhile only for significant licence agreements.

34. As already mentioned, if at least one party has fully performed its obligations with respect to a licence agreement, the licence agreement is not subject to the recommendations of the Insolvency Guide concerning treatment of contracts. Where neither the licensor nor the licensee has fully performed its obligations under the licence agreement, however, the licence agreement would be subject to rejection under those recommendations. To protect long-term investments of licensees and in recognition of the fact that a licensee may depend on the use of rights under a licence agreement, some States have adopted rules that give additional protection to a licensee (and, in effect, its secured creditor) in the case of a licence agreement that would otherwise be subject to rejection in the insolvency of the licensor. Such protection is particularly important where there is a chain of licence and sub-licence agreements and thus several parties may be affected by the insolvency of one party in the chain.

35. For example, some States give a licensee the right to continue to use or exploit the licensed intellectual property, following the rejection of the licence agreement by the licensor's insolvency representative, as long as the licensee continues to pay royalties to the estate as provided in the licence agreement and otherwise continues to perform the licence agreement. The only obligation imposed upon the licensor's estate as a result of this rule is the obligation to continue honouring the terms and conditions of the licence agreement, an obligation that does not impose upon the resources of the licensor's estate. This approach has the effect of balancing the interest of the insolvent licensor to escape affirmative burdens under the licence agreement and the interest of the licensee to protect its investment in the licensed intellectual property.

36. In other States, licence agreements may not be subject to rejection under insolvency law because: (a) a rule that excludes the leases of immovable property from insolvency rules on rejection of contracts in the case of the lessor's insolvency applies by analogy to licence agreements in the licensor's insolvency; (b) licence agreements relating to exclusive licences create property rights (rights in rem) that are not subject to rejection (but may be subject to avoidance); (c) licence agreements are not regarded as contracts that have not been fully performed by both parties as the licensor has already performed its obligations by granting the licence;

(d) they are registered in the relevant intellectual property registry. In these States, the licensee may be able to retain the licence as long as it pays the royalties owed under the licence agreement.

37. In yet other States, licence agreements may be rejected, subject to the application of the so-called “abstraction principle”. Under this principle, the licence does not depend on the effectiveness of the underlying licence agreement. Thus, the licensee may retain the right to use or exploit the licensed intellectual property, even if a licence agreement has been rejected by the licensor’s insolvency representative. However, the licensor’s insolvency representative has a claim for the withdrawal of the licence based on the principle of unjust enrichment. Until such withdrawal, the licensee has to pay for the use of the licensed intellectual property on the basis of the principle of unjust enrichment an amount equal to the royalties owed under the licence agreement that was rejected.

38. It should be noted that the Insolvency Guide provides that “Exceptions to the power to reject may also be appropriate in the case of labour agreements, agreements where the debtor is a lessor or franchisor or a licensor of intellectual property and termination of the agreement would end or seriously affect the business of the counterparty, in particular where the advantage to the debtor may be relatively minor, and contracts with government, such as licensing agreements and procurement contracts” (see Insolvency Guide, part two, chapter II, paragraph 143). To protect long-term investments and expectations of licensees and their creditors from the ability of the licensor’s insolvency representative in effect to renegotiate licence agreements existing at the commencement of insolvency proceedings, States may wish to consider adopting rules similar to those described in the preceding paragraphs. Any such rules would have to take account of the general rules of insolvency law and the overall effect on the insolvency estate, as well as law relating to intellectual property. States may also wish to consider to what extent the commercial practices described in paragraphs 30 and 31 above would provide adequate practical solutions.

C. Insolvency of the licensee

39. If the licensee is the insolvent debtor and has granted a security right in its rights under the licence agreement, and the licensee’s insolvency representative decides to continue the licence agreement, the licence agreement will remain in place, the licensee will continue to have its rights under the licence agreement to use or exploit the licensed intellectual property (in accordance with the terms and conditions of the licence agreement) and the licensee’s secured creditor will continue to have a security right in those rights. In this case, if the licensor has granted a security right in its rights to the payment of royalties under the licence agreement, the licensor’s secured creditor will continue to have a security right in the licensor’s right to the payment of royalties.

40. In cases in which the licensee’s insolvency representative decides to reject the licence agreement, however, and the licensee has granted a security right in its rights under the licence agreement, the licence agreement will no longer be effective, the licensee will no longer have a right to use or exploit the licensed intellectual property and the licensee’s secured creditor will not be able to use the

value of the licensee's rights under the licence agreement to satisfy the secured obligation. In this case too, if the licensor has granted a security right in its right to the payment of royalties under the licence agreement, the licensor will lose its royalty stream and its secured creditor will lose its encumbered asset.

41. A secured creditor with a security right in a licensor's or licensee's rights under a licence agreement may seek to protect itself from the consequences of a rejection of the licence agreement by the licensee's insolvency representative by adopting comparable measures as described above (see paras. 32-33 above).

42. In the case of the insolvency of the licensee, it is important to ensure that the licensor either receive its royalties and the licensee otherwise performs the licence agreement, or that the licensor has a right to terminate the licence agreement. Insolvency law rules, such as those relating to curing any default of the licence agreement in the event that the licence agreement is continued (see para. 29 above), are essential. In addition, in situations where the insolvent licensee has granted a security right in its rights to receive sub-royalties, those sub-royalties will likely be a source of funds for the licensee to pay the royalties that it owes to the licensor. If the licensee's secured creditor claims all the royalties and the licensee does not have another source for payment of royalties to the licensor, it is essential that the licensor has a right to terminate the license to protect its rights.

Annex

The following text briefly describes the impact of the insolvency of a licensor or licensee on a security right that party's in rights under a licence agreement.

	<i>Licensor is insolvent</i>	<i>Licensee is insolvent</i>
<i>Licensor grants a security right in its rights under a licence agreement (primarily the right to receive royalties)</i>	<p>Question: What happens if the licensor or its insolvency representative decides to continue the performance of the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?^a</p> <p>Answer: The licensee continues to owe royalties under the licence agreement and the secured creditor of the licensor continues to have a security right both in the licensor's right to royalties under the licence agreement and in the proceeds of that right, in other words, any royalty payments that are paid.</p> <p>Question: What happens if the licensor or its insolvency representative rejects the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer: The licensee does not owe royalties under the licence agreement with respect to periods after rejection, but still owes any unpaid royalties for periods before rejection; the secured creditor of the licensor thus has a security right in the right to collect such royalties for periods prior to the rejection and in the royalties paid for those periods, but has no security right in rights to any future royalties because there will be no future royalties under the rejected agreement.</p>	<p>Question: What happens if the licensee or its insolvency representative decides to continue the performance of the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer: The licensor continues to have a right to receive royalties under the licence agreement and thus the secured creditor of the licensor continues to have a security right both in the licensor's right to royalties under the licence agreement and in the proceeds of that right, in other words, any royalty payments that are made.</p> <p>Question: What happens if the licensee or its insolvency representative rejects the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer: The licensee does not continue to owe royalties under the licence agreement with respect to periods after rejection, but still owes any unpaid royalties for periods before rejection; the secured creditor of the licensor thus has a security right in the right to collect such royalties for periods prior to the rejection and in the royalties paid for those periods, but has no security right in rights to any future royalties because there will be no future royalties under the rejected agreement.</p>
<i>Licensee grants a security right in its rights under a licence agreement (primarily the right to use the intellectual property)</i>	<p>Question: What happens if the licensor decides to continue the performance of the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p>	<p>Question: What happens if the licensee decides to continue the performance of the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p>

<i>Licensor is insolvent</i>	<i>Licensee is insolvent</i>
<p>Answer: The licensee continues to have rights under the licence agreement and the secured creditor of the licensee continues to have a security right in those rights under the licence agreement.</p> <p>Question: What happens if the licensor or its insolvency representative rejects the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer: The licensee does not have rights under the licence agreement with respect to periods after rejection, but retains any rights it may still have with respect to periods before rejection; the secured creditor of the licensee continues to have a security right in those rights of the licensee with respect to periods before rejection.</p>	<p>Answer: The licensee continues to have rights under the licence agreement and the secured creditor of the licensee continues to have a security right in those rights under the licence agreement.</p> <p>Question: What happens if the licensee or its insolvency representative rejects the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer: The licensee does not have rights under the licence agreement with respect to periods after rejection, but retains rights it may still have with respect to periods before rejection; the secured creditor of the licensee continues to have a security right in those rights of the licensee with respect to periods before rejection.</p>

^a United Nations publication, Sales No. E.05.V.10.

**C. Note by the Secretariat on the Draft Supplement to the
UNCITRAL Legislative Guide on Secured Transactions dealing
with security rights in intellectual property, Proposal by the
Permanent Bureau of the Hague Conference on Private
International Law, submitted to the Working Group on
Security Interests at its sixteenth session
(A/CN.9/WG.VI/WP.40)**

[Original: English]

1. The Annex to this note contains a proposal submitted by the Permanent Bureau of the Hague Conference on Private International Law (the “Hague Conference”) with respect to the law applicable to security rights in intellectual property in chapter X on conflict of laws of the Draft Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* (the “*Guide*”) dealing with security rights in intellectual property.
2. The Hague Conference is an intergovernmental organization with 69 Member States. Its origins date back to 1893. The Organization’s core mission is the “progressive unification of the rules of private international law” (see Art. 1 of the Hague Conference Statute). To this effect, the Hague Conference has adopted 38 multilateral treaties (mostly Conventions), including several Conventions on international commercial and finance law.
3. In line with the mandate of the Hague Conference and its field of expertise, the Permanent Bureau welcomes the opportunity to comment on uniform rules of private international law developed under the auspices of other international organizations. It should be noted that the Permanent Bureau participated in the development and supported the adoption of the *Guide*, the conflict-of-law recommendations of which were prepared in close cooperation with the Permanent Bureau.

Annex

Proposal by the Permanent Bureau of the Hague Conference on Private International Law

I. Relevance and function of conflict-of-law recommendations in the Draft Supplement

1. As a preliminary remark, the Permanent Bureau wishes to underscore the importance of including conflict-of-law recommendations in the Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions (the “*Guide*”) dealing with security rights in intellectual property (the “Draft Supplement”). Its subject matter, that is, security rights in intellectual property, is a very specific and generally unaddressed topic in private international law. Therefore, guidance from a future UNCITRAL legislative instrument is in every respect an important development.

2. However, it must be noted that conflict-of-law recommendations serve a different purpose to that of the Draft Supplement’s substantive recommendations. While the adoption of the latter would address the possible inconsistencies between secured financing and intellectual property law by introducing unifying or harmonizing solutions for the interested States, conflict-of-law recommendations, by their very nature, cannot produce the same unifying or harmonizing effect on national laws. Their effect is limited to the law selection level. In other words, any conflict-of-law recommendation can result only in the use of a uniform criterion (or “connecting factor”) to be applied, which in turn leads to the application of a particular law. No unifying or harmonizing effect on the substantive level can be achieved by means of conflict-of-law recommendations.

3. On the structure of chapter X of the Draft Supplement on conflict of laws, the Permanent Bureau fully concurs with the distinction that the Draft Supplement makes between the law applicable to property matters and the law applicable to contractual matters. This distinction is fundamental in conflicts of laws because the degree of party autonomy accepted for contractual matters generally is greater than the party autonomy accepted for property matters. For this reason, the Permanent Bureau does not support the second version of Alternative B in brackets, as it enables the application of a law chosen by the parties to the “creation” of a security right in intellectual property.

II. Law applicable to property matters

4. The Permanent Bureau applauds the attempts to unify the conflict-of-law rules applicable to the property aspects of secured transactions in intellectual property rights. As such, guidance from the Draft Supplement is to be welcomed, especially since specific consideration of this question in national or international law is very limited.

A. International conventions protecting intellectual property

5. At the outset, it may be considered that the principle of national treatment embodied in international conventions protecting intellectual property implicitly imposes a universal rule in favour of the *lex loci protectionis* (“*lex protectionis*”). Provisions such as Article 2(1) of the Paris Industrial Property Convention or Article 5(2) of the Berne Intellectual Property Convention appear to leave no room for a connecting factor other than the place of protection of the relevant intellectual property right. In other words, no law other than the law of the protecting State could be applied. Such an approach suggests that Contracting States to any of these international conventions have chosen to set aside the possibility of freely determining their conflict-of-law rules in reciprocal relationships.

6. The Permanent Bureau stresses that it is highly controversial to confer such an extensive effect on international intellectual property conventions with respect to the issue of the applicable law. Even assuming that these international conventions can impose a given conflict-of-law rule, it would still be questionable whether the scope of application of that rule covers all property effects contemplated by the Draft Supplement, that is, the creation, effectiveness against third parties, priority as against the rights of competing claimants and enforcement of a security right.

7. Accordingly, recommendations on the governing law of security rights in intellectual property will at the very least perform a gap-filling function with regard to any possible conflict-of-law consequences resulting from existing international intellectual property conventions. More likely however, the formulation of conflict-of-law rules in the Draft Supplement will be a welcome development since international intellectual property conventions do not provide for the determination of the applicable law in international cases dealing with security rights in intellectual property.

B. Which conflict-of-law rules for the Draft Supplement?

8. Fully acknowledging the desirability of conflict-of-law rules in the Draft Supplement, the Permanent Bureau now considers how these rules should be best drafted. In this regard, it is noted that the Draft Supplement sets out four alternatives. Each of them offers a combination of the law of the State in which the intellectual property is protected and the law of the place where the grantor is located.

9. In light of the general objectives of the Draft Supplement, the Permanent Bureau supports the idea of a comparative assessment of these connecting factors for each and every one of the proprietary issues addressed in the Draft Supplement, that is, the creation, effectiveness against third parties, priority as against the rights of competing claimants and the enforcement of a security right.

10. As a preliminary remark, it must be stressed that the law governing the intellectual property as such provides whether a security right can be vested in that intellectual property. This is in line with recommendation 4, subparagraph (b), of the *Guide*. Therefore, none of the recommendations contemplated in the Draft Supplement can override the application of the law governing the intellectual property to the preliminary issue of the viability of a security right in intellectual property.

11. Example: a copyright cannot be pledged under the law of State X. Therefore, even if the recommendations of the Draft Supplement are adopted in State X, they cannot override the application of the law of State X prohibiting the pledge on a copyright.

C. A balanced conflict-of-law rule

12. The Permanent Bureau favours the adoption of a recommendation which combines an application of the law of the State in which the grantor is located with the law of the State in which the intellectual property is protected.

13. We respectfully submit the following proposal for the consideration of the Working Group:

“Within the limits of the law governing the transferability of an intellectual property, the law should provide that the law applicable to the creation, effectiveness against third parties, priority as against competing claimants and enforcement of a security in intellectual property is the law of the State in which the grantor is located. However, the law applicable to the third-party effectiveness and the priority of a security right in intellectual property as against the right of a transferee or a licensee of the encumbered intellectual property is the law of the State in which the intellectual property is protected.”

14. We note that this proposal follows Alternative D of the Draft Supplement to a large extent. This proposal preserves the predominant application of a single connecting factor (that is, the law of the State in which the grantor is located), in line with the recommendations adopted in the *Guide*. Insofar as possible, a single law would govern the effectiveness of the security right between the parties and as to third parties, a priority conflict between two secured creditors etc. Simplicity, certainty and predictability are hence enhanced.

D. Limitations to the application of the law of the State in which the grantor is located

15. The application of the law of the State in which the grantor is located is nevertheless subject to two important limitations. First, as stated above, the transferability of the intellectual property right is a preliminary issue to be addressed before the creation of a security in intellectual property. Accordingly, it is important to reiterate the importance of the law governing the intellectual property as the legal framework for the creation of a security right in intellectual property.

16. Second, we suggest the introduction of an exception in favour of the *lex protectionis* where a conflict arises between a secured creditor and an outright transferee or licensee. In these cases, the *lex protectionis* is to be considered the proper law in adjudicating third-party effectiveness and priority, taking into consideration the legitimate expectations of a transferee or licensee.

17. It follows that the secured creditor must fulfil the requirements of (each) *lex protectionis* to ensure that the security right will prevail in case of a licence or transfer. This may appear cumbersome for secured creditors but is to be considered a balanced solution for the evident conflict of interests between these secured creditors and the transferees or licensees.

18. Example: Grantor A, located in State X, holds a patent in State Y. It grants a security right in that patent to a secured creditor in State Y. Grantor A subsequently assigns the same patent to transferee B.

19. If the proposed recommendation is followed, it is for the law of State Y (*lex protectionis*) and not for the law of State X (the law of the grantor's location) to apply to third-party effectiveness and priority between the secured creditor and the outright transferee. In case the law of State Y (*lex protectionis*) stipulates that the security right is enforceable against B, the enforcement of the security right will take place in conformity with the law of State X (the law of the grantor's location).

III. Law applicable to contractual matters

20. Party autonomy is the key to addressing the question of what is the appropriate applicable law to contractual matters. It is acknowledged the grantor and the secured creditor may decide which law applies to the security agreement. From the Permanent Bureau's perspective, the reference to party autonomy is very positive in view of our ongoing work on the promotion of party autonomy in the field of international commercial contracts. The specific reference to the Hague Conference's future instrument in the Draft Supplement is very much appreciated; it shows how various international instruments from different organizations are carefully drafted to work together and to support each other.

21. The Permanent Bureau of the Hague Conference stands ready to further collaborate in the consideration and discussion of chapter X of the Draft Supplement. We remain at the Working Group's disposal for any further information.

**D. Report of the Working Group on Security Interests on the
work of its seventeenth session (New York, 8-12 February 2010)
(A/CN.9/689)**

[Original: English]

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I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of an annex to the UNCITRAL Legislative Guide on Secured Transactions (hereinafter referred to as “the Guide”)¹ specific to security rights in intellectual property, pursuant to a decision taken by the Commission at its

¹ Currently available on the UNCITRAL website (www.uncitral.org/pdf/english/texts/security-ig/e/final-final-e.pdf). To be issued as a United Nations sales publication.

fortieth session, in 2007.² The Commission's decision to undertake work on security rights in intellectual property was taken in response to the need to supplement its work on the Guide by providing specific guidance to States as to the appropriate coordination between secured transactions and intellectual property law.³

2. At its thirty-ninth session, in 2006, the Commission considered its future work on secured financing law. It was noted that intellectual property rights (e.g. copyrights, patents and trademarks) were becoming an extremely important source of credit and should not be excluded from a modern secured transactions law. In addition, it was noted that the recommendations of the draft Guide generally applied to security rights in intellectual property to the extent that they were not inconsistent with intellectual property law. Moreover, it was noted that, as the recommendations of the draft Guide had not been prepared with the special intellectual property law issues in mind, enacting States should consider making any necessary adjustments to the recommendations to address those issues.⁴

3. In order to provide more guidance to States, the suggestion was made that the Secretariat should prepare, in cooperation with international organizations with expertise in the fields of secured financing and intellectual property law and in particular the World Intellectual Property Organization (WIPO), a note for submission to the Commission at its fortieth session, in 2007, discussing the possible scope of work that could be undertaken by the Commission as a supplement to the draft Guide. In addition, it was suggested that, in order to obtain expert advice and the input of the relevant industry, the Secretariat should organize expert group meetings and colloquiums as necessary.⁵ After discussion, the Commission requested the Secretariat to prepare, in cooperation with relevant organizations and in particular WIPO, a note discussing the scope of future work by the Commission on intellectual property financing. The Commission also requested the Secretariat to organize a colloquium on intellectual property financing ensuring to the maximum extent possible the participation of relevant international organizations and experts from various regions of the world.⁶

4. Pursuant to those requests, the Secretariat organized in cooperation with WIPO a colloquium on security rights in intellectual property rights (Vienna, 18 and 19 January 2007). The colloquium was attended by experts on secured financing and intellectual property law, including representatives of Governments and national and international, governmental and non-governmental organizations. At the colloquium, several suggestions were made with respect to adjustments that would need to be made to the draft Guide to address issues specific to intellectual property financing.⁷

5. At the first part of its fortieth session (Vienna, 25 June-12 July 2007), the Commission considered a note by the Secretariat entitled "Possible future work on

² *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17 (Part I))*, para. 162.

³ *Ibid.*, para. 157.

⁴ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 81 and 82.

⁵ *Ibid.*, para. 83.

⁶ *Ibid.*, para. 86.

⁷ See www.uncitral.org/uncitral/en/commission/colloquia/2secint.html.

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 (Security Interests) with the preparation of an annex to the draft Guide specific to security rights in intellectual property rights.⁸

6. At the resumed fortieth session (Vienna, 10-14 December 2007), the Commission finalized and adopted the Guide on the understanding that an annex to the Guide specific to security rights in intellectual property rights would subsequently be prepared.⁹

7. At its thirteenth session (New York, 19-23 May 2008), the Working Group considered a note by the Secretariat entitled “Security rights in intellectual property rights” (A/CN.9/WG.VI/WP.33 and Add.1). At that session, the Working Group requested the Secretariat to prepare a draft of the annex to the Guide on security rights in intellectual property rights (“the draft Annex”) reflecting the deliberations and decisions of the Working Group (see A/CN.9/649, para. 13). As the Working Group was not able to reach agreement as to whether certain matters related to the impact of insolvency on a security right in intellectual property (see A/CN.9/649, paras. 98-102) were sufficiently linked with secured transactions law as to justify their discussion in the draft annex, it decided to revisit those matters at a future meeting and to recommend that Working Group V (Insolvency Law) be requested to consider those matters (see A/CN.9/649, para. 103).

8. At its forty-first session (New York, 16 June-3 July 2008), the Commission noted with satisfaction the good progress achieved by the Working Group. The Commission also noted the decision of the Working Group with respect to certain matters related to the impact of insolvency on a security right in intellectual property and decided that Working Group V should be informed and invited to express any preliminary opinion at its next session. It was also decided that, should any remaining issue require joint consideration by the two working groups after that session, the Secretariat should have discretion to organize a joint discussion of the impact of insolvency on a security right in intellectual property.¹⁰

9. At its fourteenth session (Vienna, 20-24 October 2008), the Working Group continued its work based on a note prepared by the Secretariat entitled “Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property” (A/CN.9/WG.VI/WP.35 and Add.1). At that session, the Working Group requested the Secretariat to prepare a revised version of the draft annex reflecting the deliberations and decisions of the Working Group (see A/CN.9/667, para. 15). The Working Group also referred to Working Group V (Insolvency Law) certain matters relating to the impact of insolvency on a security right in intellectual property (see A/CN.9/667, paras. 129-140). In that connection, it was widely felt that every effort should be made to conclude discussions of these matters as soon as possible, so that the result of those discussions could be included

⁸ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), paras. 156, 157 and 162.

⁹ *Ibid.*, *Sixty-second session, Supplement No. 17* (A/62/17 (Part II)), paras. 99-100.

¹⁰ *Ibid.*, *Sixty-third session, Supplement No. 17* (A/63/17), para. 326.

in the draft annex by the fall of 2009 or the early spring of 2010 and the draft annex could be submitted to the Commission for final approval and adoption at its forty-third session in 2010 (see A/CN.9/667, para. 143).

10. At its fifteenth session (New York, 27 April-1 May 2009), the Working Group continued its work based on a note by the Secretariat entitled “Draft Annex to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property” (A/CN.9/WG.VI/WP.37 and Add.1-4). At that session, the Working Group requested the Secretariat to prepare a revised version of the draft Annex reflecting the deliberations and decisions of the Working Group (see A/CN.9/670, para. 16). In addition, the Working Group, having taken note of a note by the Secretariat entitled “Discussion of intellectual property in the Legislative Guide on Insolvency Law” (A/CN.9/WG.V/WP.87), approved the substance of the discussion of the impact of insolvency of a licensor or licensee of intellectual property on a security right in that party’s rights under a licence agreement (see A/CN.9/WG.VI/WP.37/Add.4, paras. 22-40) and referred it to Working Group V (see A/CN.9/670, paras. 116-122). Moreover, the Working Group had a preliminary discussion about its future work programme (see A/CN.9/670, paras. 123-126).

11. At its thirty-sixth session, Working Group V (Insolvency Law) considered the insolvency-related issues referred to it by Working Group VI on the basis of documents A/CN.9/WG.V/WP.87 and A/CN.9/WG.VI/WP.37/Add.4 and an extract from the report of the Working Group (see A/CN.9/670, paras. 116-122). At that session, Working Group V approved the contents of those parts of the draft Annex dealing with the impact of insolvency of a licensor or licensee of intellectual property on a security right in that party’s rights under a licence agreement, as set forth in document A/CN.9/WG.VI/WP.37/Add.4, paragraphs 22-40, and the conclusions and revisions of Working Group VI reached at its fifteenth session (see A/CN.9/670, paras. 116-122).

12. At its forty-second session (Vienna, 29 June-17 July 2009), the Commission expressed its appreciation to the Working Group and the Secretariat for the progress achieved thus far and emphasized the importance of the draft Supplement (referred to above as the “draft Annex”). The Commission also noted with appreciation the results of the coordination efforts of Working Groups V and VI on insolvency-related matters in an intellectual property context. Noting the interest of the international intellectual property community, the Commission requested the Working Group to expedite its work so as to finalize the draft Supplement in one or two sessions and submit it to the Commission for finalization and adoption at its forty-third session, in 2010, so that the draft Supplement might be offered to States for adoption as soon as possible. In addition, the Commission noted with interest the future work topics discussed by the Working Group at its fourteenth and fifteenth sessions and agreed that, depending on the availability of time, preparatory work could be advanced through a discussion at the sixteenth session of the Working Group. As to the process for the preparation of a future work programme for the Working Group, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 with broad participation of experts from Governments, international organizations and the private sector. It was generally agreed that, on the basis of a note to be prepared by the Secretariat, the Commission

would be in a better position to consider and make a decision on the future work programme of the Working Group at its forty-third session, in 2010.¹¹

13. At its sixteenth session (Vienna, 2-6 November 2009), the Working Group continued its work based on a note by the Secretariat entitled "Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property" (A/CN.9/WG.VI/WP.39 and Addenda 1 to 7) and a proposal by the Permanent Bureau of the Hague Conference on Private International Law (A/CN.9/WG.VI/WP.40). At that session, the Working Group requested the Secretariat to prepare a revised version of the draft Supplement reflecting the deliberations and decisions of the Working Group (see A/CN.9/685, para. 19). In addition, the Working Group approved the substance of the discussion of automatic termination and acceleration clauses contained in intellectual property agreements in the case of insolvency of a licensor or licensee of intellectual property and referred it to Working Group V (see A/CN.9/685, para. 95).

II. Organization of the session

14. The Working Group, which was composed of all States members of the Commission, held its seventeenth session in New York from 8 to 12 February 2010. The session was attended by representatives of the following States members of the Working Group: Belarus, Cameroon, Canada, China, Colombia, Egypt, France, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Madagascar, Mexico, Morocco, Norway, Pakistan, Poland, Republic of Korea, Russian Federation, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

15. The session was attended by observers from the following States: Bangladesh, Belgium, Ghana, Indonesia, Panama, Philippines, Qatar, Romania and Turkey. The session was also attended by observers from the following non-member State and Entity: Holy See and Palestine.

16. 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) *Intergovernmental organizations*: Caribbean Community Secretariat (CARICOM) and Hague Conference on Private International Law (HCCH);

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), American Intellectual Property Organization (AIPLA), Commercial Finance Association (CFA), European Communities Trade Mark Association (ECTA), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), Independent Film and Television Alliance (IFTA) and International Trademark Association (INTA).

¹¹ Ibid., *Sixty-fourth session, Supplement No. 17* (A/64/17), paras. 317-319.

17. The Working Group elected the following officers:

Chair: Ms. Kathryn SABO (Canada)

Rapporteur: Mr. Léopold Noel BOUMSONG (Cameroon)

18. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.41 (Annotated provisional agenda) and A/CN.9/WG.VI/WP.42 and Addenda 1 to 7 (Draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property).

19. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Security interests in intellectual property.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

20. The Working Group considered a note by the Secretariat entitled “Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property” (A/CN.9/WG.VI/WP.42 and Addenda 1 to 7). The deliberations and decisions of the Working Group are set forth below in chapters IV and V. Subject to changes mentioned in chapter IV, the Working Group adopted the recommendations and the substance of the commentary of the draft Supplement. The Secretariat was requested to prepare a final version of the draft Supplement to be submitted to the Commission at its forty-third session (New York, 21 June-9 July 2010) for finalization and adoption.

IV. Security rights in intellectual property

A. Preface and introduction (A/CN.9/WG.VI/WP.42)

21. With respect to the preface and the introduction, it was agreed that paragraph 29 should clarify that, upon default, the secured creditor had a right to dispose of the encumbered asset and the transferee acquired the rights of the grantor free of security rights with a lower priority ranking than that of the security right of the enforcing secured creditor. In addition, it was agreed that, in paragraph 29, appropriate cross-references to the relevant part of chapter VIII of the Guide and the draft Supplement on the enforcement of a security right should be included. Moreover, it was agreed that paragraph 51 should include an example of consumer confusion with respect to trademarks replacing the current example, which referred to plain infringement. Subject to those changes, the Working Group adopted the substance of the preface and the introduction.

B. Scope of application and party autonomy (A/CN.9/WG.VI/WP.42/Add.1)

22. With respect to chapter I on the scope of application and party autonomy, it was agreed that the last sentence of paragraph 11 should clarify that the list of issues that followed was indicative and thus law relating to intellectual property could also deal with issues that were not included in that list. In addition, it was agreed that paragraph 19 should avoid referring to voluntary registration of a security right in a copyright, which as a matter of law relating to copyright was dealt with differently from State to State. Moreover, it was agreed that paragraph 22 should clarify that the notion of “possession” could not apply to intangible assets, because it was defined in the Guide to mean “actual possession”. Subject to those changes, the Working Group adopted the substance of chapter I on the scope of application and party autonomy.

C. Creation of a security right in intellectual property (A/CN.9/WG.VI/WP.42/Add.2)

23. With respect to chapter II on the creation of a security right in intellectual property, it was agreed that:

(a) Paragraph 2 should clarify that, under the Guide, a security right in intellectual property could be created by a written agreement between the grantor and the secured creditor;

(b) The fifth sentence of paragraph 4 should clarify that, in some cases, the secured creditor was the transferor of an asset, while, in other cases, the secured creditor was the transferee and that, in either case, a security right was created to secure the unpaid portion of the purchase price;

(c) Paragraph 7 should clarify that the requirement of specific identification of the encumbered assets in the security agreement applied to types of intellectual property other than copyright (e.g. patents) as well and that, under law relating to intellectual property, the parties could simply encumber the exclusive rights under a copyright separately;

(d) Paragraphs 17 and 18 should be reviewed to avoid any inconsistency with paragraphs 23 and 24 of chapter I;

(e) At the end of paragraph 27, reference should be added to the possibility that the secured creditor might seek to control by agreement the flow of royalties, not only by prohibiting the licensee from sublicensing the encumbered intellectual property, but also by prohibiting the assignment of the right to payment of sub-licence royalties; and

(f) In the same paragraph, it should be clarified that breach of any of the above-mentioned agreements by the licensee could make the licensee liable to damages but not invalidate any security right created by the licensee in breach of an agreement with the licensor.

24. Subject to those changes, the Working Group adopted the substance of chapter II on the creation of a security right in intellectual property.

25. The Working Group next considered recommendation 243. It was agreed that the words “unless otherwise agreed by the parties to the security agreement” were superfluous, as recommendation 10 of the Guide was sufficient in enshrining party autonomy, and should thus be deleted. It was also agreed that the second sentence of recommendation 243 should be moved to the commentary as it dealt with a matter addressed in chapter VIII on the enforcement of a security right in intellectual property. In response to a question, it was noted that the “exhaustion” doctrine was irrelevant to recommendation 243. Subject to the above changes, the Working Group adopted recommendation 243.

D. Effectiveness of a security right in intellectual property against third parties (A/CN.9/WG.VI/WP.42/Add.3, paras. 1-10)

26. With respect to chapter III on the effectiveness of a security right in intellectual property against third parties, it was agreed that paragraph 4 should be revised to refer to the possibility that not only a notice but also a document about a security right could be registered in a specialized registry. Subject to that change, the Working Group adopted the substance of chapter III on the effectiveness of a security right in intellectual property against third parties.

E. The registry system (A/CN.9/WG.VI/WP.42/Add.3, paras. 10-54)

27. With respect to chapter IV on the registry system, it was agreed that:

(a) Paragraph 19 should explain that the issue of coordination with a general security rights registry would arise even if an international or regional specialized registry was involved;

(b) Paragraphs 26 and 27 should avoid making general assumptions about the cost of registration in a specialized registry as it varied from State to State and the development of electronic registries tended to reduce costs associated with registration;

(c) Paragraphs 28 to 36 should clarify the assumptions on which those paragraphs were based; and

(d) Paragraph 48 should explain why recommendation 244 took a different approach with respect to the impact of a transfer of an encumbered asset on the effectiveness of registration of a security right in intellectual property from the approach followed in recommendation 62 with respect to security rights in other types of asset (for example, multiplicity of licences and frequency of transfers of intellectual property).

28. Subject to those changes, the Working Group adopted the substance of chapter IV on the registry system.

29. The Working Group next considered recommendation 244. It was agreed that the first sentence of recommendation 244 should be reformulated to read as follows: “The law should provide that the registration of a notice of a security right in intellectual property in the general security rights registry remains effective notwithstanding a transfer of the encumbered intellectual property.” With respect to

the second sentence of recommendation 244, the Working Group agreed that it should be placed in the commentary and revised to refer to its objective of ensuring that the effectiveness of registration of a notice in the general security rights registry would be maintained. Subject to those changes, the Working Group adopted recommendation 244.

**F. Priority of a security right in intellectual property
(A/CN.9/WG.VI/WP.42/Add.4, paras. 1-49)**

30. With respect to chapter V on the priority of a security right in intellectual property, it was agreed that:

(a) Paragraph 28 should be revised to explain that:

(i) “Ordinary course of business” was a concept of commercial or secured transactions law and was not drawn from law relating to intellectual property;

(ii) Law relating to intellectual property did not distinguish among different types of non-exclusive licences but addressed the issue whether they were authorized or not and thus whether a secured creditor, if it were a right holder under intellectual property law, could pursue a purported licensee as an infringer; and

(iii) Recommendation 81, subparagraph (c), did not affect the rights of the secured creditor, if it were a right holder under law relating to intellectual property (for example, to pursue infringers);

(b) Paragraph 40 was ambiguous and should be clarified;

(c) The commentary should generally clarify that:

(i) Recommendation 81, subparagraph (c), applied to situations in which the security right was created before the conclusion of the licence agreement; and

(ii) If the security right was created after the conclusion of the licence agreement, the secured creditor would have no greater rights than the grantor (in accordance with the *nemo dat* principle; see also recommendation 13); and

(d) The commentary should list examples to explain the impact of recommendation 81, subparagraph (c), in an intellectual property context, one of which could reflect the matter covered by the current formulation of recommendation 245.

31. Subject to those changes, the Working Group adopted the substance of chapter V on the priority of a security right in intellectual property.

32. The Working Group next considered recommendation 245. It was widely felt that, in its current formulation, recommendation 245 was too restricted in its scope, if compared with recommendation 81, subparagraph (c). Therefore, the suggestion was made that the recommendation should be reformulated to provide that the rule in recommendation 81, subparagraph (c), did not affect the rights of the secured creditor, if it were a right holder under the law relating to intellectual property. Some doubt was expressed as to whether such a revised recommendation would be useful as it merely restated the principle enshrined in recommendation 4,

subparagraph (b), and was based on the mistaken assumption that there was a rule of law relating to intellectual property that would displace the rule in recommendation 81, subparagraph (c). However, the prevailing view was that the suggested formulation would appropriately address the problems raised by recommendation 81, subparagraph (c). It was stated that the principle of recommendation 4, subparagraph (b), was so important that its restatement in that context was beneficial. It was also observed that no general statement could be made about the contents of law relating to intellectual property in that respect, as it differed from State to State. After discussion, it was agreed that recommendation 245 should be reformulated to read as follows: “The law should provide that the rule in recommendation 81, subparagraph (c), applies to the rights of a secured creditor under this law and does not affect the rights the secured creditor may have under the law relating to intellectual property.” Subject to those changes, the Working Group adopted recommendation 245.

G. Rights and obligations of the parties to a security agreement relating to intellectual property (A/CN.9/WG.VI/WP.42/Add.5, paras. 1-5)

33. The Working Group adopted the substance of chapter VI on the rights and obligations of the parties to a security agreement relating to intellectual property unchanged.

34. The Working Group next considered recommendation 246. It was widely felt that in its current formulation the recommendation was not useful, since the law recommended in the Guide recognized party autonomy did not include a limitation with respect to the preservation of encumbered assets and deferred to law relating to intellectual property to the extent that that law contained a limitation of party autonomy. At the same time, it was agreed that, in certain cases (for example, insolvency of the grantor, see A/CN.9/WG.VI/WP.42/Add.3, subpara. 1), it was important to permit the secured creditor to take steps to preserve the encumbered intellectual property. After discussion, it was agreed that recommendation 246 should be reformulated to read as follows: “The law should provide that the grantor and the secured creditor may agree that the secured creditor is entitled to take steps to preserve the encumbered intellectual property.” Subject to those changes, the Working Group adopted recommendation 246.

H. Rights and obligations of third-party obligors in intellectual property financing transactions (A/CN.9/WG.VI/WP.42/Add.5, paras. 6-7)

35. The Working Group adopted the substance of chapter VII on the rights and obligations of third-party obligors in intellectual property financing transactions unchanged.

**I. Enforcement of a security right in intellectual property
(A/CN.9/WG.VI/WP.42/Add.5, paras. 8-32)**

36. With respect to chapter VIII on the enforcement of a security right in intellectual property, it was agreed that the last sentence of paragraph 30 should clarify that in case of a breach of a licence agreement: (a) the licensor retained all its contractual rights, including the right to terminate the licence agreement; and (b) the secured creditor of the licensee with a security right in the licensee's right to payment of sub-royalties retained its right to collect the sub-royalties. Subject to that change, the Working Group adopted the substance of chapter VIII on the enforcement of a security right in intellectual property.

**J. Acquisition financing in an intellectual property context
(A/CN.9/WG.VI/WP.42/Add.5, paras. 33-58)**

37. With respect to chapter IX on acquisition financing in an intellectual property context, there was broad support in the Working Group for a regime that would transpose the commentary and recommendations of the Guide with respect to tangible assets so that they would become applicable in an intellectual property context. With regard to the terminology used, it was agreed that, rather than referring in an intellectual property context to consumer goods, equipment or inventory, reference should be made to intellectual property held by the grantor for personal, family or household use, business use or sale and licensing respectively (see Introduction, section C, terminology). Some doubt was expressed as to whether reference could be made to intellectual property held by the grantor for sale or licence in the grantor's ordinary course of business, in view of the fact that the notion of "ordinary course of business" was not drawn from law relating to intellectual property. It was stated, however, that use of that concept in the acquisition financing chapter of the draft Supplement represented an acceptable compromise to establish a regime of acquisition financing rights in intellectual property that would be parallel to the acquisition financing regime with respect to tangible assets.

38. As to the criterion that should be used for determining whether a transaction was in the ordinary course of business, differing views were expressed. One view was that a transaction based on standard terms agreed upon without negotiation would typically be an ordinary-course-of-business transaction, while a customized transaction concluded after negotiation would be a transaction outside the ordinary course of business. Another view was that emphasis should be placed on the primary purpose of the use of the intellectual property by the grantor. It was stated that, if intellectual property was held by the grantor for sale or licence, a transaction relating to such intellectual property would typically be a transaction in the grantor's ordinary course of business. However, it was observed that intellectual property could be used for multiple purposes (for example, a patent could be used by a manufacturer in its business and by other persons to whom the manufacturer licensed it). For that reason, it was pointed out that, reference should be made to the primary purpose of the relevant intellectual property. After discussion, it was agreed that the commentary of chapter IX on acquisition financing in an intellectual

property context should clarify that the distinctions made among various types of intellectual property should be based on the primary purpose of their use.

39. Subject to those changes, the Working Group adopted the substance of chapter IX on acquisition financing in an intellectual property context.

40. The Working Group then considered recommendations 247-252. It was agreed that those recommendations could be presented as one recommendation stating how the acquisition financing recommendations of the Guide would apply to an intellectual property context. It was also agreed that, in recommendation 248, reference should be made to the purpose for which the intellectual property was held by the grantor. Subject to those changes, the Working Group adopted recommendations 247-252.

K. Law applicable to a security right in intellectual property (A/CN.9/WG.VI/WP.42/Add.6, paras. 1-40)

41. With respect to chapter X on the law applicable to a security right in intellectual property, it was agreed that:

(a) Paragraph 10 should clarify that, where the grantor of a security right in intellectual property was located in a State other than the State in which the intellectual property was protected, the security right might not be effective under the law of the protecting State;

(b) The commentary should reflect the fact that, in some States, enforcement issues were regulated by law relating to intellectual property, meaning that the law of the protecting State would be applicable to those issues; and

(c) The reference to the change of location of “the encumbered asset” should be deleted in paragraph 36 and its heading, since an intellectual property right as an intangible right had no location.

42. Subject to those changes and on the understanding that, depending on its decision with respect to recommendation 253, it might have to revert to chapter X, the Working Group approved the substance of chapter X on the law applicable to a security right in intellectual property.

43. The Working Group then considered recommendation 253. In addition to the three options presented at the end of chapter X, a fourth option was proposed that read as follows:

“Within the limits of the law relating to the transferability of intellectual property, the law should provide that:

(a) Where the intellectual property is registered in a specialized registry, the law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State under whose authority the registry is maintained. However, the law applicable to the enforcement of such a security right is the law of the State in which the grantor is located; and

(b) Where the intellectual property is not registered in a specialized registry or where no specialized registry exists, the law applicable to issues of

creation, effectiveness against third parties and enforcement of a security right in intellectual property is the law of the State in which the grantor is located, whenever possible. However, the law of the State in which the intellectual property is protected is the law applicable to priority as against competing claimants and, in particular, the priority of a security right in intellectual property as against the right of a transferee or a licensee of the encumbered intellectual property.”

44. It was explained that the proposed text was based on options B and C of recommendation 253 presented at the end of chapter X (A/CN.9/WG.VI/WP.42/Add.6) and that it would apply to the extent its application was not inconsistent to law relating to intellectual property (see recommendation 4, subparagraph (b)). It was also explained that reference was made to registration of an intellectual property right (and not a security right in intellectual property) in an intellectual property registry on the assumption that law relating to intellectual property allowed the registration of a notice or document of a security right in an intellectual property registry with third-party effects (see A/CN.9/WG.VI/WP.42/Add.3, para. 4).

45. A number of suggestions were made. One suggestion was that, if the chapeau referring to the law applicable to transferability were retained, it should be accompanied by an explanation in the commentary that none of the applicable law recommendations of the Guide addressed issues of transferability; otherwise, it should be deleted. Another suggestion was that reference should be made to whether an intellectual property right might be registered, and not whether it was actually registered. Yet another suggestion was that issues of third-party effectiveness and priority should be referred to the law of the same State. Yet another suggestion was that the words “whenever possible” undermined the certainty sought to be achieved as to the law applicable and should be deleted. There was support for all those suggestions.

46. The concern was expressed, however, that an approach based on whether an intellectual property right might be registered or not in an intellectual property registry for determining the applicable law might run counter to the requirement for the equal treatment of right holders under constitutional law in certain States and the approach taken in Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (also known as “(IPR) Enforcement Directive” or “IPRED”). In response, it was stated that the concern about equal treatment of right holders was not valid, since: (a) the rule under discussion addressed the issue of the law applicable to security rights and not the substantive rights of right holders; (b) European Union Member States already followed that approach and there was no issue of them being in violation of the IPR Enforcement Directive; (c) such an approach would be justified on the basis of expectations of the parties to security agreements (not intellectual property right holders) associated with existing intellectual property registries; and (d) the Guide already followed that approach with respect to tangible assets (see recommendations 203 and 205).

47. However, to address the concern expressed above and to assist the Working Group in reaching agreement on a so-called “mixed” or “blended” approach that would combine the law of the protecting State and the law of the State of the grantor’s location, a fifth option was proposed. According to that option, the creation and enforcement of a security right in intellectual property could be

referred to the law of the State in which the intellectual property was protected, unless the parties chose the law of the grantor's location; and the third-party effectiveness and priority of such a security right would be referred to the law of the State in which the intellectual property was protected.

48. While some support was expressed with respect to the fifth option, a number of concerns were also expressed. One concern was that, by referring matters of property law and civil procedure law to party autonomy, it went far beyond generally accepted conflict-of-law principles and the general approach of the Guide, which referred only the mutual rights and obligations of the grantor and the secured creditor to the law chosen by them (see recommendations 10 and 216). Another concern was that, by making it possible that creation issues might be referred to the law of one State and third-party effectiveness issues to the law of another State, the proposed text limited its usefulness to States that had implemented the substantive law recommendations of the Guide that treated creation and third-party effectiveness as two distinct issues.

49. In order to assist the Working Group in reaching consensus, a sixth option was proposed to replace all other options, which read as follows:

“The law should provide that the law applicable to the creation of a security right in intellectual property is the law of the State in which the grantor is located unless the parties to the security agreement select the law of the State in which the intellectual property is protected as the law applicable to such issue.

The law should provide that the law applicable to the effectiveness and priority of a security in intellectual property as against the rights of a transferee, licensee or another secured creditor is the law of the State in which the intellectual property is protected.

The law should provide that the law applicable to the effectiveness and priority of a security in intellectual property as against all other competing claimants is the law of the State in which the grantor is located.

The law should provide that the law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located unless the parties to the security agreement select the law of the State in which the intellectual property is protected as the law applicable to such issue.”

50. While some support was expressed for that proposal, several concerns were also expressed. The concerns mentioned above with respect to the fifth option were reiterated. In addition, the concern was expressed that the proposed rule might be too complex and difficult to apply. In that connection, it was suggested that the proposed rule could be simplified along the following lines:

“The law should provide that:

(a) Unless the parties to the security agreement select the law of the State in which the intellectual property is protected, the law applicable to the creation and enforcement of a security right in intellectual property is the law of the State in which the grantor is located;

(b) The law applicable to the effectiveness and priority of a security right in intellectual property as against the right of a transferee, licensee, or another secured creditor is the law of the State in which the intellectual property is protected; and

(c) The law applicable to the effectiveness and priority of a security right in intellectual property as against all other claimants is the law of the State in which the grantor is located.”

51. It was stated that the rule mentioned above could be re-formulated to have the law of the protecting State apply to creation and enforcement issues in the absence of an agreement by the parties to the contrary. While some support was expressed for that proposal, the concerns mentioned above about referring creation and third-party effectiveness to the laws of different States and about referring creation and enforcement issues to party autonomy were reiterated. In that connection, reference was made to the possibility that the law chosen by the parties on matters relating to creation and enforcement of a security right might be set aside as manifestly contrary to the public policy or through the application of mandatory law provisions of the forum State (see recommendation 222). In addition, the concern was expressed that the creation of a security right in a patent or trademark registered in a national patent or trademark registry could be referred to the law of the grantor’s location. Moreover, it was observed that the proposed rule should be first tested against specific examples. It was also stated that adoption of such a rule would require substantial changes in the commentary. It was also pointed out that, if agreement could not be reached on one recommendation, it would be better to present options for the Commission to make a final decision. In that connection, it was stated that, in particular in the area of conflicts of laws, it was important to reach agreement on one recommendation, since otherwise a different rule would apply depending on the conflict-of-laws rule of the forum State, a situation that would perpetuate the currently prevailing uncertainty and have a negative impact on the cost and the availability of credit.

52. In the discussion, the view was expressed that the law of the protecting State was generally enshrined in intellectual property law treaties and could not be ignored. In response, it was stated that, while the importance of an approach based on the law of the protecting State could not be ignored, not all intellectual property law treaties led to that result at the level of domestic law relating to intellectual property.

53. Support was expressed for all of the three options presented at the end of chapter X (A/CN.9/WG.VI/WP.42/Add.6). Support was also expressed for the fourth option mentioned above (see para. 43). In that regard, it was agreed that the fourth option was an improved version of option B set out in chapter X and should replace option B.

54. However, as the Working Group was not able to reach consensus on any of those options and in an effort to reach consensus on one recommendation, the Working Group engaged in a discussion of a combined version of the fifth and sixth options (see para. 50) that read as follows:

“Version A: The law should provide that the law applicable to the creation and enforcement of a security right in intellectual property is the law of the States in which the intellectual property is protected, except to the extent that the

security agreement provides that these matters are to be governed by the law of the State in which the grantor is located. The law should provide that the law applicable to the effectiveness against third parties and priority of a security right in intellectual property as against the rights of a transferee, licensee or another secured creditor is the law of the State in which the intellectual property is protected. The law should provide that the law applicable to the effectiveness against third parties and priority of a security right in intellectual property as against all other claimants is the law of the State in which the grantor is located.”

“Version B: The law should provide that the law applicable to the creation and enforcement of a security right in intellectual property is the law of the State in which the grantor is located, except to the extent that the security agreement provides that these matters are to be governed by the law of the State in which the intellectual property is protected. The law should provide that the law applicable to the effectiveness against third parties and priority of a security right in intellectual property as against the rights of a transferee, licensee or another secured creditor is the law of the State in which the intellectual property is protected. The law should provide that the law applicable to the effectiveness against third parties and priority of a security right in intellectual property as against all other claimants is the law of the State in which the grantor is located.”

55. It was stated that the difference between the first and the second version lay in the fact that, in the absence of an agreement of the parties, under the first version, the creation and enforcement of a security right in intellectual property would be governed by the law of the protecting State, while, under the second version, those matters would be governed by the law of the State of the grantor’s location. Several delegations observed that, to the extent that the proposed text appropriately combined the law of the protecting State with the law of the grantor’s location, it constituted an acceptable compromise. In addition, it was pointed out that the proposed text would be acceptable, in particular, if the reference to party autonomy with respect to the law applicable to the creation and enforcement of a security right were omitted. As a matter of drafting, it was noted that the two versions could be combined with the first sentence of each of them being presented within square brackets.

56. While support was expressed for both versions of the above-mentioned “compromise” proposal, preference was expressed for version A. However, as the Working Group was not able to reach consensus, it decided that the three options presented at the end of chapter X, with the substitution of the second option by the text mentioned above (see para. 43), and the two versions of the compromise proposal mentioned above should be retained for further consideration by the Commission. It was widely felt that, in order to ensure certainty as to the law applicable to security rights in intellectual property, it would be essential that every effort be made for consensus to be reached on one recommendation at the Commission session. In that regard, it was stated that, in the absence of an intellectual-property specific recommendation, the general recommendations of the Guide as to the law applicable to security rights in intangible assets would apply (see recommendations 208 and 218, subpara. (b)).

L. Transition (A/CN.9/WG.VI/WP.42/Add.6, paras. 41-45)

57. The Working Group adopted the substance of chapter XI on transition unchanged.

M. The impact of insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a license agreement (A/CN.9/WG.VI/WP.42/Add.6, paras. 46-67)

58. The Working Group adopted the substance of chapter XII on the impact of insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a license agreement unchanged.

V. Future work

59. The Working Group noted that the draft Supplement would be considered by the Commission at its forty-third session,¹² which was scheduled to take place in New York from 21 June to 9 July 2010.

60. The Working Group also noted that, in line with a decision taken by the Commission at its forty-second session¹² the Third International Colloquium on Secured Transactions was scheduled to take place in Vienna from 1 to 3 March 2010. The Working Group also noted that the purpose of the Colloquium was for the Secretariat to obtain the views of experts from Governments, international organizations and the private sector in order to prepare a note to the Commission as to possible future work in the area of secured transactions.

61. The Working Group engaged in a preliminary discussion of future work. A suggestion was made that issues pertaining to a possible international registry on security rights in intellectual property should also be included in the future work topics. In response, it was noted that such a project would need to be closely coordinated with WIPO as that topic, as well as the topic of intellectual property licensing, would generally fall under the mandate of WIPO. With regard to the topics that had already been presented as possible future topics, some support was expressed for work on regulations on registration of security rights and a model law on secured transactions based on the recommendations of the Guide. With regard to a supplement to the Guide on certain types of securities not covered by the Unidroit Convention on Substantive Rules for Intermediated Securities, it was observed that that work would have to be limited to non-intermediated securities as much work had already been done by Unidroit and the Hague Conference on intermediated securities.

¹² Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 319.

**E. Note by the Secretariat on the Draft Supplement to the
UNCITRAL Legislative Guide on Secured Transactions dealing with
security rights in intellectual property, submitted to the Working
Group on Security Interests at its seventeenth session
(A/CN.9/WG.VI/ WP.42 and Add.1-7)**

[Original: English]

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Preface

[Note to the Working Group: The Working Group may wish to note that, for reasons of consistency with the Guide, the former section A of the Introduction has been shortened and is being presented as a preface to the draft Supplement.]

The Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* (the “*Guide*”) was prepared by the United Nations Commission on International Trade Law (UNCITRAL).

At its thirty-ninth session, in 2006, the Commission considered and approved in principle the substance of the recommendations of the *Guide*. At that session, the Commission also considered its future work on secured financing law. Noting that the recommendations of the *Guide* generally applied to security rights in intellectual property rights, the Commission requested the Secretariat to prepare, in cooperation with relevant organizations and in particular World Intellectual Property Organization (WIPO), a note for submission to the Commission at its fortieth session, in 2007, discussing the scope of future work on intellectual property financing in a supplement (initially called annex) to the *Guide*. 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.¹

¹ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, paras. 81, 82 and 86.

Pursuant to that decision of the Commission, the Secretariat organized in cooperation with WIPO a colloquium on security rights in intellectual property rights (Vienna, 18 and 19 January 2007). The colloquium was attended by experts on secured financing and intellectual property law, including representatives of Governments and national and international, governmental and non-governmental organizations. At the colloquium, several suggestions were made with respect to adjustments that would need to be made to the *Guide* to address issues specific to intellectual property financing.²

At the first part of its fortieth session, in June 2007, the Commission considered a note by the Secretariat entitled "Possible future work on security rights in intellectual property" (A/CN.9/632). The note took into account the conclusions reached at the colloquium. In order to provide sufficient guidance to States as to the adjustments that they might need to make in their laws to avoid inconsistencies between secured financing law and law relating to intellectual property, the Commission decided to entrust Working Group VI (Security Interests) with the preparation of a supplement to the *Guide* specific to security rights in intellectual property rights.³ At its resumed fortieth session, in December 2007, the Commission finalized and adopted the *Guide* on the understanding that a supplement to the *Guide* specific to security rights in intellectual property rights would subsequently be prepared.⁴

The work of Working Group VI was developed through 5 one-week sessions, the final session taking place in February 2010.⁵ At its fourteenth, fifteenth and sixteenth sessions, the Working Group referred certain insolvency-related matters to Working Group V (Insolvency Law),⁶ which Working Group V considered at its thirty-fifth, thirty-sixth and [...] sessions.⁷ In addition, the Working Group cooperated with WIPO and other intellectual property organizations from the public and the private sector to ensure that the Supplement would be sufficiently coordinated with law relating to intellectual property. Moreover, the Working Group closely cooperated with the Permanent Bureau of the Hague Conference in the preparation of the chapter of the Supplement on conflict of laws.⁸

[At its forty-third session, in 2010, the Commission considered and approved the Supplement. Subsequently, the General Assembly adopted resolution ...].

² See www.uncitral.org/uncitral/en/commission/colloquia/2secint.html.

³ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), paras. 156, 157 and 162.

⁴ *Ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17 (Part II)), paras. 99 and 100.

⁵ The reports of the Working Group on its work during these 5 sessions are contained in documents A/CN.9/649, A/CN.9/667, A/CN.9/670, A/CN.9/685 and A/CN.9/689. During these sessions, the Working Group considered A/CN.9/WG.VI/WP.33 and Add.1, A/CN.9/WG.VI/WP.35 and Add.1, A/CN.9/WG.VI/WP.37 and Add.1-4, A/CN.9/WG.VI/WP.39 and Add.1-7, and A/CN.9/WG.VI/WP.42 and Add.1-7.

⁶ A/CN.9/667, paras. 129-140 and, A/CN.9/670, paras. 116-122, and A/CN.9/685, para. 95.

⁷ A/CN.9/666, paras. 112-117, A/CN.9/WG.V/WP.87, A/CN.9/671, paras. 125-127, and [A/CN.9/..., paras. ...].

⁸ At its sixteenth session, the Working Group considered a proposal by the Permanent Bureau of the Hague Conference on Private International Law (A/CN.9/WG.VI/WP.40).

Introduction¹

A. Purpose of the draft Supplement

[Note to the Working Group: For paras. 1-7, see A/CN.9/WG.VI/WP.39, paras. 13-18, A/CN.9/685, para. 21, A/CN.9/WP.37, paras. 9-14, A/CN.9/670, para. 18, A/CN.9/WG.VI/WP.35, paras.8-11, A/CN.9/667, paras.17-19 and A/CN.9/WG.VI/WP.33, paras. 76-82.]

1. The overall objective of the *Guide* is to promote low-cost credit by enhancing the availability of secured credit (see recommendation 1, subparagraph (a)). In line with this objective, the draft Supplement is intended to make credit more available and at lower cost to intellectual property owners and other intellectual property rights holders, thus enhancing the value of intellectual property rights. The draft Supplement, however, seeks to achieve this objective without interfering with fundamental policies of law relating to intellectual property (see section E below).

[Note to the Working Group: The Working Group may wish to note that new section A, Purpose of the draft Supplement has been added for reasons of consistency of the draft Supplement with the Guide and for the ease of understanding of the purpose of the Guide by the reader.]

B. The interaction between secured transactions law and law relating to intellectual property

2. With only limited exceptions, the law recommended in the *Guide* applies to security rights in all types of movable asset, including intellectual property (see recommendations 2 and 4-7). However, with respect to intellectual property, the law recommended in the *Guide* does not apply insofar as its provisions are inconsistent with national law or international agreements, to which the State enacting the law is a party, relating to intellectual property (see recommendation 4, subparagraph (b)).

3. Recommendation 4, subparagraph (b), sets out the basic principle with respect to the interaction of secured transactions and law relating to intellectual property. The meaning given to the term “intellectual property” is intended to ensure consistency of the *Guide* with laws and treaties relating to intellectual property. As used in the *Guide*, the term “intellectual property” means any asset considered to be intellectual property under law relating to intellectual property. In addition, references in the *Guide* to “intellectual property” are to be understood as references to “intellectual property rights” (see paras. 18-20 below). The term “law relating to intellectual property” is used in the draft Supplement to refer to national law or law flowing from international agreements, to which a State is a party, relating to intellectual property that governs specifically security rights in intellectual property,

¹ For the easy reference of the reader, the draft Supplement follows the order in which the issues are discussed in the *Guide* (that is, Introduction with purpose, terminology, examples and key objectives and fundamental policies, Scope, Creation of a security right, etc.). In each section, the draft Supplement summarizes briefly the general considerations of the *Guide* and then goes on to discuss how they apply to an intellectual property context. Therefore, the draft Supplement has to be read together with the *Guide*.

and not law that generally governs security rights in various types of asset and that may happen to govern security rights in intellectual property (see para. 22 below). The term includes both statutory and case law and is broader than the term “intellectual property law”, but narrower than general contract or property law. The scope of recommendation 4, subparagraph (b), will, consequently, be broader or narrower, depending on how a State defines the scope of intellectual property. It is understood that a State will do so in compliance with its international obligations flowing from intellectual property law treaties (such as various conventions administered by the World Intellectual Property Organization (WIPO) or the Agreement on Trade Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”)), as provided in those treaties.

4. The purpose of recommendation 4, subparagraph (b), is to ensure that, when States adopt the recommendations of the *Guide*, they do not inadvertently change basic rules of law relating to intellectual property. As issues relating to the existence, validity and content of a grantor’s intellectual property rights are matters to which the *Guide* does not speak (see A/CN.9/WG.VI/WP.42/Add.1, section II.A.4), the occasions for possible conflict in regimes on these issues are limited. Nevertheless, in matters relating to the creation, third-party effectiveness, priority, enforcement of and law applicable to a security right in intellectual property, it is possible that in some States the two regimes will provide for different rules. Where this is the case, recommendation 4, subparagraph (b), preserves the intellectual-property-specific rule against being overridden inadvertently as a result of adoption by a State of the law recommended in the *Guide*.

5. It bears noting, however, that rules of law relating to intellectual property in some States relate only to forms of secured transactions that are not unique to intellectual property and that will no longer be available once a State adopts the law recommended in the *Guide* (for example, pledges, mortgages and transfers or trusts of intellectual property for security purposes). For this reason, States that adopt the law recommended in the *Guide* may also wish to review their law relating to intellectual property to coordinate it with the secured transactions law recommended in the *Guide*. In that connection, States enacting the law recommended in the *Guide* will have to ensure that their law reflects in particular the integrated and functional approach recommended in the *Guide*, without modifying the basic policies and objectives of their law relating to intellectual property.

6. The draft Supplement is intended to provide guidance to States with respect to such an integrated secured transactions and intellectual property law system. Building on the commentary and the recommendations of the *Guide*, the draft Supplement discusses how the commentary and recommendations of the *Guide* apply where the encumbered asset consists of intellectual property and, where necessary, adds new commentary and recommendations. As is the case with the other asset-specific commentary and recommendations, the intellectual-property-specific commentary and recommendations modify or supplement the general commentary and recommendations of the *Guide*. Accordingly, subject to contrary provisions of law relating to intellectual property and any asset-specific commentary and recommendations of the draft Supplement, a security right in intellectual property may be created, be made effective against third parties, have priority, be enforced and be made subject to applicable law as provided in the general recommendations of the *Guide*.

7. A State enacting the law recommended in the *Guide* with a view to making credit more available and at lower cost to owners of assets such as goods and receivables will most likely wish to make the benefits of such modernization available also to the owners of intellectual property, thereby enhancing the value of the intellectual property. This may have an impact on law relating to intellectual property. While it is not the purpose of the draft Supplement to make any recommendations for changes to a State's law relating to intellectual property, as already mentioned, it may have an impact on that law. The draft Supplement discusses this impact and, occasionally, includes in the commentary modest suggestions for the consideration of enacting States (the expression used is "States might" or "States may wish to consider ...", rather than "States should"). These suggestions are based on the premise that, by enacting secured transactions laws of the type recommended by the *Guide*, States have made a policy decision to modernize their secured transactions law. The suggestions seek, therefore, to point out where this modernization might lead States to consider how best to coordinate their secured transactions law with their law relating to intellectual property. Thus, recommendation 4, subparagraph (b), is intended to foreclose only inadvertent change to law relating to intellectual property, not all change after careful consideration by a State enacting the law recommended in the *Guide*.

C. Terminology

[*Note to the Working Group: For paras. 8-32, see A/CN.9/WG.VI/WP.39, paras. 19-39, A/CN.9/685, para. 22, A/CN.9/WG.VI/WP.37, paras. 15-32, A/CN.9/670, paras. 19 and 20, A/CN.9/WG.VI/WP.35, paras. 12-21, A/CN.9/667, paras. 20-22, A/CN.9/WG.VI/WP.33, paras. 39-60 and A/CN.9/649, paras. 104-107.*]

(a) Acquisition security right

8. As used in the *Guide*, the term "acquisition security right" means a security right in a tangible asset (other than a negotiable instrument or negotiable document) that secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit otherwise provided to enable the grantor to acquire the asset. An acquisition security right need not be denominated as such. Under the unitary approach, the term includes a right that is a retention-of-title right or a financial lease right (see the term "acquisition security right", Introduction to the *Guide*, section B on terminology and interpretation).

9. For the purposes of the draft Supplement, the term includes a security right in intellectual property or a licence of intellectual property, provided that the security right secures the obligation to pay any unpaid portion of the acquisition price of the encumbered asset or an obligation incurred or credit otherwise provided to enable the grantor to acquire the encumbered asset.

(b) Consumer goods

10. The *Guide* uses the term "consumer goods" to refer to goods that a grantor uses or intends to use for personal, family or household purposes (see the term "consumer goods", Introduction to the *Guide*, section B on terminology and

interpretation). For the purposes of the draft Supplement, the term includes intellectual property or a licence of intellectual property used or intended by the grantor to be used for personal, family or household purposes.

(c) Competing claimant

11. In secured transactions law, the concept of a “competing claimant” is used to identify parties other than the secured creditor in a specific security agreement that might claim a right in an encumbered asset or the proceeds from its disposition (see the term “competing claimant”, Introduction to the *Guide*, section B on terminology and interpretation). Thus, the *Guide* uses the term “competing claimant” in the sense of a claimant that competes with a secured creditor (that is, the claimant is another secured creditor with a security right in the same asset, another creditor of the grantor that has a right in the same asset, the insolvency representative in the insolvency of the grantor, a buyer or other transferee, or a lessee or licensee of the same asset). The term “competing claimant” is essential for the application in particular of the priority rules recommended in the *Guide*, such as for example of the rule in recommendation 76, under which a secured creditor with a security right in receivables that registered a notice of its security right in the general security rights registry has priority over another secured creditor that acquired a security right in the same receivables from the same grantor before the other secured creditor but failed to register a notice of its security right.

12. In law relating to intellectual property, however, the notion of a “competing claimant” is not used, and priority conflicts typically refer to conflicts among intellectual property transferees and licensees, even if no conflict with a secured creditor is involved (infringers are not competing claimants and, if an alleged infringer proves that it has a legitimate claim, it is a transferee or licensee, and not an infringer). Secured transactions law does not interfere with the resolution of such conflicts that do not involve a secured creditor (including a transferee in a transfer for security purposes that is treated in the *Guide* as a secured creditor). Thus, a conflict between two outright transferees would not be covered by the *Guide*. However, a conflict between a transferee for security purposes of intellectual property rights and an outright transferee of the same intellectual property rights would, subject to the limitation of recommendation 4, subparagraph (b), be covered by the *Guide* (see recommendations 78 and 79).

(d) Encumbered asset

13. The *Guide* uses the term “encumbered asset” to denote an asset that is subject to a security right (see the term “encumbered asset”, Introduction to the *Guide*, section B on terminology and interpretation). While the *Guide* refers by convention to a security right in an “encumbered asset”, what is really encumbered and meant is “whatever right the grantor has in an asset and intends to encumber”.

14. The *Guide* also uses various terms to denote the particular type of intellectual property that may be used as an encumbered asset without interfering with the nature, the content or the legal consequences of such terms for purposes of law relating to intellectual property, as well as contract and property law. These types of intellectual property that may be used as security for credit include the rights of an intellectual property owner (“owner”), the rights of an assignee or successor in title to an owner, the rights of a licensor or licensee under a licence agreement and the

rights in intellectual property used with respect to a tangible asset, provided that the intellectual property right is described as an encumbered asset in the security agreement. The owner, licensor or licensee may encumber all or part of its rights, if they are transferable under law relating to intellectual property.

15. Under law relating to intellectual property, the rights of an intellectual property owner generally include the right to prevent unauthorized use of its intellectual property, the right to renew registrations, the right to sue infringers and the right to transfer and grant licences in its intellectual property. For example, in the case of a patent, the patent owner has exclusive rights to prevent certain acts, such as making, using or selling the patented product without the patent owner's authorization.

16. Typically, under law relating to intellectual property and contract law, the rights of a licensor and a licensee depend on the terms of the licence agreement (in the case of a contractual licence), law (in the case of compulsory or statutory licence) or the legal consequences of specific conduct (in the case of an implied licence). In addition, normally, the rights of a licensor include the right to claim payment of royalties and to terminate the licence agreement. Similarly, the rights of a licensee include the authorization given to the licensee to use the licensed intellectual property in accordance with the terms of the licence agreement and possibly the right to enter into sub-licence agreements and the right to obtain payment of sub-royalties (see the term "licence", paras. 23-25 below). The rights of a grantor of a security right in a tangible asset with respect to which intellectual property is used are described in the agreement between the secured creditor and the grantor (owner, licensor or licensee of the relevant intellectual property) in line with secured transactions law and law relating to intellectual property.

(e) Grantor

17. The *Guide* uses the term "grantor" to denote the person creating a security right to secure either its own obligation or that of another person (see the term "grantor", Introduction to the *Guide*, section B on terminology and interpretation). As already mentioned, in a secured transaction relating to intellectual property, the encumbered asset may be the rights of the intellectual property owner, the rights of a licensor (including the right to the payment of royalties) or the authorization of the licensee to use or exploit the licensed intellectual property, the right to grant sub-licences and the right to the payment of sub-royalties. Thus, depending on the kind of intellectual property that is encumbered, the term "grantor" will refer to an owner, a licensor or a licensee (although, unlike an owner, a licensor or a licensee may not necessarily enjoy exclusive rights as this term is understood under law relating to intellectual property). Finally, as is the case with any secured transaction relating to other types of movable asset, the term "grantor" may reflect a third party granting a security right in its intellectual property to secure the obligation owed by a debtor to a secured creditor.

(f) Intellectual property

18. As used in the *Guide* (see the term "intellectual property", Introduction to the *Guide*, section B on terminology and interpretation), the term "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 (such as, for example, neighbouring, allied or related rights² or plant varieties). Furthermore, references in the *Guide* to “intellectual property” are to be understood as references to “intellectual property rights”, such as the rights of an intellectual property owner, licensor or licensee. The commentary to the *Guide* explains that the meaning given to the term “intellectual property” in the *Guide* is intended to ensure consistency of the *Guide* with law relating to intellectual property, while at the same time respecting the right of a State enacting the recommendations of the *Guide* to align the definition with its own law, whether national law or law flowing from treaties (see Introduction to the *Guide*, footnote 24). An enacting State may add to the list mentioned above or remove from it types of intellectual property so that it conforms to national law.³ As a result, the *Guide* treats as “intellectual property”, for the purposes of the *Guide*, whatever an enacting State considers to be intellectual property in conformity with its national law and compliance with its international obligations.

19. For purposes of secured transactions law, the intellectual property right itself is distinct from the income streams that flow from it, such as the income received, for example, from the exercise of broadcasting rights. Under the *Guide* these income streams are characterized as “receivables” and could be the original encumbered asset, if described as such in the security agreement, or proceeds of intellectual property, if the original encumbered asset is intellectual property. However, this treatment of these income streams in the *Guide* does not preclude a different treatment for purposes of law relating to intellectual property. For example, for the purposes of law relating to intellectual property, a right of a licensor to payment of equitable remuneration might be treated as part of the intellectual property right of the licensor (for the treatment of receivables under secured transactions law and law relating to intellectual property, see A/CN.9/WG.VI/42/Add.2, paras. 21-29).

20. It is also important to note that a licence agreement relating to intellectual property is not a secured transaction and a licence with a right to terminate the licence agreement is not a security right. Thus, secured transactions law does not affect the rights and obligations of a licensor or a licensee under a licence agreement. For example, the owner’s, licensor’s or licensee’s ability to limit the transferability of its intellectual property rights remains unaffected. In any case, it should be noted that, while the question whether an intellectual property owner may grant a licence is a matter of law relating to intellectual property, the question whether the owner’s secured creditor may prohibit by agreement the owner from granting a licence is a matter of secured transactions law addressed in the draft Supplement (see A/CN.9/WG.VI/WP.42/Add.5, para. 1).

² Closely related to “copyright” are “neighbouring rights”, also called allied or related rights. These are rights that are said to be “in the neighbourhood” of copyright. The term typically covers the rights of performers, producers of phonograms and broadcasting organizations, but in some countries it can also include the rights of film producers, or rights in photographs. Sometimes these are called *Diritti Connessi* (“connected rights”) or *Verwandte Schutzrechte* (“related rights”) or *Droits Voisins* (“neighbouring rights”), but the common term is the English “neighbouring rights.” Internationally, neighbouring rights are generally protected under the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961. Additional protections are accorded to certain performers and phonogram producers in the WIPO Performances and Phonograms Treaty of 20 December 1996.

³ See footnote 24 of the Introduction to the *Guide*.

(g) Inventory

21. As used in the *Guide*, the term “inventory” means tangible assets held for sale or lease in the ordinary course of a grantor’s business, as well as raw and semi-processed materials (work-in-process) (see the term “inventory”, Introduction to the *Guide*, section B on terminology and interpretation). For the purposes of the draft Supplement, the term includes intellectual property or a licence of intellectual property used or intended by the grantor to be used for sale or licence in the ordinary course of the grantor’s business.

(h) Law and law relating to intellectual property

22. As already mentioned (see para. 3 above), the commentary of the *Guide* also clarifies that references to the term “law” throughout the *Guide* include both statutory and non-statutory law. In addition, the commentary on the *Guide* clarifies that the expression “law relating to intellectual property” (see recommendation 4, subparagraph (b)) is broader than intellectual property law (dealing, for example, directly with patents, trademarks or copyrights) but narrower than general contract or property law (see Introduction to the *Guide*, para. 19). In particular, the expression “law relating to intellectual property” means national law or law flowing from international agreements, to which a State is a party, relating to intellectual property that governs specifically security rights in intellectual property, and not law that generally governs security rights in various types of asset and, as a result, may govern security rights in intellectual property. An example of a “law relating to intellectual property” might be law that applies specifically to pledges or mortgages of copyrights in software, assuming that it is part of the law relating to intellectual property and is not simply the application of a State’s general law of pledges or mortgages in an intellectual property context.

(i) Licence

23. The *Guide* also uses the term “licence” (which includes a sub-licence) as a general concept, while recognizing that, under law relating to intellectual property, a distinction may often be drawn: (a) between contractual licences (whether express or implied) and compulsory or statutory licences, in which a licence is not the result of an agreement; (b) between a licence agreement and the licence that is granted by the agreement (for example, the authorization to use or exploit the licensed intellectual property); and (c) between exclusive licences (which, under law relating to intellectual property in some States, may be treated as transfers) and non-exclusive licences. In addition, under the *Guide*, a licence agreement does not in itself create a security right and a licence with a right to terminate the licence agreement is not a security right.

24. However, the exact meaning of these terms is left to law relating to intellectual property, as well as to contract and other law that may be applicable (such as the Joint Recommendation Concerning Trademark Licences, adopted by the Paris Union Assembly and the WIPO General Assembly (2000)⁴ and the Singapore Treaty on the Law of Trademarks (2006)).⁵ In particular, a security right in rights under a licence agreement does not affect the terms and conditions of the licence agreement (in the

⁴ www.wipo.int/export/sites/www/about-ip/en/development_iplaw/pdf/pub835.pdf.

⁵ www.wipo.int/treaties/en/ip/singapore.

same way that a security right in a sales receivable does not affect the terms and conditions of the sales contract). This means, *inter alia*, that the secured creditor does not acquire more rights than its grantor (see recommendation 13). For example, the *Guide* does not interfere with the limits or terms of a licence agreement that may refer to the description of the specific intellectual property, the authorized or restricted uses, geographic area of use and the duration of use. As a result, an exclusive licence to exercise the “theatrical rights” in Film A in Country X for “10 years starting 1 January 2008” may be given and it will be different from an exclusive licence to exercise the “video rights” in Film A in Country Y for “10 years starting 1 January 2008”.

25. In addition, the *Guide* does not affect in any way the particular characterization of rights under a licence agreement given by law relating to intellectual property. For example, the *Guide* does not affect the nature of rights created under an exclusive licence agreement as rights in rem or the nature of an exclusive licence as a transfer, as is the case under some laws relating to intellectual property. Moreover, the *Guide* does not affect any limitations included in the licence agreement as to the transferability of licensed rights (see A/CN.9/WG.VI/WP.42/Add.2, para. 31, A/CN.9/WG.VI/WP.42/Add.3, paras. 40-41, and A/CN.9/WG.VI/WP.42/Add.4, paras. 15 and 24-25).

(j) Receivable and assignment

26. The term “receivable” is used in the *Guide* (see the term “receivable”, Introduction to the *Guide*, section B on terminology and interpretation) and in the United Nations Convention on the Assignment of Receivables in International Trade (hereinafter referred to as the “United Nations Assignment Convention”; see article 2)⁶ to reflect a right to payment of a monetary obligation. Thus, for the purposes of the *Guide*, the term includes the right of a licensor (that may be an owner or not) or a licensee/sub-licensor to obtain payment of licence royalties (without affecting the terms and conditions of the licence agreement, such as an agreement between the licensor and the licensee that the licensee will not create a security right in its right to payment of sub-royalties). The exact meaning and scope of licence royalties are subject to the terms and conditions of the licence agreement relating to the payment of royalties, such as that payments are to be staggered or that there might be percentage payments depending on market conditions or sales figures (for a discussion of the term “secured creditor”, see paras. 29-30 below; for a discussion of the distinction between a secured creditor and an intellectual property owner, see A/CN.9/WG.VI/WP.42/Add.2, paras. 10-12).

27. The term “assignment” is used in the *Guide* with respect to receivables to denote not only outright assignments but also assignments for security purposes (treated under the *Guide* as secured transactions) and transactions creating a security right in a receivable. To avoid creating the impression that the recommendations of the *Guide* relating to assignments of receivables apply also to “assignments” of intellectual property (as the term “assignment” is used in law relating to intellectual property), the term “transfer” (rather than the term “assignment”) is used in the draft Supplement to denote the transfer of the rights of an intellectual property owner. While the law recommended in the *Guide* applies to all types of assignment of

⁶ United Nations publication Sales No. E.04.V.14.

receivables, it does not apply to outright transfers of any right other than a receivable (see recommendations 2, subparagraph (d), and 3; see also A/CN.9/WG.VI/WP.42/Add.1, paras. 5-7). It should also be noted that, while what is a “transfer” or a “licence” is left to the relevant property or contract law, the term “transfer” is not used in the *Guide* to denote a licence agreement.

(k) Owner

28. The *Guide* does not explain the term “owner” of an encumbered asset, whether that asset is intellectual property or not. This is a matter of the relevant property law. Accordingly, the *Guide* uses the term “intellectual property owner” referring to the understanding of this term under law relating to intellectual property, generally denoting the person that is entitled to enforce the exclusive rights flowing from intellectual property or its transferee, that is, the creator, author or inventor or their successor in title (as to whether a secured creditor may exercise the rights of an intellectual property owner, see paras. 29-30 below and A/CN.9/WG.VI/WP.42/Add.2, paras. 10-12).

(l) Secured creditor

29. The *Guide* recognizes that a security agreement creates a security right, that is, a limited property right, not an ownership right, in an encumbered asset, provided, of course, that the grantor has the right to create a security right in the asset (see recommendation 13). Thus, in the *Guide*, the term “secured creditor” (which includes a transferee by way of security) is used to denote a person that has a security right and not an outright transferee or an owner (although, for convenience of reference, the term includes an outright assignee of receivables; see the term “secured creditor”, Introduction to the *Guide*, section B on terminology and interpretation). In other words, a secured creditor that acquires a security right under the *Guide* is not presumed to acquire ownership thereby. This approach is mainly intended to protect the grantor/owner that retains ownership and often possession or control of the encumbered asset, while sufficiently securing the secured creditor if the grantor or other debtor defaults on the payment of the secured obligation. In any case, secured creditors normally do not wish to accept the responsibilities and costs of ownership, and the *Guide* does not require a secured creditor to do so. This means, for example, that, even after the creation of a security right, the owner of the encumbered asset may exercise all its rights as an owner (subject, of course, to any limitations it may have agreed to with the secured creditor). It should also be noted that, even when the secured creditor disposes of the encumbered asset enforcing its security right after default, the secured creditor does not necessarily become an owner. In this case, the secured creditor merely exercises its security right. Only where, after default, the secured creditor becomes the owner after exercising the remedy of proposing to acquire the grantor’s ownership rights in the encumbered asset in total or partial satisfaction of the secured obligation (in the absence of any objection by the grantor, the debtor and any other affected person; see recommendations 157-158), or acquires the grantor’s ownership rights by purchasing the asset at a sale in the context of an enforcement, will the secured creditor ever become an owner.

30. For the purposes of secured transactions law, this characterization of a security agreement and the rights of a secured creditor applies also to situations where the

encumbered asset is intellectual property. However, the *Guide* does not affect different characterizations under law relating to intellectual property law with respect to matters specific to intellectual property. Under law relating to intellectual property, a security agreement may be characterized as a transfer of the intellectual property rights of an owner, licensor or licensee and the secured creditor may have the rights of an owner, licensor or licensee, such as the right to preserve the encumbered intellectual property and thus to deal with State authorities, grant licences or pursue infringers. So, for example, nothing in secured transactions law prevents a secured creditor from agreeing with the grantor/owner, licensor or licensee to become an owner, licensor or licensee of the encumbered intellectual property (see recommendation 10 and A/CN.9/WG.VI/WP.42/Add.5, para. 1). If the agreement does or is intended to secure the performance of an obligation and intellectual property law permits a secured creditor to become an owner, licensor or licensee, the term “secured creditor” may denote an owner, licensor or licensee to the extent permitted under law relating to intellectual property. In such a case, secured transactions law will apply with respect to issues normally addressed in that law, such as the creation, third-party effectiveness, priority, enforcement of and law applicable to a security right (subject to the limitation of recommendation 4, subparagraph (b)); and law relating to intellectual property will apply with respect to issues that are normally addressed in that law, such as dealing with State authorities, granting licences or pursuing infringers (for the distinction between a secured creditor and an owner with respect to intellectual property, see also A/CN.9/WG.VI/WP.42/Add.2, paras. 10-12).

(m) Security right

31. The *Guide* uses the term “security right” to refer to all types of property right in a movable asset that are created by agreement to secure payment or other performance of an obligation, irrespective of how they are denominated (see the term “security right”, Introduction to the *Guide*, section B on terminology and interpretation, and recommendations 2, subparagraph (d), and 8). Thus, the term “security right” would cover the right of a pledge or mortgagee of intellectual property, as well as of a transferee in a transfer for security purposes. States that adopt the law recommended in the *Guide* may wish to review their law relating to intellectual property and coordinate the terminology used in that law with the terminology used in the law recommended in the *Guide*.

(n) Transfer

32. While the *Guide* uses the term “outright transfer” to denote transfer of ownership (see chapter I of the *Guide* on scope, para. 25), the exact meaning of this term is a matter of property law. The *Guide* also uses the term “transfer for security purposes” to refer to a transaction that is in name only a transfer but functionally a secured transaction. In view of the functional, integrated and comprehensive approach it takes to secured transactions (see recommendations 2, subparagraph (d), and 8), for the purposes of secured transactions law, the *Guide* treats a transfer for security purposes as a secured transaction. To the extent that a different characterization of a transfer for security purposes in other law would apply to all assets, this is not an issue with respect to which the *Guide* would defer to law relating to intellectual property (see recommendation 4, subparagraph (b), and paras. 2-7 above). However, this approach does not affect a different

characterization of a transfer other than an outright transfer for the purposes of law relating to intellectual property. For example, under intellectual property law, the expression “transfer other than an outright transfer” may denote a transfer of parts of exclusive rights from a licensor to a licensee where the licensor retains some rights (for a discussion of outright transfers of intellectual property, see A/CN.9/WG.VI/WP.42/Add.1, paras. 5-7).

D. Valuation of intellectual property to be encumbered

[Note to the Working Group: For paras. 33-45, see A/CN.9/WG.VI/WP.39, paras. 40-52, A/CN.9/685, para. 23, A/CN.9/WG.VI/WP.37, paras. 33-46, A/CN.9/670, paras. 21-26, A/CN.9/WG.V/WP.35, paras. 22-41, A/CN.9/667, paras. 23 and 24, A/CN.9/WG.VI/WP.33, paras. 8-21, and A/CN.9/649, para. 108.]

33. The valuation of assets to be encumbered is an issue that any prudent grantor and secured creditor have to address irrespective of the type of asset to be encumbered. However, valuation of intellectual property may be harder at least to the extent that it raises the issue whether intellectual property is an asset that may be exploited economically to generate income. For example, once a patent is created, the question arises whether it has any commercial application and, if so, what would be the amount of income that could be generated from the sales of any patented product.

34. Secured transactions law cannot answer this question. Still, insofar as it affects the use of intellectual property as security for credit, some of the complexities involved in appraising the value of intellectual property need to be understood and addressed. For example, one issue is that, although the appraisal must take into account the value of the intellectual property itself and the expected cash flow, there are no universally accepted formulae for making this calculation. However, because of the increasing importance of intellectual property as security for credit, in some States, lenders and borrowers are often able to seek guidance from independent appraisers of intellectual property. In addition, parties in some States may be able to rely on valuation methodologies developed by national institutions, such as bank associations. Moreover, parties may be able to rely on training for valuation of intellectual property in general or for the purpose of licence agreements in particular provided by international organizations, such as WIPO. Parties may also be able to rely on standards for the valuation of intellectual property as assets that can be used as security for credit developed by other international organizations, such as the Organization for Economic Cooperation and Development.

E. Examples of financing practices relating to intellectual property

35. Secured transactions relating to intellectual property can usefully be divided into two broad categories. The first category consists of transactions in which the intellectual property rights themselves serve as security for the credit (that is, the rights of an owner, the rights of a licensor or the rights of a licensee). In these transactions, the provider of credit is granted a security right in patents, trademarks, copyrights or other intellectual property rights of the borrower. Examples 1 through 4 below each involve such a situation. In example 1, the encumbered assets are the

rights of an owner. In examples 2 and 3, the encumbered assets are the rights of a licensor, and, in example 4, the encumbered assets are the rights of a licensee.

36. The second category of transaction involves financing transactions that involve intellectual property in combination with other movable assets, such as equipment, inventory or receivables. An illustration of this type of transaction is found in Example 5, which involves a credit facility to a manufacturer, secured by a security right covering substantially all of the manufacturer's assets, including its intellectual property rights.

37. Each of the examples illustrates how owners, licensors and licensees of intellectual property can use these assets as security for credit. In each case, a prudent prospective lender will engage in due diligence to ascertain the nature and extent of the rights of the owners and licensees of the intellectual property involved, and to evaluate the extent to which the proposed financing would or would not interfere with such rights. The ability of a lender to address these issues in a satisfactory manner, obtaining consents and other agreements where necessary from the owners of the intellectual property, will affect the lender's willingness to extend the requested credit and the cost of such credit. Each of these categories of transaction involves not only different types (or combinations) of encumbered assets, but also presents different legal issues for a prospective lender or other credit provider.⁷

Example 1 (rights of an owner in a portfolio of patents and patent applications)

38. Company A, a pharmaceutical company that is constantly developing new drugs, wishes to obtain a revolving line of credit from Bank A secured in part by Company A's portfolio of existing and future drug patents and patent applications. Company A provides Bank A with a list of all of its existing patents and patent applications, as well as their chain of title. Bank A evaluates which patents and patent applications it will include in the "borrowing base" (that is, the pool of patents and patent applications to which Bank A will agree to attribute value for borrowing purposes), and at what value they will be included. In connection therewith, Bank A obtains an appraisal of the patents and patent applications from an independent appraiser of intellectual property. Bank A then obtains a security right in the portfolio of patents and patent applications and registers a notice of its security right in the appropriate national patent registry (assuming that the applicable law provides for registration of security rights in the patents registry). When Company A obtains a new patent, it provides its chain of title and valuation to Bank A for inclusion in the borrowing base. Bank A evaluates the information, determines how much additional credit it will extend based on the new patent, and adjusts the borrowing base. Bank A then makes appropriate registrations in the patent registry reflecting its security right in the new patent.

⁷ Some of these questions might be addressed in asset-specific intellectual property legislation. For example, article 19 of the Council Regulation (EC) No. 40/94 on the Community Trademark provides that a security right may be created in a community trademark and, on request of one of the parties, such a right may be registered in the community trademark registry.

Example 2 (rights of a licensor in royalties from the licence of visual art)

39. Company B, a publisher of comic books, licenses its copyrighted characters to a wide array of manufacturers of clothing, toys, interactive software and accessories. The licensor's standard form of licence agreement requires licensees to report sales, and pay royalties on such sales, on a quarterly basis. Company B wishes to borrow money from Bank B secured by the anticipated stream of royalty payments arising under these licence agreements. Company B provides Bank B with a list of the licences, the credit profile of the licensees, and the status of each licence agreement. Bank B then requires Company B to obtain an "estoppel certificate" from each licensee verifying the existence of the licence, the absence of default and the amount due, and confirming the licensee's agreement to pay future royalties to appropriate party (for example, Company B, Bank B or an escrow account) until further notice.

Example 3 (rights of a licensor in royalties from the licence of a motion picture)

40. Company C, a motion picture company, wishes to produce a motion picture. Company C sets up a separate company to undertake the production and hire the individual writers, producers, directors and actors. The production company obtains a loan from Bank C secured by the copyright, service contracts and all revenues to be earned from the exploitation of the motion picture in the future. The production company then enters into licence agreements with distributors in multiple countries who agree to pay "advance guarantees" against royalties upon completion and delivery of the picture. For each licence, the production Company C, Bank C and the distributor/licensee enter into an "acknowledgement and assignment" agreement under which the licensee acknowledges the prior security right of Bank C and the assignment of its royalty payments to Bank C, while Bank C agrees that, in case of enforcement of its security right in the licensor's rights, it will not terminate the licence so long as the licensee makes payments and otherwise abides by the terms of the licence agreement.

Example 4 (authorization of a licensee to use or exploit licensed software)

41. Company D is a developer of sophisticated software used in various architectural applications. In addition to certain software components created by the company's in-house software engineers (which the company licenses to its customers), Company D also incorporates into its products software components that it licenses from third parties (and then sub-licenses to its customers). Company D wishes to borrow money from Bank D secured by a security right in its rights as licensee of intellectual property from third parties, that is, its right to use and incorporate into its software some software components that it licenses from third parties. For evidence, the software developer can provide Bank D with a copy of its software components licence agreement.

Example 5 (security right in all assets of an enterprise)

42. Company E, a manufacturer and distributor of cosmetics, wishes to obtain a €200 million credit facility to provide ongoing working capital for its business. Bank E is considering extending this facility, provided that the facility is secured by a so called "enterprise mortgage", "floating charge" or all asset-security right granting to the bank a security right in substantially all of Company E's existing and

future assets, including all existing and future intellectual property rights that it owns or licenses from third parties.

43. Apart from the transactions mentioned above, there are transactions in which assets other than intellectual property, such as inventory or equipment, serve as security for credit, while the value of these assets is based to some extent upon the intellectual property with which they are associated. This category of transactions is illustrated by examples 6 and 7 below. As discussed in the draft Supplement (see A/CN.9/WG.VI/WP.42/Add.2, paras. 32-36), a security right in a tangible asset does not automatically extend to the intellectual property used with respect to that asset. If a secured creditor wishes to take a security right in such intellectual property, the intellectual property has to be described in the security agreement as part of the encumbered asset.

Example 6 (rights of a manufacturer of trademarked inventory)

44. Company F, a manufacturer of designer jeans and other high-fashion clothing, wishes to borrow money from Bank F secured in part by Company F's inventory of finished products. Many of the items manufactured by Company F bear well-known trademarks licensed from third parties under licence agreements that give Company F the right to manufacture and sell the products. Company F provides Bank F with its trademark licence agreements evidencing its right to use the trademarks and its obligations to the trademark owner. Bank F extends credit to Company F against the value of the inventory.

Example 7 (rights of a distributor of trademarked inventory)

45. Company G, one of Company F's distributors (see example 6), wishes to borrow money from Bank G secured in part by its inventory of designer jeans and other clothing that it purchases from Company F, a significant portion of which bears well-known trademarks licensed by Company G from third parties. Company G provides Bank G with invoices from Company F evidencing that it acquired the jeans in an authorized sale, or copies of the agreements with Company F evidencing that the jeans distributed by Company G are genuine. Bank G extends credit to Company G against the value of the inventory.

F. Key objectives and fundamental policies

[Note to the Working Group: For paras. 46-52, see A/CN.9/WG.VI/WP.39, paras. 53-59, A/CN.9/685, para. 25, A/CN.9/WG.VI/WP.37, paras. 47-53, A/CN.9/670, para. 27, A/CN.9/WG.VI/WP.35, paras. 42-45, A/CN.9/667, paras. 25-28, A/CN.9/WG.VI/WP.33, paras. 61-75, and A/CN.9/649, paras. 88-97.]

46. As already mentioned (see para. 1 above), the overall objective of the *Guide* is to promote secured credit. In order to achieve this general objective, the *Guide* elaborates and discusses several additional objectives, including the objectives of predictability and transparency (see Introduction to the *Guide*, section D.2). The *Guide* also rests on and reflects several fundamental policies. These include providing for comprehensiveness in the scope of secured transactions laws, the integrated and functional approach to secured transactions (under which all transactions performing security functions, however denominated, are considered to

be security devices) and the possibility of granting a security right in future assets (see Introduction to the *Guide*, section D.3).

47. These key objectives and fundamental policies are equally relevant to secured transactions relating to intellectual property. Accordingly, the overall objective of the *Guide* with respect to intellectual property is to promote secured credit for businesses that own or have the right to use intellectual property, by permitting them to use rights pertaining to intellectual property as encumbered assets, without interfering with the legitimate rights of the owners, licensors and licensees of intellectual property under law relating to intellectual property, as well as under contract or general property law. Similarly, all the objectives and fundamental policies mentioned above apply to secured transactions in which the encumbered asset is or includes intellectual property. For example, the *Guide* is designed to:

- (a) Allow persons with rights in intellectual property to use intellectual property as security for credit (see Key objective 1, subparagraph (a));
- (b) Allow persons with rights in intellectual property to use the full value of their assets to obtain credit (see Key objective 1, subparagraph (b));
- (c) Enable persons with rights in intellectual property to create a security right in such rights in a simple and efficient manner (see Key objective 1, subparagraph (c));
- (d) Allow parties to secured transactions relating to intellectual property maximum flexibility to negotiate the terms of their security agreement (see Key objective 1, subparagraph (i));
- (e) Enable interested parties to determine the existence of security rights in intellectual property in a clear and predictable way (see Key objective 1, subparagraph (f));
- (f) Enable secured creditors to determine the priority of their security rights in intellectual property in a clear and predictable way (see Key objective 1, subparagraph (g)); and
- (g) Facilitate efficient enforcement of security rights in intellectual property (see Key objective 1, subparagraph (h)).

48. A general policy objective of law relating to intellectual property law is to prevent unauthorized use of intellectual property or to protect the value of intellectual property and thus to encourage further innovation and creativity. To accomplish this general policy objective, law relating to intellectual property accords certain exclusive rights to intellectual property owners, licensors or licensees. To ensure that the key objectives of secured transactions law will be achieved in a way that does not interfere with the objectives of intellectual property law and thus provide mechanisms to fund the development and dissemination of new works, the *Guide* states a general principle for dealing with the interaction of secured transactions law and law relating to intellectual property. The principle is set out in recommendation 4, subparagraph (b) (see paras. 2-7 above and A/CN.9/WG.VI/WP.42/Add.1, section II, A.4).

49. At this stage, it is sufficient to note that the regime elaborated in the *Guide* does not, in itself, in any way define the content of any intellectual property right, describe the scope of the rights that an owner, licensor or licensee may exercise or

impede their rights to preserve the value of their intellectual property rights by preventing their unauthorized use. Thus, the key objective of promoting secured credit with respect to intellectual property will be achieved in a way that does not interfere with the objectives of law relating to intellectual property to prevent unauthorized use of intellectual property or to protect the value of intellectual property and thus to encourage further innovation and creativity.

50. Similarly, this key objective of promoting secured credit without interfering with the objectives of law relating to intellectual property means that neither the existence of the secured credit regime nor the creation of a security right in intellectual property should diminish the value of intellectual property. Thus, for example, the creation of a security right in intellectual property should not be misinterpreted as constituting an inadvertent abandonment of intellectual property by the owner or the secured creditor (for example, failure to use a trademark properly, to use it on all products or services or to maintain adequate quality control may result in loss of value to, or even abandonment of, the intellectual property).

51. In addition, in the case of products or services associated with marks, this key objective means that secured transactions law should avoid causing consumer confusion as to the source of products or services. For example, if a secured creditor replaces the manufacturer's name and address on the products with a sticker bearing its name and address or retains the trademark and sells the products in a jurisdiction where the trademark is owned by a different person, confusion as to the source of the products is bound to arise.

52. Finally, this key objective means that secured transactions law should not provide that a security right in the rights of a licensee that are non-transferable without the consent of the licensor may be created without the consent of the licensor.

A/CN.9/WG.VI/WP.42/Add.1 (Original: English)**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security
rights in intellectual property, submitted to the Working Group on
Security Interests at its seventeenth session.****ADDENDUM****CONTENTS**

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I. Scope of application and party autonomy

[*Note to the Working Group: For paras. 1-24, see A/CN.9/WG.VI/WP.39/Add.1, paras. 1-24, A/CN.9/685, para. 26-27, A/CN.9/WG.VI/WP.37/Add.1, paras. 1-24, A/CN.9/670, paras. 28-34, A/CN.9/WG.VI/WP.35, paras. 46-67, A/CN.9/667, paras. 29-31, A/CN.9/WG.VI/WP.33, paras. 82-108 and A/CN.9/649, paras. 81-87.*]

A. Broad scope of application

1. The law recommended in the *Guide* applies to security rights in all types of movable asset, including intellectual property (for the meaning of the term “intellectual property”, see A/CN.9/WG.VI/WP.42, paras. 18-20). Under the law recommended in the *Guide*, a legal or natural person may create or acquire a security right, and a security right may secure any type of obligation (see recommendation 2). The law recommended in the *Guide* applies to all transactions serving security purposes, regardless of the form of the transaction or the terminology used by the parties (see recommendations 2, subparagraph (d), and 8). The draft Supplement has an equally broad scope with respect to security rights in intellectual property.

1. Encumbered assets covered

2. The characterization of different types of intellectual property and the question of whether each type of intellectual property is transferable and may thus be encumbered are matters of law relating to intellectual property. However, the *Guide* and the draft Supplement are based on the general assumption that a security right may be created in any type of intellectual property, such as a patent, a trademark or a copyright. The *Guide* and the draft Supplement are also based on the assumption that the encumbered asset may be any of the various exclusive rights of an owner,

the rights of a licensor, the rights of a licensee or the rights in intellectual property used with respect to a tangible asset.

3. However, there is an important limitation to the scope of the *Guide* and the draft Supplement. In line with general rules of property law, for a security right to be created in an asset, including intellectual property, the asset has to be transferable under property law, including law relating to intellectual property. For example, typically, under law relating to intellectual property, only the economic rights under a copyright may be transferred (and thus encumbered), but not the moral rights of an author. The law recommended in the *Guide* does not affect such limitations. More specifically, the law recommended in the *Guide* does not override provisions of any other law (including law relating to intellectual property) to the extent that they limit the creation or enforcement of a security right in or the transferability of specific types of asset, including intellectual property (see recommendation 18). The only exception to this rule relates to statutory limitations to the assignability of future receivables and receivables assigned in bulk, which would be removed or overridden by a rule or law enacting the relevant recommendation of the *Guide* (see recommendation 23).

2. Transactions covered

4. As already mentioned (see para. 1 above), the law recommended in the *Guide* applies to all transactions serving security purposes, regardless of how they are denominated by the parties or by law relating to intellectual property. In other words, even if law relating to intellectual property characterizes a transfer of intellectual property to a creditor for security purposes as a conditional transfer or even as an “outright” transfer, the law recommended in the *Guide* treats this transaction as giving rise to a security right and thus applies to it as long as it serves security purposes (see recommendations 2, subparagraph (d), and 8).

3. Outright transfers of intellectual property

5. To some extent, the law recommended in the *Guide* applies to an outright transfer (that is, a transfer of ownership) of a receivable (see recommendation 3). As the law recommended in the *Guide* treats royalties payable by the licensee of intellectual property to its licensor as receivables of the licensor, it applies, to some extent, to the outright transfer of the right to the payment of royalties (without affecting the terms and conditions of the licence agreement, such as an agreement between the licensor and the licensee that the licensee will not create a security right in its right to payment of sub-royalties). The inclusion of outright transfers of receivables in the scope of the law recommended in the *Guide* reflects the fact that such transfers are usually seen as financing transactions and are often difficult in practice to distinguish from loans against the receivables. However, simply because the law recommended in the *Guide* generally applies to outright transfers of receivables, this does not mean that the law re-characterizes an outright transfer of a receivable as a secured transaction as this could negatively affect important receivables financing practices, such as factoring (for outright transfers of receivables, see chapter I of the *Guide* on scope, paras. 25-31; for an example of a factoring transaction, see Introduction to the *Guide*, paras. 31-34).

6. The law recommended in the *Guide* also applies to transfers of all movable assets for security purposes, which it treats as a transaction giving rise to a security

right (see recommendations 2, subparagraph (d), and 8). Thus, if a State enacts the recommendations of the *Guide*, a transfer of intellectual property (whether of full title or rights limited in scope, time or territory) for security purposes would be treated as a secured transaction. This approach of the law recommended in the *Guide* is based on the principle that, in determining whether a transaction is a secured transaction or not, substance prevails over form. Accordingly, parties will be able to simply create a security right in intellectual property using the methods provided in the law recommended in the *Guide* without the need to adopt other formalities of a “transfer” for purposes of secured transactions law. This result will not affect licensing practices as, under the law recommended in the *Guide*, a licence agreement does not in itself create a security right and a licence with the right to terminate the licence agreement is not a security right (see A/CN.9/WG.VI/WP.42, paras. 30-32).

7. However, the law recommended in the *Guide* does not apply to outright transfers of any movable asset other than receivables, including intellectual property (the term assignment is used in the *Guide* only with respect to receivables to avoid any implication that the recommendations that apply to the assignment of receivables apply more generally to security rights in intellectual property; see Introduction to the *Guide*, footnote 24). The law recommended in the *Guide* may, however, affect the rights of an outright transferee of an encumbered asset to the extent that there is a priority conflict between the rights of that transferee and a secured creditor with a security right in the asset. The reason for the exclusion of outright transfers of any movable asset other than receivables, including intellectual property, is that they are normally subject to and sufficiently covered by other law, including law relating to intellectual property.

4. Limitations on scope

8. The *Guide* is based on the assumption that, in order to facilitate access to financing based on intellectual property, States enacting the recommendations of the *Guide* will include rules on security rights in intellectual property in their modern secured transactions regime. Accordingly, States enacting the recommendations of the *Guide* may wish to review their laws relating to intellectual property with a view to replacing all devices by way of which a security right in intellectual property may be created (including pledges, mortgages and conditional transfers) with the general concept of a security right. However, the *Guide* also recognizes that this must be done in a manner that is consistent with the policies and infrastructure of law relating to intellectual property of each enacting State.

9. The potential points of intersection between secured transactions law and law relating to intellectual property are dealt with in detail in the introduction (see A/CN.9/WG.VI/WP.42, Introduction, section B) and in various chapters of the draft Supplement. To provide a context for this more detailed discussion of the implications of recommendation 4, subparagraph (b), it is helpful at this point to delineate: (a) issues that are clearly the province of law relating to intellectual property and are not intended to be affected in any way by the *Guide*; and (b) issues on which the rules set out in the *Guide* may be pre-empted or supplemented by a rule of the law relating to intellectual property that regulates the same issue in a different manner from the *Guide*.

(a) **Distinction between intellectual property rights and security rights in intellectual property rights**

10. The law recommended in the *Guide* addresses only legal issues unique to secured transactions law as opposed to issues relating to the nature and legal attributes of the asset that is the object of the security right. The latter are the exclusive province of the body of property law that applies to the particular asset (with the partial unique exception of receivables to the extent that outright transfers of receivables are also covered in the law recommended in the *Guide*).

11. In the context of intellectual property financing, it follows that the law recommended in the *Guide* does not affect and does not purport to affect issues relating to the existence, validity, enforceability and content of a grantor's intellectual property rights. These issues are determined solely by law relating to intellectual property. Of course, the secured creditor will need to pay attention to those rules in order to assess the existence and quality of the assets to be encumbered, but this would be the case with any type of encumbered asset (for example, whether a right to payment of funds credited to a bank account exists, its exact content and enforceability are matters for law other than secured transactions law). What follows is an indicative, non-exhaustive list of issues that may be addressed by law relating to intellectual property relevant to that assessment. Law relating to intellectual property may deal with issues not included in the following list.

Copyright:

- (a) The determination of who is the author, joint author or right holder;
- (b) The duration of copyright protection;
- (c) The economic rights granted under the law and limitations on and exceptions to protection;
- (d) The nature of the protected subject matter (expression embodied in the work, as opposed to the idea behind it, and the dividing line between these);
- (e) The transferability of economic rights as a matter of law and the right to grant a licence;
- (f) The possibility to terminate a transfer or licence of copyright, or otherwise regulate a transfer or licence;
- (g) The scope and non-transferability of moral rights;
- (h) Presumptions relating to the exercise and transfer of rights and limitations relating to who may exercise rights;
- (i) Attribution of original ownership in the case of commissioned works and works created by an employee within the scope of employment.

Neighbouring (allied or related) rights:

- (a) The meaning and extent of neighbouring rights, including whether a State may recognize certain neighbouring rights within copyright or other law;
- (b) The persons entitled to claim neighbouring rights;

- (c) The type of protected expression;
- (d) The relationship between holders of neighbouring rights and holders of copyright;
- (e) The extent of exclusive rights or rights of equitable remuneration with respect to neighbouring rights;
- (f) Any connecting factors or formalities for protection, such as fixation, publication or notice;
- (g) Any limitations and exceptions to protection for neighbouring rights;
- (h) The duration of protection for neighbouring rights;
- (i) The transferability of any neighbouring rights as a matter of law and the right to grant licences;
- (j) The possibility to terminate a transfer or licence of neighbouring rights, or otherwise regulate a transfer or licence;
- (k) The scope, duration and non-transferability of any related moral rights.

Patents:

- (a) The determination of who is the patent owner or co-owner;
- (b) The validity of a patent;
- (c) The limitations on and exceptions to protection;
- (d) Scope and duration of protection;
- (e) The grounds for invalidity challenges (obviousness or lack of novelty);
- (f) Whether certain prior publication is excluded from prior art and thus may not preclude patentability;
- (g) Whether protection is granted to a person who first invented the patent or to a person who first filed an application.

Trademarks and service marks:

- (a) The determination of who is the first user or the owner of the mark;
- (b) Whether protection of the mark is granted to a person that uses the mark first or to a person that files an application first and whether protection is granted to a subsequently registered mark if it conflicts with a previously registered mark;
- (c) Whether ex ante use is a prerequisite to registration in a mark registry or whether the right is secured by initial registration and maintained by later use;
- (d) The basis of protection of the right (distinctiveness);
- (e) The basis for losing protection (holder's failure to ensure that mark retains its association with the owner's products in the marketplace), as in the case of:
 - (i) Licensing without the licensor directly or indirectly controlling the quality or character of the products or services associated with the mark (so called "naked licensing"); and

- (ii) Altering the mark so its appearance does not match the mark as registered;
- (f) Whether the mark may be transferred with or without goodwill.

(b) Areas of potential overlap between secured transactions law and law relating to intellectual property

12. The issues just addressed do not create any necessity for deference to law relating to intellectual property, since the law recommended in the *Guide* does not purport to address these issues. In other words, they are not issues where the principle of recommendation 4, subparagraph (b), has any application. The deference issue arises when the law relating to intellectual property of the State enacting the law recommended in the *Guide* provides an intellectual-property-specific rule on an issue falling within the scope of the law recommended in the *Guide*, namely, an issue relating to the creation, third-party effectiveness, priority, enforcement of or law applicable to a security right in intellectual property (see A/CN.9/WG.VI/WP.42, Introduction, Section B).

13. The precise scope and implications of deference to law relating to intellectual property cannot be stated in the abstract since there is great variation among States on the extent to which intellectual-property-specific rules have been established, and indeed even within the same State depending on which category of intellectual property is at issue. In addition, the harmonization and modernization of the secured financing law achieved through the law recommended in the *Guide* has its limitations, since that law addresses issues of secured transactions law only and, under certain conditions defers to law relating to intellectual property (see recommendation 4, subparagraph (b)). Another fact that limits the impact of the law recommended in the *Guide* is that law relating to intellectual property in the various States does not address all secured transactions law issues in a comprehensive or coordinated way. For this reason, optimal results can only be obtained if the harmonization and modernization of secured transactions law achieved through the law recommended in the *Guide* is accompanied by a review of intellectual property financing law to ensure compatibility and coordination with the secured transactions law recommended in the *Guide*. The following examples illustrate some typically encountered patterns.

Example 1

14. In some States, in which security rights are created by a transfer of title to the encumbered asset, a security right may not be created in a trademark. The reason is a concern that the secured creditor's title would impair the quality control required of the trademark holder. Adoption of the law recommended in the *Guide* by such a State would make transfers of title unnecessary to create a security right in a trademark and eliminate the rationale for this prohibition, since the grantor retains ownership of the encumbered trademark under the concept of security right of the law recommended in the *Guide*. Whether the secured creditor may become the owner, licensor or licensee of rights in the trademark for the purposes of law relating to intellectual property is a different matter (for purposes of secured transactions law, a secured creditor does not become the owner, licensor or licensee). Nonetheless, adoption of the law recommended in the *Guide* would not automatically eliminate the prohibition, because, to the extent that it is inconsistent

with law relating to intellectual property, the law recommended in the *Guide* defers to that law. As a result, a specific amendment to the relevant law relating to intellectual property may be needed to harmonize it with the law recommended in the *Guide*.

Example 2

15. In some States, only transfers of intellectual property (whether outright or for security purposes) may be registered in a specialized intellectual property registry and such registration is mandatory for the effectiveness of a transfer. In other States, a security right in intellectual property may also be registered and such registration has constitutive or third-party effects. In view of the principle of deference to law relating to intellectual property embodied in recommendation 4, subparagraph (b), adoption of the law recommended in the *Guide* would not affect the operation of such a rule and such specialized registration will continue to be required. However, deference to law relating to intellectual property will not always be sufficient to address the issue of coordination between the general security rights registry and intellectual property registries (see A/CN.9/WG.VI/WP.42/Add.3, paras. 15-20) or the question whether a security right may be created in and a notice may refer to a future intellectual property right (see A/CN.9/WG.VI/WP.42/Add.2, paras. 37-41, and A/CN.9/WG.VI/WP.42/Add.3, paras. 21-23).

Example 3

16. In some States, law relating to intellectual property provides for registration of both outright transfers and security rights in various intellectual property registries, but registration is not a mandatory precondition to effectiveness. However, registration has priority consequences in that rights arising from an unregistered transaction can be subject to rights arising from a registered transaction. In the case of such a State, recommendation 4, subparagraph (b), would preserve that rule of law relating to intellectual property of the State and, accordingly, a secured creditor desiring optimal protection may need to register both a notice of its security right in the general security rights registry and the security agreement or a notice thereof in the relevant intellectual property registry (although, if the intellectual property registry permits registration of security rights, registration there would be sufficient for all purposes). This is because: (a) registration in that State's general security rights registry is a necessary prerequisite to third-party effectiveness under secured transactions law (unless law relating to intellectual property allows registration of a security right in the relevant intellectual property registry to achieve third-party effectiveness); and (b) registration in the intellectual property registry will be necessary to protect the secured creditor against the risk of finding its security right affected by the rights of a competing transferee or secured creditor registered in the intellectual property registry pursuant to the priority rules of law relating to intellectual property.

17. In some States, registration of transfers and security rights in the relevant intellectual property registry provides protection only against a prior unregistered transfer or security right and only if the person with the registered right took without notice of the prior unregistered right (the law recommended in the *Guide* would defer to this rule as it is a rule of law relating to intellectual property rather than a general rule of secured transactions law present throughout the State's legal system; see recommendation 4, subparagraph (b)). In those States, adoption of the

law recommended in the *Guide* will raise the further question as to whether registration of a notice of a security right in intellectual property in the general security rights registry constitutes constructive notice to a subsequent transferee or secured creditor that registers its transfer or security right in the intellectual property registry. If so, under the law of such a State, it would be unnecessary for a secured creditor that has registered a notice of its security right in the general security rights registry to also register a document or notice thereof in the intellectual property registry in order to prevail as against subsequent transferees and secured creditors. Otherwise, under the law of that State, registration of a document or notice of the security right in the intellectual property registry may be required to gain priority over subsequent transferees and secured creditors.

Example 4

18. As a matter of law relating to intellectual property, some States provide for registration in the relevant intellectual property registry of a document or notice of a transfer of, but not of a security right in, intellectual property. In such situations, registration has priority consequences only as between transferees, and not as between a transferee and a secured creditor. In States that adopt this approach, a secured creditor will need to ensure that a document or notice of all transfers of intellectual property to its grantor is duly registered in the intellectual property registry so as to avoid the risk of the grantor's title being defeated by the subsequently registered rights of a transferee. In all other respects, however, the secured creditor's rights will be determined by the secured transactions regime. Likewise, the secured creditor will need to ensure that a document or notice of a transfer for security purposes made to it by the grantor is duly registered in the intellectual property registry in order to avoid the risk that the rights of a subsequent transferee of the grantor will defeat the rights arising from the security transfer in favour of the secured creditor.

Example 5

19. As a matter of law relating to intellectual property, in some States, registration of a document or notice of a transfer and a security right in an intellectual property registry is purely permissive and intended only to facilitate identification of the current owner. Failure to register neither invalidates the transaction nor affects its priority (although it might create evidentiary presumptions). In States that adopt this approach, the position is essentially the same as when no specialized registry exists at all, as is often the case for copyright. Where these issues are dealt with by law relating to intellectual property, the law recommended in the *Guide* defers to it. Where, however, these issues are left to be determined by general property law, no issue of deference arises since the pre-*Guide* rules were not derived from the law relating to intellectual property but rather from property law generally. Thus, adoption of the law recommended in the *Guide* will replace the existing rules on creation, third-party effectiveness, priority, enforcement and law applicable to security rights in intellectual property. Of course, the old rules on these issues will continue to apply to outright transfers of intellectual property since the law recommended in the *Guide* only covers security rights in intellectual property. Consequently, the secured creditor will need to verify whether a purported transfer is actually an outright transfer or a disguised secured transaction (that is, a transaction which, although not called a secured transaction by the parties, serves

security purposes). However, this type of risk management is no different from that necessary for any other type of encumbered asset for which a specialized registry does not exist.

Example 6

20. The question of who is the intellectual property owner in a chain of transferees of intellectual property is a matter of law relating to intellectual property. At the same time, the question of whether a transfer is an outright transfer or a transfer for security purposes is a matter of general property and secured transactions law. Finally, the rights and obligations flowing from a licence agreement is a matter of law relating to intellectual property and contract law. If a State adopts the law recommended in the *Guide*, transfers for security purposes will be treated as secured transactions.

Example 7

21. If law relating to intellectual property has specialized rules governing specifically the enforcement of a security right in intellectual property, these rules will prevail over the enforcement regime recommended in the *Guide*. However, if there is no specific rule of law relating to intellectual property on the matter and the enforcement of security rights in intellectual property is a matter left to general civil procedure law, the enforcement regime for security rights recommended in the *Guide* would take precedence. Similarly, if there is no specific rule of law relating to intellectual property on extrajudicial enforcement, the relevant regime recommended in the *Guide* on extrajudicial enforcement of security rights would apply (see A/CN.9/WG.VI/WP.42/Add.5, chapter IX on enforcement).

B. Application of the principle of party autonomy to security rights in intellectual property

22. The law recommended in the *Guide* generally recognizes the principle of party autonomy, although it does elaborate a number of exceptions (see recommendations 10 and 111-113). This principle applies equally to security rights in intellectual property to the extent that law relating to intellectual property does not limit party autonomy (see A/CN.9/WG.VI/WP.42/Add.5, para. 1). It should be noted that recommendations 111-113 apply only to tangible assets, as they refer to the possession of encumbered assets and intangible assets are by definition not subject to possession.

23. An example of the application of the principle of party autonomy in secured transactions relating to intellectual property would be the following: if not prohibited by law relating to intellectual property, under secured transactions law, a grantor and a secured creditor may agree that the secured creditor may acquire certain rights of an owner, licensor or licensee and thus become an owner, licensor or licensee entitled to deal with public authorities (for example, to register or renew registrations), as well as to pursue infringers, make further transfers or grant licences. This agreement could take the form of a special clause in the security agreement or a separate agreement between the grantor and the secured creditor, since, under the *Guide*, a secured creditor does not, by the mere fact of obtaining a security right, become an owner, licensor or licensee.

24. Another example of the application of the principle of party autonomy would be the following: if not prohibited by law relating to intellectual property, under secured transactions law, a grantor and a secured creditor may agree that damages for infringement, as well as for lost profits and devaluation of the encumbered intellectual property, are included in the original encumbered assets. In the absence of such an agreement, such damages may still be treated as proceeds under the law recommended in the *Guide*, provided that that treatment is not inconsistent with law relating to intellectual property (see recommendation 4, subparagraph (b)). However, the right to pursue infringement claims (as opposed to the right to the payment of damages for infringement) is a different matter. Typically, under law relating to intellectual property, this right cannot be used as security for credit. In addition, under the law recommended in the *Guide*, this right would not constitute proceeds as it would not fall under the scope of “whatever is received in respect of encumbered assets” (see the term “proceeds”, Introduction to the *Guide*, section B on terminology and interpretation).

A/CN.9/WG.VI/WP.42/Add.2 (Original: English)

**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security rights
in intellectual property, submitted to the Working Group on Security
Interests at its seventeenth session.**

ADDENDUM

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II. Creation of a security right in intellectual property

[*Note to the Working Group: For paras. 1-44, see A/CN.9/WG.VI/WP.39/Add.2, paras. 1-43, A/CN.9/685, paras. 28-35, A/CN.9/WG.VI/WP.37/Add.1, paras. 25-64, A/CN.9/670, paras. 35-55, A/CN.9/WG.VI/WP.35, paras. 68-102, A/CN.9/667, paras. 32-54, A/CN.9/WG.VI/WP.33, paras. 112-133, and A/CN.9/649, paras. 16-28.*]

A. The concepts of creation and third-party effectiveness

1. With respect to all types of encumbered asset (including intellectual property), the law recommended in the *Guide* draws a distinction between the creation of a security right (its effectiveness as between the parties) and its effectiveness against third parties, providing different requirements to achieve each of these outcomes. In effect, this means that the requirements for the creation of a security right can be kept to a minimum, while any additional requirements are aimed at addressing the rights of third parties. The main reason for this distinction is to achieve three of the key objectives of the law recommended in the *Guide*, namely, to establish a security right in a simple and efficient way, to enhance certainty and transparency and to establish clear priority rules (see recommendation 1, subparagraphs (c), (f) and (g)).

2. Under the law recommended in the *Guide*, a security right may be created by agreement between the grantor and the secured creditor (see recommendation 13 and paras. 5-8 below). For the security right to be effective against third parties, an additional step is required. For most intangible assets, this step is registration of a notice about the possible existence of the security right in a public registry, which establishes an objective criterion for determining priority between a secured creditor and a competing claimant (see recommendation 29; for the term “competing claimant”, see A/CN.9/WG.VI/WP.42, paras. 11-12). Accordingly, if a security right has been created in accordance with the requirements set out in the law recommended in the *Guide*, the security right is effective between the grantor and the secured creditor even if the additional steps necessary to make the security right effective against third parties have not yet been taken (see recommendation 30). As a result, the secured creditor may enforce the security right in accordance with the enforcement procedures set out in chapter VIII of the law recommended in the *Guide*, subject to the rights of competing claimants in accordance with the priority rules set out in chapter V.

3. This distinction between creation and effectiveness against third parties applies equally to security rights in intellectual property. Thus, under the law recommended in the *Guide*, a security right in intellectual property can be effective between the grantor and the secured creditor even if it is not effective against third parties. In some States, law relating to intellectual property draws such a distinction. In other States, however, such a distinction is not drawn in law relating to intellectual property, which provides that the same actions are required for both the creation of a security right and its effectiveness against third parties. In such a case, as required by recommendation 4, subparagraph (b), the law recommended in the *Guide* defers to that law. To ensure better coordination between secured transactions law and law relating to intellectual property, States enacting the law recommended in the *Guide* may wish to consider reviewing their law relating to intellectual property. Such a review should make it possible for States to determine whether: (a) the fact that law relating to intellectual property does not draw a distinction between creation and third-party effectiveness of a security right in intellectual property serves specific policy objectives of law relating to intellectual property (rather than other law, such as general property law, contract law or secured transactions law) and should be retained; or (b) the distinction should be introduced in law relating to intellectual property so as to harmonize it with the relevant approach of the law recommended in the *Guide*.

B. Functional, integrated and unitary concept of a security right

4. To the extent law relating to intellectual property permits the creation of a security right in intellectual property, it may do so by referring to outright or conditional transfers of intellectual property, mortgages, pledges, trusts or similar terms. The *Guide* uses the term “security right” to refer to property rights in movable assets that are created by agreement and secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right (see the term “security right”, Introduction to the *Guide*, section B on terminology and interpretation). This approach is referred to as the “functional, integrated and unitary approach” to secured transactions (see chapter I of the *Guide*

on the scope of application, paras. 110-112, and recommendation 8). The *Guide* contemplates, by exception, that States may adopt a non-unitary approach in the limited context of acquisition financing and may retain transactions denominated as retention of title or financial lease of tangible assets (see chapter IX of the *Guide* on acquisition financing). A similar approach may be followed with respect to conditional transfers, outright transfers in which the transferee creates a security right in favour of the transferor or retention-of-title transactions with respect to intellectual property that secure any unpaid portion of the purchase price or an obligation incurred or credit provided to enable the grantor to acquire intellectual property or a licence (see the term “acquisition security right”, Introduction to the *Guide*, section B on terminology and interpretation, as well as A/CN.9/WG.VI/WP.42/Add.5, chapter IX acquisition financing in an intellectual property context). Thus, States enacting the law recommended in the *Guide* may wish to review their law relating to intellectual property with a view to: (a) replacing all terms used to refer to the right of a secured creditor with the term “security right”; or (b) providing that, whatever the term used, rights performing security functions are treated in the same way and that such a way is not inconsistent with the treatment of security rights in the law recommended in the *Guide*.

C. Requirements for the creation of a security right in intellectual property

5. Under the law recommended in the *Guide*, the creation of a security right in an intangible asset requires a written document, which by itself or in conjunction with the course of conduct between the parties evidences the agreement of the parties to create a security right. In addition, the grantor must have rights in the asset to be encumbered or the power to encumber it either at the time of the conclusion of the security agreement or thereafter. The agreement must reflect the intent of the parties to create a security right, identify the secured creditor and the grantor, and describe the secured obligation and the encumbered assets in a manner that reasonably allows their identification (see recommendations 13-15). As already mentioned, no additional step is required for the creation of a security right in an intangible asset. The additional steps (for example, registration of a notice in a general security rights registry) required for third-party effectiveness of that security right are not required for the security right to be created and thus be effective as between the grantor and the secured creditor.

6. However, law relating to intellectual property in many States imposes different requirements for the creation of a security right in intellectual property. For example, registration of a document or notice of a security right in intellectual property (for example, a transfer for security purposes, a mortgage or pledge of intellectual property) in the relevant intellectual property registry may be required for the creation of the security right. In addition, under law relating to intellectual property, the intellectual property to be encumbered may need to be described specifically in a security agreement. Similarly, as some intellectual property registries index registered transactions by the specific intellectual property to which they relate, and not the grantor’s name or other identifier, registration of a document that merely states “all intellectual property of the grantor” would not be sufficient to

create a security right. It would instead be necessary to identify each intellectual property right in the security agreement or in any other document to be registered in the intellectual property registry for the purposes of creating the security right.

7. Specific identification of the encumbered intellectual property right will, in particular, often be necessary for copyright. This is so because, under law relating to copyright, copyright is often conceptualized as comprising a bundle of rights and, unless the parties intended to encumber all those rights, they may need to describe the assets to be encumbered specifically in the security agreement. In such a case, law relating to copyright may require a specific description for certainty as to assets that are subject to a security right. Under such an approach, the copyright owner may use specifically identified rights to obtain credit from another credit provider. It should also be noted, however, that the nature of copyright as a bundle of rights typically allows parties to divide the exclusive rights under a copyright into separate rights and encumber them separately, if they wish. Thus, if the parties wish to describe the encumbered intellectual property rights in a specific way, they are always entitled to do so and will probably do so in most cases; but this should not deprive the parties of the right to describe the encumbered intellectual property rights in a general way.

8. It should be noted that the standard to be met with regard to the description of the encumbered assets in the security agreement under the law recommended in the *Guide* is sufficiently flexible to accommodate all different situations in that it refers to a description of the encumbered assets “in a manner that reasonably allows their identification” (see recommendation 14, subparagraph (d)); the same standard applies to the notice to be registered, see A/CN.9/WG.VI/WP.42/Add.3, para. 21, and recommendation 63). Thus, this standard could vary depending on what is a reasonable description under the relevant law and practice with respect to the particular encumbered asset. Furthermore, in all these situations, under the principle embodied in recommendation 4, subparagraph (b), the law recommended in the *Guide* would apply only insofar as it is not inconsistent with law relating to intellectual property. States enacting the law recommended in the *Guide* may wish to consider reviewing their laws relating to intellectual property to determine whether the different concepts and requirements with respect to the creation of security rights in intellectual property serve specific policy objectives of law relating to intellectual property and should be retained or whether they should be harmonized with the relevant concepts and requirements of the law recommended in the *Guide*.

D. Rights of a grantor with respect to the intellectual property to be encumbered

9. As already mentioned (see para. 5 above), a grantor of a security right must have rights in the asset to be encumbered or the power to encumber it at the time of the security agreement or at a later time (see recommendation 13). This is a principle of secured transactions law that applies equally to intellectual property. A grantor may encumber its full rights or only limited rights. So, an intellectual property owner, licensor or licensee may encumber its full rights or rights limited in time, scope or territory. In addition, as a matter of general property law, a grantor may encumber its assets only to the extent that the assets are transferable under

general property law (the law recommended in the *Guide* does not affect such limitations; see recommendation 18 and paras. 43 and 44 below). This principle also applies to secured transactions relating to intellectual property. So, an owner, licensor or licensee may only encumber its rights to the extent that these rights are transferable under law relating to intellectual property.

E. Distinction between a secured creditor and an owner with respect to intellectual property

10. For the purposes of the law recommended in the *Guide*, the secured creditor does not become an owner, licensor or licensee (depending on the rights of the grantor) on the sole ground that it acquired a security right in intellectual property. This may also be the case though under law relating to intellectual property (see the terms “owner” and “secured creditor”, A/CN.9/WG.VI/WP.42, Introduction to the draft Supplement, section C on terminology).

11. However, the exercise of the secured creditor’s rights upon default of the grantor will often result in the grantor’s encumbered intellectual property rights being transferred and, thus, the identity of the owner, licensor or licensee (depending on the rights of the grantor), as determined by law relating to intellectual property, might change. This may happen in situations in which the enforcement of the security right in the intellectual property results in acquisition of the encumbered intellectual property by the secured creditor in a disposition (see recommendations 142 and 148) or in an acquisition of the encumbered intellectual property by the secured creditor in satisfaction of the secured obligation (see recommendations 156-159).

12. In any case, the question of who is the owner, licensor or licensee with respect to intellectual property and whether the parties may determine it for themselves is a matter of law relating to intellectual property. Under law relating to intellectual property, a secured creditor may at times be treated as an owner, licensor or licensee. Should intellectual property law so provide, the secured creditor could, for example, renew registrations or pursue infringers or agree with the owner, licensor or licensee that the secured creditor will become the owner, licensor or licensee (see A/CN.9/WG.VI/WP.42/Add.5, paras. 2-5).

F. Types of encumbered asset in an intellectual property context

13. Under the law recommended in the *Guide*, a security right may be created not only in the rights of an intellectual property owner but also in the rights of a licensor or licensee under a licence agreement (see the term “encumbered asset”, A/CN.9/WG.VI/WP.42, Introduction to the draft Supplement, section C on terminology, as well as A/CN.9/WG.VI/WP.42/Add.1, paras. 2 and 3). In addition, although a security right in a tangible asset with respect to which intellectual property is used (for example, designer watches or clothes bearing a trademark) does not extend to the intellectual property (see paras. 32-36 below), such a security right may have an impact on the intellectual property used with respect to the tangible asset to the extent the secured creditor may enforce its security right in the tangible asset (see A/CN.9/WG.VI/WP.42/Add. 5, paras. 24-27). As already

mentioned (see paras. 5-8 above), under the law recommended in the *Guide*, the intellectual property to be encumbered needs to be described in the security agreement in a manner that reasonably allows its identification and this standard is sufficiently flexible to accommodate any requirements of law relating to intellectual property for a specific description of intellectual property to be encumbered (see recommendation 14, subparagraph (d)).

14. It should be noted that the law recommended in the *Guide* does not override any provisions of law relating to intellectual property (or other law) that limit the creation or enforcement of a security right or the transferability of an intellectual property (or other) asset (see recommendation 18). In addition, the law recommended in the *Guide* does not affect contractual limitations to the transferability of intellectual property rights (recommendation 23 deals only with contractual limitations on the assignability of receivables). As a result of these two recommendations, if, under law relating to intellectual property, a security right may not be created or enforced in an intellectual property right or if that intellectual property right is non-transferable by law or contract, the law recommended in the *Guide* will not interfere with these limitations. The law recommended in the *Guide*, however, does override legal limitations to the assignability of future receivables or of receivables assigned in bulk or in part on the sole ground that they are future receivables or are assigned in bulk or in part (see recommendation 23). In addition, under certain conditions, the law recommended in the *Guide* affects contractual limitations to the assignability of receivables (without affecting the different treatment of receivables for purposes of law relating to intellectual property; see recommendation 24 and paras. 26-29 below). As a result, to the extent that the law recommended in the *Guide* is enacted by a State, these legal or contractual limitations to the assignability of such receivables will no longer apply.

1. Rights of an owner

15. The law recommended in the *Guide* applies to secured transactions in which the encumbered assets are the rights of an owner. Typically, the essence of the rights of an owner is the right to enjoy its intellectual property, the right to prevent unauthorized use of its intellectual property and to sue infringers, the right to register intellectual property, the right to authorize others to use or exploit the intellectual property and the right to collect royalties (for the owner's rights to preserve the encumbered intellectual property by pursuing infringers and renewing registrations, see paras. 17-19 below).

16. If, under law relating to intellectual property, these rights are transferable, the owner may encumber all or some of them with a security right under the law recommended in the *Guide*. That law will apply to such a security right subject to recommendation 4, subparagraph (b). In such a case, all these rights would constitute the original encumbered assets (any royalties would be proceeds of the owner's rights, unless included in the description of the encumbered assets in the security agreement). If these rights may not be transferred under law relating to intellectual property, they may not be encumbered by a security right under the law recommended in the *Guide*, since, as already mentioned (see para. 14 above), the law recommended in the *Guide* does not affect legal provisions that limit the creation or enforcement of a security right, or the transferability of assets, with the

exception of provisions relating to the assignability of future receivables and receivables assigned in bulk (see recommendation 18 and paras. 22-25 below).

17. Whether the right of an owner to preserve its intellectual property and thus, for example, to pursue infringers and obtain an injunction and compensation, is a movable asset that may be transferred separately from the other rights of the owner is a matter of law relating to intellectual property. Typically, under law relating to intellectual property, the right to pursue infringers is part of the owner's rights and cannot be transferred separately from the owner's rights (see A/CN.9/WG.VI/WP.42/Add.5, paras. 2-5).

18. However, under law relating to intellectual property, the benefits from the exercise of this right to pursue infringers (such as damages arising from an infringement once collected) may be a movable asset that may be transferred separately from the owner's rights. Whether a security right may be created in that right is a matter of secured transactions law, which would apply only if law relating to intellectual property does not address that matter in a different way (see recommendation 4, subparagraph (b)). Thus, unless not permitted by law relating to intellectual property, the grantor as an owner and the secured creditor may agree that the benefits from the exercise of the right of the grantor to pursue infringers and obtain an injunction and compensation would be part of the original encumbered intellectual property.

19. For example, if, after the creation of a security right in the rights of an intellectual property owner, an infringement has been committed, the owner has sued infringers and infringers have paid compensation to the owner (for an infringement that occurred before or after the creation of the security right), the secured creditor may be able to claim the compensation paid either as proceeds of the original encumbered intellectual property or as an original encumbered asset if properly so described in the security agreement. If the compensation has not been paid at the time of creation of the security right, but is paid later after default of the grantor (owner), the secured creditor could also be able to claim the compensation paid either as proceeds of the original encumbered intellectual property or if appropriately so described in the security agreement as an original encumbered asset. To the contrary, under law relating to intellectual property, the right to pursue infringers and obtain an injunction and compensation would normally not constitute proceeds of the original encumbered intellectual property or an original encumbered asset (see para. 17 above). However, if the grantor (owner) has filed a suit against an infringer and the lawsuit is still pending at the time of enforcement of the security right, a person that acquired the grantor's rights in the encumbered intellectual property in the context of enforcement of the security right should be able to take over the lawsuit and obtain any compensation granted (again, if permitted under law relating to intellectual property).

20. Similar considerations apply to the question of whether the right to deal with authorities in the various stages of the registration process (for example, the right to file an application for or register intellectual property, or the right to renew a registration) or the right to grant licences may be transferred, and thus be part of the encumbered intellectual property. Whether the right to deal with authorities or to grant licences may be transferred or is an inalienable right of the owner is a matter of law relating to intellectual property. Whether it is part of the encumbered rights of the owner is a matter of the description of the encumbered asset in the security

agreement (assuming that it may be transferred under law relating to intellectual property).

2. Rights of a licensor

21. Under the law recommended in the *Guide*, a security right may be created in a licensor's rights under a licence agreement. If a licensor is an owner, it can create a security right in (all or part of) its rights as mentioned above (see paras. 15-20 above). If a licensor is not an owner but a licensee that grants a sub-licence, typically, it may create a security right in its right to the payment of royalties owed by sub-licensees under the sub-licence agreement. In such a case where the grantor creating a security right in sub-royalties is a licensor but not the intellectual property owner, the sub-royalties would be the original encumbered assets; where the grantor creating a security right in the intellectual property itself is the intellectual property owner, the sub-royalties would be proceeds of the original encumbered intellectual property, unless the sub-royalties were included in the description of the original encumbered assets in the security agreement (for the licensee's rights, see paras. 30-31 below). Such a licensor may also create a security right in other contractual rights of value that the licensor might have under the licence agreement and the relevant law. These other contractual rights might include, for example: (a) the licensor's right to compel the licensee to advertise the licensed intellectual property or product with respect to which the intellectual property is used; (b) the licensor's right to compel the licensee to market the licensed intellectual property only in a particular manner; and (c) the licensor's right to terminate the licence agreement on account of the licensee's breach.

22. Following the approach taken in most legal systems and reflected in the United Nations Assignment Convention (see article 2), the law recommended in the *Guide* treats rights to the payment of royalties arising from the licence of intellectual property as receivables (see the term "receivable", Introduction to the *Guide*, section B on terminology and interpretation). This means that the general discussion and recommendations dealing with security rights, as modified by the receivables-specific discussion and recommendations of the *Guide*, apply to rights to the payment of royalties. Thus, under the law recommended in the *Guide*, statutory prohibitions that relate to the assignment of future receivables or receivables assigned in bulk or partial assignments on the sole ground that they are future receivables or receivables that are assigned in bulk or in part are rendered unenforceable (see recommendation 23). However, other statutory prohibitions or limitations are not affected (see recommendation 18). In addition, a licensee could raise against an assignee of the right to the payment of royalties all defences or rights of set-off arising from the licence agreement or any other agreement that was part of the same transaction (see recommendation 120).

23. In this context, it is important to note that the statutory prohibitions set aside refer to future receivables only as future receivables, or receivables assigned in bulk or in part. They do not affect statutory prohibitions based on the nature of receivables, for example, as wages or royalties that may by law be payable directly only to authors or collecting societies. Many countries have "author-protective" or similar legislation that designates a certain portion of income earned from exploitation of the intellectual property rights as "equitable remuneration" or the like which must be paid to authors or other entitled parties or their collecting

societies. These laws often make such payment rights expressly non-assignable. The *Guide's* recommendations with respect to limitations on the assignment of receivables do not apply to these or other legal limitations.

24. Furthermore, it is important to note that the treatment of the right to the payment of royalties as receivables for the purposes of the secured transactions law recommended in the *Guide* does not affect the different treatment of this right to the payment of royalties for the purposes of law relating to intellectual property.

25. Finally, it is equally important to note that the treatment of rights to receive payment of royalties in the same way as any other receivable does not affect the terms and conditions of the licence agreement relating to the payment of royalties, such as that payments are to be staggered or that there might be percentage payments depending on market conditions or sales figures.

26. Under the law recommended in the *Guide*, if a licence agreement, under which royalties are payable, includes a contractual provision that restricts the ability of the licensor to assign the right to the payment of royalties to a third party ("assignee"), an assignment of the right to the payment of royalties by the licensor is nonetheless effective and the licensee cannot terminate the licence agreement on the sole ground of the assignment by the licensor of the right to the payment of royalties (see recommendation 24). However, under the law recommended in the *Guide*, the rights of a licensee (as a debtor of the assigned receivables) are not affected except as otherwise provided in the secured transactions law recommended in the *Guide* (see recommendation 117, subparagraph (a)). Specifically, the licensee is entitled to raise against the assignee all defences or rights of set-off arising from the licence agreement or any other agreement that was part of the same transaction (see recommendation 120, subparagraph (a)). In addition, the law recommended in the *Guide* does not affect any liability that the licensor (or sub-licensor) may have under other law for breach of the anti-assignment agreement (see recommendation 24). As the term "licence" includes a sub-licence (see A/CN.9/WG.VI/WP.42, para. 23), the same principles apply to a provision in a sub-licence agreement under which a sub-licensee restricts the ability of its sub-licensor to assign the right to the payment of the sub-royalties due from the sub-licensee to the sub-licensor.

27. It is important to note that recommendation 24 applies only to receivables, and not to intellectual property rights. This means that it does not apply to an agreement between a licensor and a licensee according to which the licensee does not have the right to grant sub-licences. It is equally important to note that recommendation 24 applies only to an agreement between a creditor of a receivable and the debtor of the receivable that the receivable owed to the creditor by the debtor may not be assigned. It does not apply to an agreement between a creditor of a receivable and the debtor of the receivable that the debtor may not assign receivables that may be owed to the debtor by third parties. Thus, recommendation 24 does not apply to an agreement between a licensor and a licensee that the licensee will not assign its right to receive payment of sub-licence royalties from third-party sub-licensees. Such an agreement may exist, for example, where the licensor and the licensee agree that sub-licence royalties will be used by the licensee to further develop the licensed intellectual property. Thus, recommendation 24 does not affect the right of the licensor to negotiate the licence agreement with the licensee so as to control by agreement who can use the intellectual property or the flow of royalties from the licensee and sub-licensees. However, a licensor, while entitled to claim the payment

of royalties, might not be able to control by agreement the flow of royalties in situations where the licensee in its capacity as a sub-licensor creates a security right in its right to the payment of sub-royalties (unless the licensor prohibits sub-licences).

28. In addition, recommendation 24 does not apply to an agreement between a licensor and a licensee that the licensor will terminate the licence agreement if the licensee violates the agreement not to assign the right to the payment of royalties payable to the licensee by sub-licensees. In this context, it should be noted that the right of the licensor to terminate the licence agreement if the licensee breaches this agreement gives the sub-licensees a strong incentive to make sure that the licensor will receive payment. Moreover, recommendation 24 does not affect the right of the licensor to: (a) agree with the licensee that part of the licensee's royalties (representing a source for the payment of the royalties the licensee owes to the licensor) be paid by sub-licensees to an account in the name of the licensor; or (b) obtain a security right in the licensee's right to the payment of royalties by sub-licensees, register a notice in that regard in the general security rights registry (or the relevant intellectual property registry) and thus obtain a security right with priority over the licensee's other creditors (subject to the recommendations of the *Guide* for obtaining third-party effectiveness and priority of security rights; see A/CN.9/WG.VI/WP.42/Add.4, paras. 41-46).

29. Under the law recommended in the *Guide*, a secured creditor with a security right in a receivable has the benefit of a security right in intellectual property securing payment of the receivable (see recommendation 25). However, this does not mean that legal limitations on the transferability of intellectual property rights are set aside (see recommendation 18). Similarly, this does not mean that contractual limitations to the transferability of intellectual property rights are affected, as recommendation 24 applies to assignment of receivables and not to transfers of intellectual property rights.

3. Rights of a licensee

30. Under an intellectual property licence agreement and the law governing it, a licensee may have the right to grant sub-licences and to receive as a sub-licensor the payment of any royalties flowing from a sub-licence agreement. The discussion above with respect to the rights of a licensor (see paras. 21-29 above) would apply equally to the rights of a licensee as a sub-licensor.

31. Typically, a licensee is authorized to use or exploit the licensed intellectual property in line with the terms and conditions of the licence agreement. Some laws relating to intellectual property provide that the licensee may not create a security right in its authorization to use or exploit the licensed intellectual property without the licensor's consent (although in many States an exception may arise where the licensee sells its business as a going concern). The reason is that it is important for the licensor to retain control over the licensed intellectual property and who can use it. If such control cannot be exercised, the value of the licensed intellectual property may be materially impaired or lost completely. If, however, the rights of a licensee under a licence agreement are transferable and the licensee grants a security right in them, the secured creditor will take a security right in the licensee's rights subject to the terms and conditions of the licence agreement. If the licence is transferable and the licensee transfers it, the transferee will take the licence subject to the terms and

conditions of the licence agreement. The law recommended in the *Guide* does not affect these licensing practices.

4. Tangible assets with respect to which intellectual property is used

32. Intellectual property may be used with respect to a tangible asset. For example: (a) a tangible asset may be manufactured according to a patented process or through the exercise of patented rights; (b) jeans may bear a trademark or cars may contain a chip which includes a copy of copyrighted software; (c) a compact disk may contain a software programme; or (d) a heat pump may contain a patented product.

33. Where intellectual property is used in connection with a tangible asset, two different types of asset are involved. One is the intellectual property; another is the tangible asset. These assets are separate. Law relating to intellectual property allows an intellectual property owner the ability to control many but not all uses of the tangible asset. For example, law relating to copyright allows an author to prevent unauthorized duplication of a book, but typically not to prevent an authorized bookstore that bought the book in an authorized sale to re-sell it or the end-buyer to make notes in the margin while reading. As such, a security right in a tangible asset does not extend to the intellectual property used with respect to a tangible asset, and a security right in intellectual property does not extend to the tangible asset with respect to which the intellectual property is used (see recommendation 243 below).

34. However, under the law recommended in the *Guide*, the parties to the security agreement may always agree that a security right is created both in a tangible asset and in intellectual property used with respect to that asset (see recommendation 10). For example, a security right may be taken in inventory of trademarked jeans and in the trademark giving the right to the secured creditor in the case of default of the grantor to sell both the encumbered trademarked jeans and the right to produce other jeans bearing the encumbered trademark. In such a case, where the manufacturer/grantor is the trademark owner, the encumbered assets are the owner's rights. Where the manufacturer/grantor is a licensee, the encumbered assets are the licensee's rights under a valid licence agreement.

35. The exact extent of the security right depends on the description of the encumbered asset in the security agreement. As already noted (see paras. 5-8 above), a description of the encumbered assets "in a manner that reasonably allows their identification" is sufficiently flexible to accommodate all different situations (see recommendation 14, subparagraph (d)), as it sets a standard that could vary depending on what is a reasonable description under the relevant law and practice. It would thus seem that a general description of the encumbered tangible asset would be in line with the principles of the *Guide* and the reasonable expectations of the parties. At the same time, key principles of law relating to intellectual property with respect to a specific description of intellectual property to be encumbered in a security agreement would be accommodated by the law recommended in the *Guide*. In any case, if under the law recommended in the *Guide*, a general description of the encumbered intellectual property would be sufficient, while under law relating to intellectual property a specific description would be necessary, the latter requirement would apply to encumbered intellectual property under recommendation 4, subparagraph (b) of the *Guide*.

36. As already mentioned (see para. 33 above), a security right in a tangible asset, with respect to which intellectual property is used, does not extend to the intellectual property, but it does encumber the tangible asset itself, including those characteristics of the asset that use the intellectual property (for example, the security right applies to a television set as a functioning television set). Thus, a security right in such an asset does not give the secured creditor the right to manufacture additional assets using the intellectual property. Upon default, however, the secured creditor with a security right in the tangible assets could exercise the remedies recognized under secured transactions law, provided that such exercise of remedies did not interfere with rights existing under law relating to intellectual property. It may be that, under applicable law relating to intellectual property, the “exhaustion doctrine” (or similar concepts) might apply to the enforcement of the security right (for a discussion of enforcement issues, see A/CN.9/WG.VI/WP.42/Add.5, paras. 24-27).

G. Security rights in future intellectual property

37. The law recommended in the *Guide* provides that a person may grant a security right in a future asset, namely an asset created or acquired by the grantor after the creation of a security right (see recommendation 17). Like any other rule recommended in the *Guide*, this rule too applies to intellectual property, except insofar as it is inconsistent with law relating to intellectual property (see recommendation 4, subparagraph (b)). Accordingly, under the law recommended in the *Guide*, a security right can be created in future intellectual property (as to legal limitations in that regard, see recommendation 18 and paras. 43-44 below). This approach is justified by the commercial utility in allowing a security right to extend to future intellectual property.

38. Many laws relating to intellectual property follow the same approach, allowing intellectual property owners to obtain financing useful in the development of new works, provided that their value can be reasonably estimated in advance. For example, it is usually possible to create a security right in a copyrighted motion picture or software (the security right is created when the copyrighted work is created; see A/CN.9/WG.VI/WP.42, para. 40, example 3). In some States, a security right may be created in a patent application before the patent right is granted (typically, after the patent right is granted, it is considered as having been created at the time of the application).

39. However, in certain cases, law relating to intellectual property may limit the transferability of various types of future intellectual property to achieve specific policy goals. For example, in some cases, a transfer of rights in new media or technological uses that are unknown at the time of the transfer may not be effective in view of the need to protect authors from undue commitments. In other cases, transfers of future rights may be subject to a statutory right of cancellation after a certain period. In other cases, the notion of “future intellectual property” may include registrable rights created but not yet registered. Statutory prohibitions may also take the form of a requirement for a specific description of intellectual property.

40. Other limitations on the use of future intellectual property as security for credit may be the result of the meaning of the concepts of “improvements”, “updates”, “adaptations” or other changes to intellectual property under law relating to intellectual property. Such “other changes” in relation to copyrighted content can be, for example, changes regarding the quality of the content or the form of its delivery, such as the re-mastering or the digital conversion of a sound recording or new forms of electronic delivery of a sound recording which might lead to new, yet to be invented forms of uses, whether dependent or independent of any physical carrier.

41. The secured creditor should understand how these concepts are interpreted under law relating to intellectual property and how they may affect the concept of “ownership”, which is essential in the creation of a security right in intellectual property. For example, this determination is of particular relevance in the case of copyrighted software. In some States a security right in a version of copyrighted software which exists at the time of the financing may extend automatically to modifications made to that version following the financing. However, typically law relating to intellectual property treat such future improvements as separate assets and not as integral parts of existing intellectual property. Thus, if future intellectual property rights may be encumbered, a prudent secured creditor that wishes to ensure that improvements are encumbered should describe the encumbered asset in the security agreement in a manner that ensures that improvements are directly encumbered (see A/CN.9/WG.VI/WP.42/Add.5, para. 20). If future intellectual property rights may not be encumbered, improvements may not be encumbered either and, the law recommended in the *Guide* does not affect any such limitations (see recommendation 18).

42. If law relating to intellectual property limits the transferability of future intellectual property, the law recommended in the *Guide* does not apply to this matter insofar as it is inconsistent with law relating to intellectual property (see recommendation 4, subparagraph (b)). Otherwise, the law recommended in the *Guide* applies and permits the creation of a security right in future assets (see recommendation 17). States enacting the law recommended in the *Guide* may wish to review their law relating to intellectual property with a view to establishing whether the benefits from these limitations (for example, the protection of the owner from undue commitments) outweigh the benefits from the use of such assets as security for credit (for example, the financing of research and development activities).

H. Legal or contractual limitations on the transferability of intellectual property

43. Specific rules of law relating to intellectual property may limit the ability of an intellectual property owner, licensor or licensee to create an effective security right in certain types of intellectual property. In many States, only the economic rights of an author are transferable; the moral rights are not transferable. In addition, legislation in many States provides that an author’s right to receive equitable remuneration may not be transferable. Moreover, in many States, trademarks are not transferable without their associated goodwill. Finally, as is the case with assets other than intellectual property, an asset may not be encumbered by a person if that

person does not have rights in the asset or the power to encumber it (see recommendation 13 and the *nemo dat* principle). The law recommended in the *Guide* respects all these limitations on the transferability of intellectual property (see recommendation 18).

44. The only limitations on the transferability of certain assets that the law recommended in the *Guide* may affect and remove are the legal limitations on the transferability of future receivables, receivables assigned in bulk and parts of or undivided interests in receivables, as well as to contractual limitations on the assignment of receivables arising for the sale or licence of intellectual property rights (see articles 8 and 9 of the United Nations Assignment Convention and recommendations 23-25). In addition, the law recommended in the *Guide* may affect and render ineffective contractual limitations, but only with respect to receivables (not intellectual property) and only in a certain context, that is, in an agreement between the creditor of a receivable and the debtor of that receivable (see paras. 26-29 above).

Recommendation 243¹

Security rights in tangible assets with respect to which intellectual property is used

The law should provide that, in the case of a tangible asset with respect to which intellectual property is used, unless otherwise agreed by the parties to a security agreement, a security right in the tangible asset does not extend to the intellectual property and a security right in the intellectual property does not extend to the tangible asset. However, to the extent permitted by law relating to intellectual property, this recommendation does not limit the enforcement remedies of a secured creditor with a security right in the tangible asset or in the intellectual property.

[Note to the Working Group: The Working Group may wish to consider whether the words “unless otherwise agreed by the parties to the security agreement”, included in the first sentence of this recommendation, should be retained. The Working Group may wish to note that recommendation 10 states that the law should provide that the grantor and the secured creditor may derogate by agreement from the provisions of the law relating to their respective rights and obligations, unless otherwise provided in the law. As a result, the reference to party autonomy in the first sentence of this recommendation may create doubt as to the application of the principle of party autonomy to other provisions of the law that do not include similar language and thus create problems of interpretation. The Working Group may also wish to consider whether the second sentence of this recommendation could be placed in the commentary as it addresses an issue discussed in the enforcement chapter (see A/CN.9/WG.VI/WP.42/Add.5, paras. 24-27).]

¹ If it could be included in the *Guide*, this recommendation would be included in chapter II on the creation of a security right as recommendation 28 bis.

A/CN.9/WG.VI/WP.42/Add.3 (Original: English)**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security
rights in intellectual property, submitted to the Working Group on
Security Interests at its seventeenth session****ADDENDUM****CONTENTS**

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**III. Effectiveness of a security right in intellectual property
against third parties**

[Note to the Working Group: For paras. 1-9, see A/CN.9/WG.VI/WP.39/Add.3, paras. 1-9, A/CN.9/685, paras. 36-38, A/CN.9/WG.VI/WP.37/Add.2, paras. 1-9, A/CN.9/670, paras. 56-61, A/CN.9/WG.VI/WP.35/Add.1, paras. 1-14, A/CN.9/667, paras. 55-63, A/CN.9/WG.VI/WP.33, paras. 137-145, and A/CN.9/649, paras. 29-31.]

A. The concept of third-party effectiveness

1. As already noted (see A/CN.9/WG.VI/WP.42/Add.2, paras. 1-3), the law recommended in the *Guide* distinguishes between the creation of a security right (effectiveness of the security right as between the parties) and its effectiveness against third parties. This distinction applies equally to security rights in intellectual property. However, to the extent that law relating to intellectual property makes no such distinction and this is an intellectual-property specific approach, the law recommended in the *Guide* would defer to that law (see recommendation 4, subparagraph (b)).

2. In addition, in some States, the creation and third-party effectiveness of security rights in intellectual property are governed by the same rules that apply to security rights in other types of intangible asset. In other States, however, law relating to intellectual property may provide for particular methods in which a security right in some types of intellectual property may be created and made effective against third parties. The rules often differ for rights in intellectual property that are subject to a specialized registration system (such as patents, trademarks and, in some States, copyrights), and rights in intellectual property that are not subject to such registration (such as trade secrets, industrial designs and, in some States, copyrights). These matters are addressed in sections B and C below.

3. In the law recommended in the *Guide*, the concept of “effectiveness against third parties” refers to whether a security right in an encumbered asset as a property right is effective against parties other than the grantor and the secured creditor that have at that time or may acquire in the future a security or other right in that encumbered asset. Such third parties (“competing claimants”) include creditors of the grantor, the insolvency representative in the insolvency of the grantor, as well as transferees, lessees and licensees of the encumbered asset (see A/CN.9/WG.VI/WP.42, paras. 11-12). In law relating to intellectual property, by contrast, the phrase “third-party effectiveness” is often used to refer to the effectiveness of exclusive rights associated with ownership or rights of a licensor or licensee in intellectual property, rather than to the effectiveness of a security right. These two sorts of references should not be confused. While effectiveness of a security right in intellectual property as against competing claimants is a matter of secured transactions law, effectiveness of exclusive rights associated with ownership rights or rights of a licensor or licensee against transferees of those rights is a matter of law relating to intellectual property. In this context, it should be noted that, for purposes of secured transactions law, infringers are not competing claimants. Thus, the law recommended in the *Guide* does not apply to a “conflict” between a secured creditor and a purported infringer. In addition, if, for example, the infringer asserts as a defence against a secured creditor that the infringer is a transferee or a licensee of the encumbered intellectual property, the matter is to be determined in accordance with the law relating to intellectual property. If the purported infringer is proven to be a transferee or licensee and there is a priority conflict with a security right, the law recommended in the *Guide* applies to that priority conflict (see A/CN.9/WG.VI/WP.42/Add.4, sections F, G and H).

B. Third-party effectiveness of security rights in intellectual property that are registered in an intellectual property registry

4. Under the law recommended in the *Guide*, security rights in intangible assets may be made effective against third parties by registration of a notice in the general security rights registry or of a document or notice in a specialized registry, if any. The law recommended in the *Guide* is based on the assumption that where a State maintains a specialized registry, it will permit registration of a notice of a security right as a method of achieving third-party effectiveness of the security right (see recommendations 34, subparagraph (a) (iii), and 38, subparagraph (a)) (see also paras. 12-14 below).

5. Registration in an intellectual property registry differs from State to State in many respects, including: (a) whether transfers, licences or also security rights may be registered; (b) whether rights in patents, trademarks, copyrights or other types of intellectual property may be registered; (c) whether a document, summary or notice need be registered; and (d) what are the legal consequences of registration. In some cases, the answers to all these questions are not easy to obtain even in one and the same legal system.

6. For example, under law relating to intellectual property, in some States, a security right is not created or made effective against third parties, unless and until a document or notice of it is registered in the relevant intellectual property registry. In other States, law relating to intellectual property provides that a security right is created and, at the same time, becomes effective against third parties when the security agreement is entered into between the parties, even without registration. In these cases, registration in the relevant intellectual property registry allows certain third parties (typically transferees that are not aware that the asset is encumbered; “good faith transferees”), to invoke a priority rule, according to which a registered security right takes precedence over an unregistered prior security right, but the unregistered security right still remains effective against other third parties. In still other States, a security right is created when the security agreement is entered into between the parties, but registration in the relevant intellectual property registry is necessary to make the security right effective against third parties, for example, by way of an evidentiary rule that prohibits evidence of unregistered security rights. In still other States, the registration system does not readily accommodate registration of documents or notices of security rights, and creation and third-party effectiveness of security rights must be achieved outside the intellectual property registration system. Finally, in some States that distinguish between creation and third-party effectiveness, it is possible to achieve third-party effectiveness of a security right by using either the intellectual property registry or an available general security rights registry. If any of these methods existing under law relating to intellectual property is intended to be the exclusive method of obtaining effectiveness of a security right against third parties, in accordance with recommendation 4, subparagraph (b), it takes precedence over any of the methods provided in the law recommended in the *Guide*.

7. The *Guide* recommends a general security rights registry and, where specialized registries exist that permit registration of a notice of a security right as a method of achieving third-party effectiveness of the security right, avoids undermining them by accepting registration in such registries as a method of

achieving third-party effectiveness of a security right and attributing priority results to such a registration (see recommendations 38, 77 and 78). As this matter is beyond the scope of secured transactions law and, in any case, would require additional effort and expense by States, the *Guide* does not recommend that States that currently do not have a specialized registry for certain types of intellectual property create such registries in order to permit the registration of a notice of a security right in intellectual property. For the same reason, the *Guide* does not recommend that States that currently do not permit the registration of a notice of a security right in an intellectual property registry amend their laws to permit such registrations. Finally, to avoid duplication of effort and expense, the *Guide* does not recommend a rule that requires registration of a notice of a security right in both the relevant intellectual property registry and in the general security rights registry. However, if States enacting the recommendations of the *Guide* have specialized intellectual property registries and wish to use them for registration of security rights in intellectual property, making use of the options offered in recommendation 38 of the *Guide*, they may wish to review their law relating to intellectual property and consider whether to permit the registration of notices of security rights with third-party effects in such already existing intellectual property registries. States that do not have specialized intellectual property registries or have such registries but do not wish to use them for registration of security rights in intellectual property, may always use the general security rights registry for registration of notices of security rights in all types of movable asset, including intellectual property.

C. Third-party effectiveness of security rights in intellectual property that are not registered in an intellectual property registry

8. As already mentioned (see para. 4 above), under the law recommended in the *Guide*, a security right in intellectual property may become effective against third parties by registration of a notice in the general security rights registry (see recommendation 32). This is possible even if the encumbered intellectual property rights may not be registered in an intellectual property registry (as is typically the case, for example, with copyrights, industrial designs or trade secrets). The same rule would apply in cases where a document or notice of a security right in intellectual property may be registered in an intellectual property registry but is not actually registered. In these cases, registration of a notice in the general security rights registry is sufficient and the legal consequence of registration is to make the security right effective against third parties (see recommendations 29, 32, 33 and 38). However, in the particular case where law relating to intellectual property provides that a security right in intellectual property may be made effective against third parties only by registration in an intellectual property registry, a security right cannot be made effective against third parties by registration in the general security rights registry (see recommendation 4, subparagraph (b)).

9. As also already mentioned (see paras. 5-6 above), there are different approaches in law relating to intellectual property to the question of registration of a document or notice of a security right in intellectual property. In some States (often those whose secured transactions law derives from non-possessory pledge concepts), either no rights at all may be registered in some types of intellectual

property or only outright transfers of intellectual property may be registered. This means that a security right in such intellectual property cannot be made effective against third parties by registration in an intellectual property registry. In other States (often those whose secured transactions law utilizes mortgage concepts), a security right is treated as another type of (outright or conditional) transfer and is, therefore, created and made effective against third parties to the same extent as any other transfer. Consequently, in those States, a document or notice of title-based security rights must often be registered in the relevant intellectual property registry in order for it to be created and made effective against third parties, but non-title-based security rights cannot be so registered. In some of those States, such registration has third-party effects. Finally, in a few States, there are additional requirements. These commonly include payment of a stamp duty or other transaction tax, or a requirement to give notice to an administrative body, such as a national authors association or collecting society. If States enacting the law recommended in the *Guide* wish to harmonize their secured transactions laws and their laws relating to intellectual property by: (a) replacing all existing security devices with an integrated notion of a security right, or, at least, subjecting title-based security rights to the same rules that are applicable to security rights (see A/CN.9/WG.VI/WP.42/Add.2, para. 4); and (b) permitting the registration of a notice of a security right in intellectual property in the relevant intellectual property registry (at least for intellectual property rights that may already be registered therein) as a method of achieving third-party effectiveness.

IV. The registry system

[*Note to the Working Group: For paras. 10-54, see A/CN.9/WG.VI/WP.39/Add.3, paras. 10-42, A/CN.9/WG.VI/WP.37/Add.2, paras. 10-42, A/CN.9/670, paras. 62-72, A/CN.9/WG.VI/WP.35, paras. 15-31, A/CN.9/667, paras. 64-85, A/CN.9/WG.VI/WP.33, paras. 149-161, and A/CN.9/649, paras. 32-40.*]

A. The general security rights registry

10. As already noted, the *Guide* recommends that States establish a general security rights registry (see recommendations 54-75). In general, the purpose of the registry system recommended in the *Guide* is to: (a) provide an efficient method for making a security right in existing or future assets effective against third parties; (b) establish an effective point of reference for priority rules based on the time of registration; and (c) provide an objective source of information for third parties dealing with a grantor's assets as to whether the assets may be encumbered by a security right (see purpose section of chapter IV on the registry of the law recommended in the *Guide*). Under this approach, registration is accomplished through registration of a notice of a security right, as opposed to registration of the security agreement or other document (see recommendation 54, subparagraph (b)). The notice need only provide basic information concerning the security right, that is: (a) the name or identifier of the grantor and the secured creditor or its representative; (b) a description of the encumbered asset; (c) the duration of registration; and (d) a statement of the maximum amount for which the security

right may be enforced, if so provided in a State enacting the law recommended in the *Guide* (see recommendation 57).

11. The law recommended in the *Guide* provides precise rules for identifying the grantor of the security right, whether an individual or a legal person. This matter is important because notices are indexed and can be retrieved by searchers according to the name or other identifier of the grantor (see recommendations 54, subparagraph (h), and 58-63). In addition, the law recommended in the *Guide* contains a number of rules to simplify the operation and use of the registry. For example, the law recommended in the *Guide* provides that, to the extent possible, the registry should be electronic and permit registration and searching by electronic means (see recommendation 54, subparagraph (j)). Moreover, the law recommended in the *Guide* provides that fees for registration and searching, if any, should be set at a level no higher than necessary to permit cost recovery (see recommendation 54, subparagraph (i)).

B. Asset-specific intellectual property registries

12. As already mentioned (see paras. 7-11 above), many States maintain registries for registering (or recording) transactions (such as transfers) relating to intellectual property. In some of those registries, security rights may also be initially filed (that is, an application for registration may be made) and then registered. For example, patent and trademark registries exist in most States, but not all provide for the registration of a document or notice of a security right. In addition, in some States, the registration of a notice (whether of a security right or some other right) does not produce third-party effects. Moreover, a number of States have similar registries for copyrights, but the practice is not universal.

13. While some States have notice-based intellectual property registries, a larger number of States use recording act structures or “document registration” systems. In those systems, it is necessary to record the entire instrument of transfer, or, in some cases, a memorandum describing the essential terms of the transfer. A more modern approach is to simplify the registration process by registering a limited amount of information (such as the names of the parties and a general description of the encumbered assets). For example, the registration requirements for trademarks are simplified by the Trademark Law Treaty (1994), the Singapore Treaty on the Law of Trademarks, as well as by the Madrid Agreement (1891), the Madrid Protocol (1989) and the model international registration forms attached to both treaties. Similarly, the Patent Law Treaty (Geneva, 2000) and the Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community Trademark simplify registration requirements. The reason for requiring registration of the transaction document or a memorandum stating the essential terms of the transaction is the need for transparency. Thus, it is essential for a transfer instrument or memorandum to identify the specific right being transferred in order to give effective notice to searchers and to allow efficient utilization of assets. In addition, the intellectual property registries sometimes index registrations by the specific intellectual property, and not by the grantor’s identifier. This is because the central focus is on the intellectual property itself, which may have multiple co-owners or co-authors and may be subject to multiple changes in ownership as transfers are made.

14. In addition to national registries, there are a number of international intellectual property registries and registration in these registries is subject to relatively modern treaties or other international legislative texts that simplify the registration process. For example, under the Community Trademark regulation, a statement may be registered referring not only to ownership but also to security rights with third-party effects. Another example is the treaty on the International Registration of Audiovisual Works (the “Film Register Treaty”), adopted at Geneva on 18 April 1989, under the auspices of WIPO. The Film Register Treaty creates an international registry, which permits the registration of statements concerning audiovisual works and rights in such works, including, in particular, rights relating to their exploitation (the records of the diplomatic conference indicate statements concerning security rights were also contemplated). The Film Register Treaty provides an evidentiary presumption of validity for registered statements. This international registry allows two types of application. A work-related application identifies an existing or future work at least by title or titles. A person-related application identifies one or more existing or future works by the natural person or legal entity that makes or owns, or is expected to make or own, the work or works. The international registry maintains an electronic database that allows cross-indexing between the different types of registrations. There is also a procedure to request removal of contradictory filings.

C. Coordination of registries

15. As already mentioned (see paras. 4 and 5 above), the *Guide* neither recommends the creation of a specialized registration system (for intellectual property or for other assets), if one does not exist, nor interferes with existing specialized registration systems. However, where, under law relating to intellectual property, a document or notice of a security right in intellectual property may be registered in an intellectual property registry and, at the same time, under the law recommended in the *Guide*, that security right may also be registered in the general security rights registry, there is a need to address the issue of coordination between these two registries. In order to avoid interfering with law relating to intellectual property, the law recommended in the *Guide* addresses it through the general deference to law relating to intellectual property (see recommendation 4, subparagraph (b)) and appropriate priority rules.

16. Thus, the law recommended in the *Guide* does not address or purport to address the question whether a security right in intellectual property may be registered in an intellectual property registry, the requirements for such registration (for example, document or notice registration) or its legal consequences (for example, effectiveness or presumption of effectiveness against all parties or only against third parties). Even if an intellectual property registry does not provide for the registration of security rights, provides for the registration of a document rather than a notice thereof or, having provided for such registration, does not give registration third-party effects, the *Guide* provides no recommendation to the contrary and takes the specialized registration system, if any, as is.

17. However, the *Guide* does make recommendations concerning the registration of a notice of a security right in intellectual property in the general security rights registry. For this reason, to the extent that law relating to intellectual property

addresses the effects of registration of security rights in an intellectual property registry in a way that would be inconsistent with the third-party effects given to such registration by the law recommended in the *Guide* (see recommendation 38), the law recommended in the *Guide* defers to that law (recommendation 4, subparagraph (b)). By contrast, if law relating to intellectual property does not address these issues and there is no overlap or conflict with law relating to intellectual property, then the issue of deference to law relating to intellectual property will not arise and thus the law recommended in the *Guide* will apply giving such specialized registration third-party effects.

18. In addition, the *Guide* addresses the issue of coordination between a specialized registry (including an intellectual property registry) and the general security rights registry recommended in the *Guide* through appropriate priority rules. Thus, in order to preserve the reliability of intellectual property (and other specialized) registries (in particular, in cases where law relating to intellectual property provides no rule for determining priority), the law recommended in the *Guide* provides that a security right in intellectual property, a document or notice of which is registered in the relevant intellectual property registry (see para. 4 above), has priority over a security right in the same intellectual property, a notice of which is registered in the general security rights registry (see recommendation 77, subparagraph (a)). For the same reason, the law recommended in the *Guide* provides that a transferee of intellectual property acquires it, in principle, free of a previously created security right in that property, unless a document or notice of the security right is registered in the intellectual property registry (see recommendations 78 and 79). Under recommendation 4, subparagraph (b), this rule would apply only if it was not inconsistent with a rule of law relating to intellectual property (see A/CN.9/WG.VI/WP.42/Add.4, paras. 12-15).

19. If States enacting the recommendation of the *Guide* have specialized intellectual property registries and wish to use them for registration of security rights in intellectual property, making use of the options offered in recommendation 38 of the *Guide*, they may wish to consider ways aimed at coordinating their existing intellectual property registries with the general security rights registry recommended in the *Guide*. For example, States may wish to consider permitting the registration of a notice of a security right in intellectual property in an intellectual property registry with third-party effects. In addition, States may wish to consider whether asset-based intellectual property registries should also have a debtor-based index (and vice versa). Moreover, States may wish to consider requiring the transmission of a notice about a registration in an intellectual property registry to the general security rights registry (or vice versa). Of course, coordination of registries in this way would be easier, simpler, quicker and less expensive in an electronic registration system rather than in a paper-based registration system.

20. An alternative to a system permitting the forwarding of notices from one registry to the other might be a system implementing a common gateway to both the general security rights registry and to various specialized registries. Such a common gateway would enable registrants to enter the notice simultaneously in both registries. Several steps would have to be taken in order to ensure the efficiency and effectiveness of a common gateway, including that a simple notice should be enough, the notice should include the identifiers of both the grantor and the secured

creditor (or its representative) and an asset-specific description of the encumbered assets, searches in both registries should be possible with a single request and both grantor-based and asset-based indices should be maintained with cross references in each registry to the other registry (see chapter III of the *Guide* on the effectiveness of a security right against third parties, paras. 80-82).

D. Registration of notices about security rights in future intellectual property

21. An essential feature of the general security rights registry recommended in the *Guide* is that a notice of a security right can refer to future assets of the grantor. This means that the security right can cover assets to be later produced or acquired by the grantor (see recommendation 17) and the notice may cover assets described in a manner that reasonably allows their identification (see recommendation 63 and A/CN.9/WG.VI/WP.42/Add.2, paras. 5-8 and 37-42). Thus, if the encumbered assets are described in the security agreement as all existing and future inventory, the notice may also describe the inventory in the same manner. Since priority is determined by date of registration, the priority of the security rights extends to future inventory. This approach greatly facilitates revolving credit arrangements, since a lender extending new credit under such a facility knows that it can maintain its priority position in new assets that are included in the borrowing base.

22. Existing intellectual property registries, however, in many States, do not readily accommodate registration of rights in future intellectual property. As transfers of or security rights in intellectual property are indexed against each specific intellectual property right, they can only be effectively registered after the intellectual property is first registered in the intellectual property registry. This means that a blanket registration of a security right in future intellectual property in an intellectual property registry would not be effective and a new registration of the security right would be required each time new intellectual property is acquired.

23. If, under law relating to intellectual property, intellectual property may not be acquired, transferred or encumbered before it is actually registered in an intellectual property registry, the law recommended in the *Guide* does not interfere with that prohibition and does not make the grant of a security right in such future intellectual property possible. However, if the creation of a security right in future intellectual property is not prohibited under law relating to intellectual property (as is the case, for example, with a patent or trademark while the application for its registration in the patent or trademark registry is pending), a security right in such an asset could be created and made effective against third parties under the law recommended in the *Guide*. States enacting the recommendations of the *Guide* may wish to consider reviewing their law relating to intellectual property to determine whether a notice of a security right may refer to future intellectual property.

E. Dual registration or search

24. As already mentioned, the law recommended in the *Guide* gives priority, as a matter of secured transactions law, to rights with respect to which a registration is made in an intellectual property registry and defers to any rules of law relating to

intellectual property governing the registry with respect to the details of registration of a document or notice of a security right (see paras. 4, 17 and 18 above). As also noted above, this means that the law recommended in the *Guide* often obviates the need for dual registration or search. In particular, registration only in the general security rights registry would seem to be necessary and useful for secured transactions purposes: (a) where the encumbered asset is a type of intellectual property with respect to which no registration system exists under law relating to intellectual property (for example, copyrights or trade secrets in many States); (b) where the encumbered asset is a type of intellectual property with respect to which ownership rights may be registered in an intellectual property registry, but not a document or notice of security right; and (c) where a notice of security right in intellectual property may be registered in an intellectual property registry, but such registration has effects that are inconsistent with third-party effects. On the other hand, registration in the relevant intellectual property registry may be preferable, for example: (a) where the encumbered asset is a type of asset for which a registration system exists and allows registration of documents or notices of security rights (for example, patents or trademarks in many States); or (b) where the secured creditor needs to ensure priority over other secured creditors or transferees under the relevant law relating to intellectual property.

25. Before credit is extended or committed pursuant to a security agreement, a secured creditor exercising normal due diligence will typically conduct a search to determine whether there are prior competing claimants that have priority over the proposed security right. As a first step, the secured creditor will search the chain of title to identify prior transfers and to determine whether the grantor actually has rights in the intellectual property or other movable assets to be encumbered so that the security right can become effective in the first instance. For types of intellectual property as to which ownership transfers must be recorded in a specialized registry in order to be effective against third parties, this chain of title search will be easier than for types of encumbered assets for which no such registry exists (the general security rights registry does not record title). As a next step, the secured creditor will search to determine whether each prior party in the chain of title has granted a security right which might have priority over the proposed security right. If there are no such security rights, a secured creditor will be able to reliably extend or commit credit on the basis of that intellectual property so long as it takes the steps necessary under the law recommended in the *Guide* to assure third-party effectiveness. Finally, in cases where a secured creditor registered a notice or document of its security right in the relevant intellectual property registry, the secured creditor has a right to rely on that registration and on the priority attributed to that registration under the law recommended in the *Guide*. In such cases, a potential third-party creditor may need to search only in the relevant intellectual property registry. In other cases, such a third-party creditor may need to search in both the relevant intellectual property registry (for ownership transfers) and in the general security rights registry (for security rights that may not be registered in the relevant intellectual property registry).

26. Under the law recommended in the *Guide*, it is envisaged that the general security rights registry will be electronic and will accept registration of notices of possible security rights with third-party effects at a nominal cost (based on cost recovery), if any, for registration and searching (see recommendation 54, subparagraph (i)). This means that, in States that enact the recommendations of the

Guide, registration and searching in the general security rights registry is likely to be simple, quick and inexpensive. However, under law relating to intellectual property, registries may not necessarily be fully electronic (although an increasing number of intellectual property registries allow online searching for a small fee or for free). In addition, the document of a transaction or a summary thereof may need to be registered (instead of a notice). Moreover, the document registered may have to be checked by the registry staff at least to the extent that the legal consequence of registration may be conclusive or presumptive evidence of the existence of a right in intellectual property.

27. Thus, while the relevant fees vary widely from State to State, the cost of registration of a document of a security right in an intellectual property registry may reasonably be assumed to be higher than the cost of registration of a notice of a security right in the general security rights registry. As to the cost and time of searching, searching in a document registry (whether electronic or not) may be more time-consuming and costly than searching in an electronic notice-based general security rights registry. These differences, of course, will be minimized to the extent that an intellectual property registry permits the online registration of a notice of a security right, for a nominal fee, with third-party effects and is organized in a way that also permits searching in a time- and cost-efficient way. At the same time though, registration in the relevant intellectual property registry would provide more information (for example, because of the specific description of the encumbered assets and the information about transfers) and probably more certain information (for example, because registration may constitute or provide firm evidence as to the existence of a right).

28. The differences in cost of registration and searching may be illustrated by the following examples. For convenience, the examples assume that only the law of a single State applies, that the State has enacted the law recommended in the *Guide* and that (where applicable) the State also has an intellectual property registry that accepts registration of security rights in intellectual property.

29. A grantor that is the initial owner of a single intellectual property right creates a security right in that intellectual property right. Whether registration is made in the general security rights registry or in the relevant intellectual property registry, the secured creditor needs to register only one notice in order for the security right to be effective against third parties (unless the secured creditor prefers to register in the relevant intellectual property registry, if any, because of the priority rules recommended in the *Guide*). A searcher that wants to extend credit on the basis of the encumbered intellectual property right will mainly need to search in the relevant intellectual property registry as by registering in that registry the searcher's security right would gain priority even over a security right, a notice of which was registered earlier in the general security rights registry. It should be noted, however, that the intellectual property registration system may require registration of a document and the registrar may have to check the document to ensure that it can be registered. These characteristics may affect the time- and cost-efficiency of the registration process. While the notice-based registration system of the general security rights registry gives less information about the specifics of a transaction and thus has the advantage of providing greater confidentiality and simplicity than the document-based registration system of the intellectual property registry, it has the

disadvantage that it may not provide a searcher as much information as a document-based registration system.

30. A grantor that is the initial owner of ten intellectual property rights creates a security right in all ten intellectual property rights. If there is no specialized registry in which security rights in intellectual property rights may be registered, then registration has to be made in the general security rights registry. In such a case, the secured creditor needs to register only one notice, listing the grantor's name and indicating the intellectual property rights as encumbered assets. As the grantor is assumed to be the initial owner, a secured creditor need only be concerned about competing transfers made only by the grantor and not by any prior party in the chain of title. Thus, a searcher needs to conduct only one search in the general security rights registry against the name of the grantor to find competing security rights.

31. However, a searcher will also need to conduct ten searches against each intellectual property right in the intellectual property registry to determine if there are other competing claimants such as outright transferees. If there is a specialized registry in which security rights in the intellectual property may be registered and the secured creditor, cognizant of the priority advantages of registration in such a registry, decides to search that registry and register its security right there, the secured creditor may need to register a document or notice for each intellectual property right separately, although in some cases it may be possible to register a single document that identifies some or all of the encumbered intellectual property (for example, if all the intellectual property rights are patents). In such a case, a searcher needs to conduct a search in the intellectual property registry against each of the ten intellectual property rights to find both prior security rights and other competing claimants.

32. In summary, in this example, a secured creditor need only register one notice in the general security rights registry but may need to make up to ten separate registrations in the intellectual property registry. A searcher needs to make: (a) one search in the general security rights registry to find competing security rights plus ten searches to find other competing claimants for each intellectual property right; or (b) ten searches to find competing security rights and other competing claimants in the specialized intellectual property registry.

33. In the example mentioned above, if the grantor is not the initial owner but a transferee in a chain of transferees and each of the ten intellectual property rights has ten prior owners, registration in the general security rights registry may still be more efficient than registration in an intellectual property registry. A secured creditor would only need to register one notice in the general security rights registry against the grantor, but up to ten notices in any relevant intellectual property registry against each of the ten intellectual property rights. However, with respect to searching, if a security right remains effective against transferees without the need for an amendment notice to be registered in the general security rights registry (see paras. 45-48 and recommendation 244 below), then a searcher would have to conduct ten searches outside the security rights registry to identify the prior owners of each intellectual property right and then conduct a search of each prior owner in the general security rights registry to discover whether there are prior competing security rights, that is one hundred searches (10 prior owners x 10 intellectual property rights) in the general security rights registry to identify all prior security rights. However, if a security right is registered in an intellectual property registry,

if any, the secured creditor need only conduct ten searches, that is, one for each intellectual property right, since the search in the intellectual property registry will disclose both prior competing security rights and other competing claimants. Thus, as to searching with respect to intellectual property rights that have had many previous owners, it would seem that searching in the intellectual property registry, if any, would be more time- and cost-efficient.

34. In summary, in cases where there are multiple intellectual property rights with multiple prior transferees in the chain of title: (a) if there is no specialized intellectual property registry and the law does not require registration of an amendment notice in the general security rights registry for the registration to remain effective against a transferee, then the secured creditor need only register one notice in the general security rights registry, but needs to conduct a search in any relevant intellectual property registry for each intellectual property right to find other prior transferees and then must also search against each of these prior transferees in the general security rights registry to find prior competing security rights; and (b) if there is an intellectual property registry in which notices of security rights may be registered, a secured creditor may need to register a notice for each intellectual property right individually (unless in some cases one document can apply to multiple intellectual property rights), but need to only search in the intellectual property registry to find all prior competing security rights and transferees.

35. These examples indicate that, while the general security rights registry in the *Guide* may better accommodate intellectual property financing in some contexts, this may not always be the case and would depend on the circumstances of each case (see also section G below). They also indicate that, in view of the priority of a security right registered in an intellectual property registry and the need for the secured creditor to establish that the grantor has rights in the intellectual property to be encumbered, registration and search may need to take place in the intellectual property registry in most cases (of course, where registration of a security right in an intellectual property registry is possible).

36. The law applicable to third-party effectiveness and priority will also have an impact on the time- and cost-efficiency of registration. If the law applicable to these matters is the law of the State in which the encumbered intellectual property is protected, in the case of a portfolio of intellectual property rights, registration and searching will involve several States. The result would be different if third-party effectiveness and priority were to be governed by the law of the State in which the grantor is located (unless, of course, the grantor moves to another country or the encumbered intellectual property right is transferred from a person in one country to a person in another country, in which the law of more than one State will be involved; see recommendations 45, 219 and 220). However, in any case, the main cause of the difference would be the applicable law and not the type of registration. Therefore, this matter is discussed in chapter X on the law applicable to a security right in intellectual property.

F. Time of effectiveness of registration

37. Under the law recommended in the *Guide*, registration of a notice of a security right becomes effective against third parties when the information in the notice is entered into the registry records and becomes available to searchers (see recommendation 70). Where the registry is electronic, registration of a notice will become effective immediately upon registration. However, where the registry is paper-based, registration of a notice will become effective some time after registration.

38. Under law relating to intellectual property, specialized registration systems may have different rules with respect to the time of effectiveness of registration of a security right. For example, under law relating to patents and trademarks in many States, third-party effectiveness of a registered security or other right in a patent or a trademark dates back to the date of filing (that is, submission to the registry of an application for registration). Such an approach is useful where the registry takes time to actually register the security right in the patent or trademark, but may mislead a searcher as to whether specific intellectual property is encumbered.

39. As already mentioned (see paras. 17-18 above), the law recommended in the *Guide* deals with coordination issues by giving priority to a security right a document or notice of which is registered in a specialized registry (or with respect to which a notation is made on a title certificate) irrespective of the time of registration (see recommendations 77 and 78). Thus, the difference in the approach as to the time of effectiveness of registration may not cause any problems in determining the priority of a security right in intellectual property registered in the relevant intellectual property registry.

G. Impact of a transfer of encumbered intellectual property on the effectiveness of registration

40. The *Guide* recommends that the secured transactions law should address the impact of a transfer of an encumbered asset on the effectiveness of registration of a notice in the general security rights registry (see recommendation 62). This recommendation is equally applicable to security rights in intellectual property made effective against third parties by registration of a notice in the general security rights registry. However, this recommendation does not apply if:

(a) The transferee of an encumbered asset acquires it free of the security right, as is the case, for example, where the transfer is authorized by the secured creditor free of the security right (see recommendation 80);

(b) A document or notice of the security right has been registered in an intellectual property (or other specialized) registry;

(c) The grantor has transferred all its rights in the encumbered asset before granting a security right in that asset (in such situations, under the *Guide*, no security right is created; see recommendation 13); and

(d) There is no transfer of ownership, but only a licence in intellectual property.

41. With respect to subparagraph (a) in the preceding paragraph, it should be noted that, if the secured creditor did not authorize a licence (that is, if the licensee did not acquire the asset free of the security right) and enforced its security right, enforcement would amount to termination of the licence and any sub-licence, which would make all the “licensees” infringers upon completion of enforcement of the security right. With respect to subparagraph (d), it should be noted that recommendation 62 might apply to a licence, if, under law relating to intellectual property, it is treated as a transfer of ownership (while under the *Guide*, a licence is not a transfer, the exact meaning of the term “licence”, including the question whether an exclusive licence is to be treated as a transfer is a matter of law relating to intellectual property; see A/CN.9/WG.VI/WP.42, paras. 23-25, and A/CN.9/WG.VI/WP.42/Add.4, para. 15).

42. The commentary discusses three ways in which an enacting State may wish to address the matter. One way is to provide that, where the encumbered asset is transferred and the transferee does not acquire it free of the security right, the secured creditor must register an amendment notice identifying the transferee within a certain specified period after the transfer. If the secured creditor fails to do so, the original registration continues to be effective in principle. However, the security right is subordinated to intervening secured creditors and transferees whose rights arise after the transfer of the encumbered asset and before the amendment notice is registered. A second way in which enacting States may wish to address this issue is to provide that the grace period for the registration of an amendment notice is triggered only once the secured creditor acquires actual knowledge of the transfer of the encumbered asset by the grantor. A third way might be to provide that a transfer of an encumbered asset has no impact on the effectiveness of registration of a security right.

43. If an enacting State adopts the third approach, a secured creditor of the transferor need not register a notice of its security right again identifying the transferee. In such a case, the original registration of a notice of security right in the asset now owned by the transferee would remain effective. However, transferees down in the chain of transferees might not readily be able to discover, through a search in the general security rights registry, a security right granted by any person other than their immediate transferor. In such cases, they would still have to search the chain of title and status of an encumbered asset outside the general security rights registry. On the other hand, if an enacting State adopts the first or the second approach discussed above, a secured creditor will have to register an amendment notice identifying the transferee. In such a case, the secured creditor will have the burden of monitoring the status of the encumbered asset (to a different degree, depending on whether the first or the second approach is followed). At the same time, however, transferees down the chain of title will readily be able to identify a security right granted by a person other than their immediate transferor.

44. States enacting the law recommended in the *Guide* will have to consider the relative advantages and disadvantages of these different approaches mentioned above and, in particular, their impact on rights in intellectual property. For example, under the first approach, a secured creditor extending credit against the entire copyright in a movie would need to make continuous registrations against tiers of licensees and sub-licensees (if the applicable law relating to copyrights treated such an exclusive licence as a transfer that may be registered) to maintain its priority

against them or their own secured creditors. This would be a significant burden on such lenders and might discourage credit against such assets. On the other hand, such an approach would make it easier for a lender to a sub-licensee to find a security right created by its sub-licensor by a simple search only against the identifier of the sub-licensor. Here, the trade-off is between the relative costs of monitoring and multiple registrations by the lender to the “upstream” party as against the costs of conducting a search of the entire chain of title for security rights created by the “downstream” party. In this regard, it should be noted that typically under law relating to intellectual property a prior transfer retains its priority over later transfers without the need for an additional registration in the name of a transferee of an encumbered asset.

45. As already mentioned, if a State does not follow the third option, a secured creditor would have to register an amendment notice in the general security rights registry each time the encumbered intellectual property became the subject of an unauthorized transfer, licence or sub-licence (if licences are treated as transfers under the relevant law relating to intellectual property), at the risk of losing its priority if it were not informed and had not acted promptly. The following examples may highlight the need for such an approach (see recommendation 244 below).

46. If a grantor of a security right in an intellectual property right is not the initial owner but a transferee with ten prior transferees and if a secured creditor need not register an amendment notice in the name of each transferee of the encumbered intellectual property right, the secured creditor need only register one notice in a general security rights registry. However, a searcher would have to conduct ten searches outside the security rights registry to identify each owner and then search the general security rights registry for each of the ten prior owners to determine if there are any prior security rights granted by any owner.

47. If, however, the law requires a new notice each time the encumbered intellectual property is transferred, the secured creditor must register one notice against its grantor and one for each of the ten prior owners. This may require that the secured creditor make a substantial effort to monitor not only the actions of its grantor, but also transferees (and licensees, if a licence is treated as a transfer).

48. These examples indicate that, if the law requires the secured creditor to register an amendment notice each time the encumbered intellectual property is transferred or licensed, intellectual property financing would be discouraged or become more expensive.

H. Registration of security rights in trademarks

49. The International Trademark Association (“INTA”) issued a series of recommendations with respect to the registration of security rights in trademarks and service marks (collectively referred to as “marks”).¹ More specifically, INTA endorsed uniformity and best practice in registration mechanisms and methods regarding security rights in trademarks, recognizing that: intellectual property rights, including marks, are a major and growing factor in commercial lending transactions; lack of consistency in the registration of security rights in marks

¹ See www.inta.org/index.php?option=com_content&task=view&id=1517&Itemid.

fosters commercial uncertainty, and also poses a risk that a mark owner may forfeit or otherwise endanger its mark-related rights; many States have no recording mechanisms (or have insufficient mechanisms) for the registration of security rights in marks; many countries apply different and conflicting criteria for determining what can and will be recorded; and international initiatives on security rights in intellectual property rights by organizations such as UNCITRAL will have broad implications for the way secured financing laws are implemented to deal with registration and other aspects of trademark security rights, especially in developing countries. It should be noted that the recommendations do not address issues relating to the registration of security rights in marks that may not be registered in a trademark office, leaving those issues to domestic secured transactions law (including the law recommended in the *Guide*). In addition, the recommendations address third-party effectiveness issues but do not set out priority rules, leaving them to domestic secured transactions law (including the law recommended in the *Guide*).

50. The main features of such best practices are the following:

(a) A security right in a mark covered by a pending application or registration should be registrable in the national Trademark Office;

(b) For purposes of giving notice of a security right, registration in the applicable national Trademark Office or in any applicable commercial registry is recommended, with free public accessibility, preferably through electronic means;

(c) The grant of a security right in a mark should not have the effect of a transfer of legal or equitable title to the mark that is subject to the security right, and should not confer upon the secured creditor a right to use the mark;

(d) The security agreement creating the security right should clearly set forth provisions acceptable under local law enabling the renewal of the marks by the secured creditor, if necessary to preserve the mark registration;

(e) Valuation of marks for purposes of security rights should be made in any manner that is appropriate and permitted under local law and no particular system or method of valuation is preferred or recommended;

(f) Registration of security rights in the local Trademark Office should suffice for purposes of perfecting a security right in a mark; at the same time, registration of a security right in any other place allowed under local law, such as a commercial registry, should also suffice;

(g) If local law requires that a security right be registered in a place other than the local Trademark Office in order to be perfected, such as in a commercial registry, dual registration of the security right should not be prohibited;

(h) Formalities in connection with registration of a security right and the amount of any government fees should be kept to a minimum; a document evidencing: (i) existence of a security right, (ii) the parties involved, (iii) the mark(s) involved by application and/or registration number, (iv) a brief description of the nature of the security right, and (v) the effective date of the security right, should suffice for purposes of making a security right effective against third parties;

(i) Regardless of the procedure, enforcement of a security right through foreclosure, after a judgement, administrative decision or other triggering event, should not be an unduly burdensome process;

(j) The applicable Trademark Office should promptly record the entry of any judgement or adverse administrative or other decision against its records and take whatever administrative action is necessary; the filing of a certified copy of the judgement or decision should be sufficient;

(k) In the event that enforcement is triggered by means other than a judgement or administrative decision, local law should provide for a simple mechanism enabling the holder of the security right to achieve registration, with free public accessibility, preferably through electronic means;

(l) In cases where the mark owner is bankrupt or otherwise unable to maintain the marks which are subject to a security right, absent specific contract provisions, the holder of the security right (or the administrator or executor, as the case may be) should be permitted to maintain the marks, provided that nothing shall confer upon the secured creditor the right to use the marks; and

(m) The relevant government agency or office should promptly record the filing of documentation reflecting release of the security right in its records, with free public accessibility, preferably through electronic means.

51. Recommendations (a), (b), (f) and (g), dealing with third-party effectiveness of a security right in a mark, are compatible with the law recommended in the *Guide* in that they promote the objectives of certainty and transparency (see recommendation 1, subparagraph (f)).

52. Recommendation (c), providing that the creation of a security right in a mark does not result in a transfer of the mark or confer upon the secured creditor the right to use the mark, is also compatible with the law recommended in the *Guide*. It should be noted that, under the law recommended in the *Guide*, the secured creditor has a right, but no obligation, to preserve an encumbered intangible asset (such an obligation is foreseen only for tangible assets; see recommendation 111). If, in the case of the owner's insolvency, neither the owner nor the insolvency representative nor the secured creditor takes the necessary steps to preserve the encumbered mark, the mark may still be preserved under law relating to intellectual property (for example, under the doctrine of the "excusable non-use" of a mark).

53. In addition, recommendation (d) is compatible with the law recommended in the *Guide* in that it sets forth a default rule for the rights of the parties within the limits of the applicable law. Recommendation (e) is also compatible with the law recommended in the *Guide* to the extent it emphasizes the importance of valuation of marks without suggesting any particular system of valuation. Recommendation (h) is also compatible with the law recommended in the *Guide* in that it recommends notice filing even in relation to mark registries. It should be noted that the reference to "the date of the security right" is a reference to the time of effectiveness of the security right between the parties and not against third parties.

54. Moreover, recommendations (i), (j) and (k) are compatible with the law recommended in the *Guide* in the sense that they provide for efficient enforcement mechanisms and registration of court judgements or administrative enforcement

decisions. Finally, recommendation (m), which is subject to approval by the appropriate Government authorities, is compatible with the law recommended in the *Guide* with respect to efficient registration procedures.

Recommendation 244²

Impact of a transfer of encumbered intellectual property on the effectiveness of registration

The law should provide that the transfer of intellectual property that is subject to a security right does not affect the effectiveness of the registration of the security right. As a result, the secured creditor does not have to register an amendment notice indicating the name of the transferee of the encumbered intellectual property.

[Note to the Working Group: The Working Group may wish to consider whether the second sentence of recommendation 244 should be moved to the commentary as it deals with the result of the application of this recommendation.]

² If it could be included in the *Guide*, this recommendation would be included in chapter IV on the registry system as recommendation 62 bis.

A/CN.9/WG.VI/WP.42/Add.4 (Original: English)

**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security
rights in intellectual property, submitted to the Working Group on
Security Interests at its seventeenth session**

ADDENDUM

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V. Priority of a security right in intellectual property

[Note to the Working Group: For paras. 1-49 below, see A/CN.9/WG.VI/WP.39/Add.4, paras. 1-15, A/CN.9/WG.VI/WP.42/Add.5, paras. 1-12, A/CN.9/685, paras. 47-72, A/CN.9/WG.VI/WP.37/Add.2, paras. 43-55, A/CN.9/WG.VI/WP.37/Add.3, paras. 1-23, A/CN.9/670, paras. 73-95, A/CN.9/WG.VI/WP.35/Add.1, paras. 33-61, A/CN.9/667, paras. 86-103, A/CN.9/WG.VI/WP.33/Add.1, paras. 1-25, and A/CN.9/649, paras. 41-56.]

A. The concept of priority

1. As used in the *Guide*, the concept of priority of a security right as against competing claimants refers to the question of whether the secured creditor may derive the economic benefit of its security right in an encumbered asset in preference to a competing claimant (see the term “priority”, Introduction to the *Guide*, section B on terminology and interpretation; see also the term “competing claimant”, Introduction to the draft Supplement, section C on terminology, A/CN.9/WG.VI/WP.42, paras. 22-23, as well as paras. 3-5 below). It should also be noted that a conflict between two persons, neither of whom is a secured creditor, is not a priority conflict under the law recommended in the *Guide*.

2. By contrast, in law relating to intellectual property, the notion of the priority of intellectual property rights may relate to notions of exclusive rights, in particular in the case of patents and trademarks. In most States, once intellectual property is transferred by the intellectual property owner, a second transfer by the same person will normally transfer no rights to the second transferee (except if the first transferee does not comply with statutory registration requirements or the second transferee is a good faith purchaser; for the relevance of knowledge of prior transfers, see paras. 5-6 below). Similarly, if both the first and the second transferee create a security right in their intellectual property rights, there may be no priority conflict under the law recommended in the *Guide* to the extent the second transferee did not have any intellectual property rights to create a security right in. In such a case, the issue of priority in the sense that this term is used in the *Guide* does not arise. Accordingly, the law recommended in the *Guide* would not apply and this matter would be left to law relating to intellectual property, which would typically resolve them by reference to the *nemo dat* principle and principles about good faith acquisition of assets. In any case, it should be noted that, under the law recommended in the *Guide*, a party that has no rights in, or the power to encumber, an asset may not create a security right in the asset (see recommendation 13).

B. Identification of competing claimants

3. The *Guide* uses the term “competing claimant” to refer to another secured creditor with a security right in the same asset (which includes a transferee in a transfer by way of security), an outright transferee, lessee or licensee of the encumbered asset, a judgement creditor with a right in the encumbered asset and an insolvency representative in the insolvency of the grantor (see the term “competing claimant”, Introduction to the draft Supplement, section C on terminology, A/CN.9/WG.VI/WP.42, paras. 22-23). In particular, the law recommended in the *Guide* applies to priority conflicts: (a) between two security rights, notices of which are registered in the general security rights registry (see recommendation 76, subparagraph (a)); (b) between a security right, a notice of which is registered in the general security rights registry, and a security right, a document or notice of which is registered in the relevant intellectual property registry (see recommendation 77, subparagraph (a)); (c) between two security rights, documents or notices of which are registered in the relevant intellectual property registry (see recommendation 77, subparagraph (b)); (d) between the rights of a transferee or licensee of intellectual property and a security right in that intellectual property, a notice or document of

which may be registered in an intellectual property registry (see recommendation 78); (e) between the rights of a transferee or licensee of intellectual property and a security right in that intellectual property, a notice or document of which may not be registered in an intellectual property registry (see recommendations 79-81); and (f) between two security rights, one of which is granted by the grantor and the other is granted by the transferee, lessee or licensee of the encumbered asset (see recommendations 31, 79 and 82). The last conflict is addressed in the sense that the transferee takes the asset subject to the security right (see recommendations 79 and 82) and the secured creditor of the transferee takes no more rights than the transferee had (see recommendation 31).

4. In an intellectual property context, the notion of “conflicting transferees” is used instead and it includes transferees and licensees competing with each other. If no conflict with a security right in intellectual property (which includes the right of a transferee by way of security) is involved, the law recommended in the *Guide* does not apply and the matter is left to law relating to intellectual property. If a conflict with such a security right is involved, the law recommended in the *Guide* does not apply insofar as its provisions are inconsistent with the enacting State’s law relating to intellectual property (see recommendation 4, subparagraph (b)). Furthermore, the law recommended in the *Guide* does not apply to a conflict between a transferee of an encumbered asset that acquired the asset from a secured creditor enforcing its security right and another secured creditor that later received a right in the same asset from the same grantor (that no longer had any rights in the encumbered asset). This is not a priority conflict under the law recommended in the *Guide*, but it may well be a conflict addressed by law relating to intellectual property.

C. Relevance of knowledge of prior transfers or security rights

5. Under the law recommended in the *Guide*, knowledge of the existence of a prior security right on the part of a competing claimant is generally irrelevant for determining priority (see recommendation 93; however, knowledge that a transfer violates the rights of a secured creditor may be relevant; see recommendation 81, subparagraph (a)). Thus, a later created but first registered security right has priority over an earlier created but later registered security right, even if the holder of the former security right has knowledge of the existence of the earlier created security right (see recommendation 76, subparagraph (a)).

6. By contrast, in many States, law relating to intellectual property provides that a later conflicting transfer or security right may only gain priority if it is registered first and taken without knowledge of a prior conflicting transfer. The deference to law relating to intellectual property under recommendation 4, subparagraph (b), should preserve these knowledge-based priority rules to the extent they apply specifically to security rights in intellectual property.

D. Priority of security rights in intellectual property that are not registered in an intellectual property registry

7. As already mentioned, if law relating to intellectual property has priority rules dealing with the priority of security rights in intellectual property that apply specifically to intellectual property and the priority rules of the law recommended in the *Guide* are inconsistent with those rules, the law recommended in the *Guide* does not apply (see recommendation 4, subparagraph (b)). However, if law relating to intellectual property does not have such rules or the priority rules of the law recommended in the *Guide* are not inconsistent with those rules, the priority rules of the law recommended in the *Guide* apply.

8. Under the law recommended in the *Guide*, priority between security rights granted by the same grantor in the same encumbered asset that were made effective against third parties by registration in the general security rights registry is determined by the order of registration of a notice in that registry (see recommendation 76, subparagraph (a)). This rule applies if a notice or document of a security right may not be registered or is not registered in a specialized registry. If such a notice or document may be registered and is registered in a specialized registry, different rules apply (see recommendation 77 and paras. 9-11 below). In addition, if a security right is granted by a different grantor (for example, a transferee of the initial grantor), different rules apply (see recommendation 79-83 and paras. 12-29 below). All these rules apply equally to security rights in intellectual property.

E. Priority of security rights in intellectual property that are registered in an intellectual property registry

9. The *Guide* recommends that a security right in an asset that is made effective against third parties by registration in a specialized registry (see recommendation 38) should have priority over a security right in the same asset, which is made effective against third parties by another method (see recommendation 77, subparagraph (a)). It also recommends that a security right in an asset that is made effective against third parties by registration in a specialized registry has priority over a security right that was subsequently registered in the specialized registry (see recommendation 77, subparagraph (b)). In addition, the *Guide* recommends that, if an encumbered asset is transferred, leased or licensed and, at the time of the transfer, lease or licence, the security right has been made effective against third parties by registration in a specialized registry, the transferee, lessee or licensee takes its rights subject to the security right. If such a security right has not been registered in a specialized registry, a transferee, lessee or licensee of an encumbered asset takes the asset free of the security right, even if a notice of the security right was registered in the general security rights registry (see recommendation 78). These rules are subject to certain exceptions (see paras. 12-29 below, as well as recommendations 79-81). In addition, if a transferee, lessee or licensee of an encumbered asset acquires its rights in the asset free of a security right, any person that subsequently acquires rights in the asset acquires its rights free of the security right (see recommendations 31 and 82).

10. These recommendations are equally applicable to security rights in intellectual property. Thus, if there is a conflict between two security rights in intellectual property, one of which is the subject of a notice registered in the general security rights registry and the other is the subject of a document or notice registered in the relevant intellectual property registry, the law recommended in the *Guide* applies and gives priority to the latter security right (see recommendation 77, subparagraph (a)). If there is a conflict between security rights with respect to which documents or notices are registered in the relevant intellectual property registry, the right a document or notice of which is registered first has priority, and the law recommended in the *Guide* confirms that result (see recommendation 77, subparagraph (b)). If there is a conflict between the rights of a transferee of intellectual property and a security right with respect to which, at the time of the transfer, a document or notice could be registered and was registered in the relevant intellectual property registry, the transferee would take the encumbered intellectual property subject to the security right. However, if a security right in intellectual property may be registered but is not registered, the transferee or licensee of the encumbered intellectual property takes the encumbered intellectual property free of the security right, even if the security right was registered in the general security rights registry (see recommendation 78). In some States, under law relating to intellectual property, a secured creditor would have priority in this case, if the transferee is not a good faith purchaser. Following recommendation 4, subparagraph (b), the law recommended in the *Guide* would defer to that rule if it applied specifically to intellectual property. Finally, a secured creditor of a transferee of intellectual property takes the intellectual property subject to the security right of the transferor (see recommendations 31 and 82).

11. For example, if A creates a security right in a patent in favour of B that registers a notice of its security right in the general security rights registry, and then A transfers title to the patent to C, which registers a document or notice of its transfer in the patent registry, under recommendation 78 of the *Guide*, C would take the patent free of the security right of B. If A, instead of making a transfer, creates a second security right in favour of C and C registers a document or notice of the security right in the patent registry, under recommendation 77, subparagraph (a), of the *Guide*, C would prevail. In either case, as registration of a document or notice in the patent registry gives superior rights, under the law recommended in the *Guide*, third-party searchers could rely on a search in that registry and would not need to search in the general security rights registry. In all these examples, the questions of who is a transferee and what are the requirements for a transfer are matters of law relating to intellectual property. It should also be noted that registration in the intellectual property registry would normally refer only to a security right in intellectual property. It would not refer to a security right in tangible assets with respect to which intellectual property is used.

F. Rights of transferees of encumbered intellectual property

12. Under the law recommended in the *Guide*, a transferee of an encumbered asset (including intellectual property) normally takes the asset subject to a security right that was effective against third parties at the time of the transfer. There are two exceptions to this rule (recommendation 79). The first exception arises where

the secured creditor authorizes the sale or other disposition free of the security right (see recommendation 80, subparagraph (a)). The second exception relates to a transfer in the ordinary course of the seller's business where the buyer has no knowledge that the sale or other disposition violates the rights of the secured creditor under the security agreement (see recommendation 81, subparagraph (a)). If a security right may be registered (whether registered or not) in an intellectual property registry, as already mentioned (see paras. 9-11 above), a different rule applies (see recommendation 78).

13. Recommendation 79 applies equally to security rights in intellectual property that may not be registered in an intellectual property registry and recommendation 78 applies to security rights in intellectual property that may be registered (whether registered or not) in an intellectual property registry. Thus, if a notice in respect of a security right is registered in the general security rights registry, a transferee or licensee of intellectual property will take the encumbered intellectual property subject to the security right, unless one of the exceptions set out in recommendations 80-82 applies (with respect to recommendation 81, subparagraph (c), see paras. 21-29). These recommendations do not apply, under recommendation 4, subparagraph (b), if they are inconsistent with the priority rules of the law relating to intellectual property that apply specifically to intellectual property.

14. The preceding analysis deals with a priority conflict between a security right and the rights of a subsequent transferee. The situation is different where intellectual property is transferred before the creation of a security right, as no priority conflict arises here under the law recommended in the *Guide*. In this case, as a result of the *nemo dat* principle, the secured creditor will have no security right at all. As already mentioned, the *Guide* does not interfere with the application of the *nemo dat* principle. To the contrary, this approach is reflected in the general rule in the law recommended in the *Guide* that a grantor can create a security right only in an asset in which the grantor has rights or the power to create a security right (see recommendation 13). This rule would be displaced though by a rule of law relating to intellectual property giving priority to a secured creditor that took a security right in intellectual property without knowledge of a prior transfer of the intellectual property by the grantor (see recommendation 4, subparagraph (b)).

15. It is also important to note that, as already mentioned (see A/CN.9/WG.VI/WP.42, paras. 23-25, and A/CN.9/WG.VI/WP.42/Add.3, paras. 40-41), under the *Guide*, a licence of intellectual property is not a transfer of the licensed intellectual property. Thus, the rules of the law recommended in the *Guide* that apply to transfers of encumbered assets do not apply to licences. However, the law recommended in the *Guide* would defer to law relating to intellectual property treating certain licences (in particular, exclusive licences) as transfers (see recommendation 4, subparagraph (b)).

G. Rights of licensees in general

16. Intellectual property is routinely licensed. In such cases, the retained rights of a licensor, such as the ownership right, rights associated with ownership and the rights of a licensor under a licence agreement (such as the right to grant further

licences or to obtain payment of royalties) may be used by the licensor as security for credit. Similarly, the licensee's authorization to use or exploit the intellectual property or the licensee's right to grant sub-licences and obtain payment of royalties (in both cases according to the terms of the licence agreement) may be used by the licensee as security for credit (as to the types of encumbered asset in an intellectual property context, see A/CN.9/WG.VI/WP.42/Add.2, paras. 13-36).

17. Typically, under secured transactions law, including the law recommended in the *Guide*, a secured creditor does not become an owner of the encumbered asset, unless upon default, the secured enforces its security right and acquires the asset in an enforcement sale or in satisfaction of the secured obligation (see A/CN.9/WG.VI/WP.42, paras. 28-30, A/CN.9/WG.VI/WP.42/Add.1, paras. 10-12, and A/CN.9/WG.VI/WP.42/Add.5, paras. 16-17 and 21). The question whether the intellectual property owner that has created a security right in its intellectual property is still, the owner and may, for example, grant a licence in the encumbered intellectual property is a matter of law relating to intellectual property. Under general principles of law relating to intellectual property (with which the law recommended in the *Guide* is consistent), the owner may not grant a licence in its encumbered intellectual property if the secured creditor becomes the owner (or may exercise the rights of an owner) of the intellectual property with authority to grant licences while the security right is in place (see A/CN.9/WG.VI/WP.42/Add.5, para. 1). In this situation, a licence granted by the original owner would be an unauthorized licence under law relating to intellectual property and the licensee or its secured creditor would obtain nothing based on the *nemo dat* principle.

18. If the owner, after creating a security right in its intellectual property, remains the owner but its ability to grant licences is limited by agreement with the secured creditor (to the extent such agreement is permitted under law relating to intellectual property), the owner may theoretically grant a licence, but the granting of a licence by the owner in breach of its agreement with the secured creditor would be an event of default. As a result, the owner's secured creditor could enforce its security right and, exercising the rights of the owner sell the licensed intellectual property or grant another licence free of the pre-existing licence (and any security right granted by the licensee) as that licensee would normally have taken its licence subject to the security right of the owner's secured creditor (see recommendations 79 and 161-163). Alternatively, the owner's secured creditor could enforce its security right upon default by collecting the royalties owed by the licensee to the owner as licensor. If the encumbered asset is the owner's intellectual property rights, the secured creditor may collect the royalties as proceeds of the encumbered asset (see recommendations 19, 39, 40, 100 and 168). If the encumbered asset is the right of the owner as licensor to the payment of royalties, the secured creditor may collect the royalties as the original encumbered asset. In either case, the secured creditor may collect royalties even before default but only if there is an agreement to that effect between the owner and its secured creditor (see recommendation 168). In any case, if the licensee took the licensed intellectual property free of the security right granted by the owner in the intellectual property, the licensee could retain its licence and the secured creditor could only seek to collect the royalties owed by the licensee to the owner (see recommendations 80, subparagraph (b), and 245).

19. If the licensee also creates a security right in its rights under the licence agreement (for example, the authorization to use or exploit the licensed intellectual

property), that security right would be in a different asset (that is, not in the owner's rights). If the security right created by the licensee were in the same asset, it would be subject to the security right created by the owner (and made effective against third parties). The reason for this result is that the licensee would have taken its rights subject to the security right created by the owner (see recommendation 79) and the licensee could not have given to its secured creditor more rights than the licensee had (based on the *nemo dat* principle). So, if the secured creditor of the owner enforced its security right and disposed of the encumbered intellectual property free of the licence, the licence would terminate upon that disposition and the licensee's encumbered asset would cease to exist. Likewise, whether or not the owner had granted a security right to one of its creditors, if the licensee defaults on the licence agreement, the owner as licensor can terminate it to the extent permitted under law relating to intellectual property and the licensee's secured creditor would be again left without an asset encumbered by its security right.

20. As already mentioned (see A/CN.9/WG.VI/WP.42, paras. 23-25, A/CN.9/WG.VI/WP.42/Add.3, paras. 40-41, and para. 15 above), the rights of the licensor and the licensee under the licence agreement and the relevant law relating to intellectual property would remain unaffected by secured transactions law. So, if the licensee defaulted on the licence agreement, the licensor could exercise any available right to terminate it and the licensee's secured creditor would be again left without security. Similarly, secured transactions law would not affect an agreement between the licensor and the licensee prohibiting the licensee from granting sub-licences or assigning to the licensor the licensee's rights to the payment of royalties owed by sub-licensees to the licensee as sub-licensor (see A/CN.9/WG.VI/WP.42/Add.2, paras. 26-28).

H. Rights of certain licensees

21. As already mentioned (see para. 12 above), there are two exceptions to the rule that a licensee of encumbered intellectual property takes the licence subject to a pre-existing security right (see recommendation 79).

22. The first exception arises where the secured creditor authorized the licence free of the security right (see recommendation 80, subparagraph (b)). Thus, under the law recommended in the *Guide*, in the case of the grantor's default, the secured creditor could collect any royalties owed by the licensee to the grantor as licensor, but not sell the licensed intellectual property free of the rights of the existing licensee or grant another licence with the effect of terminating the rights of the existing licensee as long as the licensee performs the terms of the licence agreement.

23. The second exception to the principle embodied in recommendation 79 is that a non-exclusive licensee that takes a licence in the ordinary course of business of the licensor without knowledge that the licence violated the rights of the secured creditor in the licensed intellectual property, takes its rights under the licence agreement unaffected by a security right previously granted by the licensor (see recommendation 81, subparagraph (c), which applies to intangible assets generally). The result of this rule is that, in the case of enforcement of the security right in the licensed intellectual property by the secured creditor of the licensor under the

enforcement rules of the law recommended in the *Guide*, the secured creditor could collect any royalties owed by the licensee to the licensor, but not sell the licensed intellectual property free of the rights of the existing licensee or grant another licence with the effect of terminating the rights of the existing licensee as long as the licensee performs the terms of the licence agreement. This rule is intended to protect everyday, legitimate transactions, such as off-the-shelf purchases of copyrighted software with end-user licence agreements by limiting the enforcement remedies of a secured creditor under the enforcement rules of the law recommended in the *Guide*. In such transactions, the essence of the protection meant here is that purchasers should not have to do a search in a registry or acquire the copyrighted software subject to security rights created by the software developer or its distributors.

24. Recommendation 81, subparagraph (c), is based on the assumption that the grantor retains ownership of the encumbered intellectual property. This means that recommendation 81, subparagraph (c), does not apply if, under law relating to intellectual property, the grantor is no longer authorized to grant a licence because it has transferred the owner's rights to the secured creditor. In addition, recommendation 81, subparagraph (c), does not affect the relationship between the licensor and the licensee and does not mean that the licensee would obtain a licence free of the terms and conditions of the licence agreement and the law applicable to it (nor does it affect limitations in the licence agreement on the licensee entering into sub-licence agreements). Moreover, this recommendation and the *Guide* as a whole do not interfere with the enforcement of provisions as between the secured creditor and the grantor/licensor (or between the licensor and its licensee) that the grantor/licensor place in all of the non-exclusive ordinary course-of-business licences a provision that the licence will terminate if the licensor's secured creditor enforces its security right.

25. The secured creditor may elect to avoid extending any credit until it has an opportunity to review and approve the terms and conditions of any sub-licence agreement. For example, the secured creditor may wish to ensure that expected royalties are paid upfront, termination is permitted in the case of non-payment of royalties and assignment of sub-royalties is prohibited. In addition, if the secured creditor of the licensor does not want to encourage non-exclusive licences, it can, in its security agreement (or elsewhere), require the grantor (the licensor) to place in all of the non-exclusive licences a provision that the licence will terminate if the licensor's secured creditor enforces its security right. Similarly, if the licensor does not want its licensee to grant any sub-licences, it can include in the licence agreement a provision that the granting of a sub-licence by the licensee is an event of default under the licence agreement that would entitle the licensor to terminate the licence. Nothing in the *Guide* would interfere with the enforcement of such provisions as between the secured creditor and its borrower (or as between the licensor and its licensee). Ordinarily, the secured creditor will have no interest in doing that, since the licensor (and any licensee) is in the business of granting non-exclusive licences and the secured creditor expects the grantor to use the fees paid under those licence agreements to pay the secured obligation.

26. From the discussion above it becomes clear that the scope of application of recommendation 81, subparagraph (c), is very limited for a number of reasons. First, secured creditors often have no interest in limiting the ability of an owner/grantor to

grant licences in its intellectual property and collect royalties. As a matter of fact, a secured creditor is in many cases interested in permitting licensing so that the owner/grantor may repay the secured obligation. Second, by its wording, recommendation 81, subparagraph (c), applies only where there is a non-exclusive licence, one that includes a legitimate “off-the-shelf” purchase of licences of copyrighted software used with respect to equipment and only where the licensee had no knowledge that the licence violated the rights of the secured creditor under the security agreement. Such off-the shelf licences may be described without reference to the ordinary-course-of-business concept (see recommendation 245 below).

27. In addition, the impact of the application of recommendation 81, subparagraph (c), is very limited. The effectiveness, priority and enforceability of the security right against competing claimants (other than the specific licensee) under secured transactions law are not affected. At the same time, if the secured creditor has other rights under law relating to intellectual property law (for example, the rights of an owner), these rights are not affected by recommendation 81, subparagraph (c). The extent of such rights or remedies is a matter of law relating to intellectual property.

28. However, the concept of ordinary course of business is rarely used in intellectual property law and may create confusion in an intellectual property financing context. In many States, a different rule applies that provides that a licensee of encumbered intellectual property takes the licence subject to a security right created by the licensor, unless the secured creditor (to whom the grantor has given the right to authorize licences) authorized the granting of the licence free of the security right. To the extent that a State has such a rule recommendation 81, subparagraph (c), would not apply (see recommendation 4, subparagraph (b)). As a result, unless the secured creditor authorized the grantor to grant licences unaffected by the security right (which will typically be the case as the grantor will rely on its royalty income to pay the secured obligation), the licensee would take the licence subject to the security right. Thus, if the grantor defaults, the secured creditor would be able to enforce its security right in the licensed intellectual property and sell or licence it free of the licence. In addition, a person obtaining a security right from the licensee will not obtain an effective security right as the licensee would have received an unauthorized licence and would have no right to give.

29. If law relating to intellectual property does not address this matter at all or addresses it consistently with the way in which it is addressed in recommendation 81, subparagraph (c), recommendation 81, subparagraph (c), will apply in the limited cases and with the limited impact described above (see recommendation 4, subparagraph (b)).

30. However, in order to avoid any possible inconsistency between the law recommended in the *Guide* and law relating to intellectual property, a different approach could be followed (see recommendation 245 below) that would ensure that the law recommended in the *Guide* does not affect: (a) The effectiveness of a security right in licensed intellectual property, its priority as against a competing claimant other than a non-exclusive licensee or the enforcement remedies of the secured creditor that do not affect the rights of the licensee; (b) Any right that the licensor may have to terminate the licence for non-compliance of the licensee with

the licence agreement; or (c) The rights of a secured creditor as an owner under law relating to intellectual property.

31. It should be noted that: (a) the rights of the licensee as against a secured creditor of the licensor under such an approach may be derogated from by agreement of the licensee in the licence agreement or otherwise (see recommendation 10); and (b) like any other approach recommended in the *Guide* with respect to security rights in intellectual property, this approach also would be subject to recommendation 4, subparagraph (b). In addition, it should be noted that: (a) references in the *Guide* and the draft Supplement to a security right in a priority context refer to a security right that is effective against third parties (otherwise no priority dispute may arise under the *Guide*); (b) references in the *Guide* and the draft Supplement to an intellectual property licence refer to a licence granted by a person that is authorized to grant a licence in that intellectual property under the law relating to intellectual property.

32. The following examples are designed to clarify the situations to which this approach would apply and the impact from its application. In each example, it should be assumed that: (a) O owns intellectual property; (b) O creates a security right in the intellectual property in favour of SC; (c) O's security right is effective against third parties either in accordance with the recommendations of the *Guide* or assuming the law recommended in the *Guide* does not apply, in accordance with recommendation 4, subparagraph (b), under the law relating to intellectual property; (d) SC has not agreed, in the security agreement or otherwise, that any licensee of the intellectual property from O will enjoy its rights free of SC's security right; and (e) the transaction satisfies each provision of recommendation 245.

33. After SC takes the steps necessary to make its security right effective against third parties, O, who is in the business of granting non-exclusive licences of the intellectual property on substantially the same terms to any person who agrees to perform in accordance with such terms, offers to license the intellectual property to L. L enters into a licence agreement with O on those terms. O defaults on the obligation secured by the security right and SC sets out to enforce its security right. The right of L to use the intellectual property is protected by recommendation 245 against enforcement by SC of its security right because the licence and the transaction satisfy each provision of recommendation 245. However, SC still has whatever rights it may have against L under law relating to intellectual property and contract law.

34. After SC takes the steps necessary to make its security right effective against third parties, O grants a licence in the intellectual property to L. The licence agreement provides that L may grant sub-licences in the intellectual property only for educational markets. L grants a sub-licence in a commercial market to S. O defaults on the obligation secured by the security right, and SC sets out to enforce its security right. If, under the law relating to intellectual property, the sub-licence to S is not authorized, the right of S to use the intellectual property is not protected by recommendation 245 against enforcement by SC of its security right (and, as rights and obligations under the licence agreement go together, L is no longer bound by the obligations set out in the licence agreement).

35. After SC takes the steps necessary to make its security right effective against third parties, O grants a licence in the intellectual property to L. The licence

agreement provides that L has exclusive rights to use the intellectual property in State Z. O defaults on the obligation secured by the security right, and SC sets out to enforce its security right. The right of L to use the intellectual property is not protected by recommendation 245 against enforcement by SC of its security right because the licence is exclusive.

36. After SC takes the steps necessary to make its security right effective against third parties, O, who is in the business of granting non-exclusive licences of the intellectual property on substantially the same terms to any person who agrees to perform in accordance with such terms, offers to license the intellectual property to L on such terms. L declines to enter into a licence agreement with O on those terms. Instead, O grants a licence in the intellectual property to L, pursuant to which L has greater rights in the intellectual property than under the licences generally offered to others. O defaults on the obligation secured by the security right, and SC sets out to enforce its security right. The right of L to use the intellectual property is not protected by recommendation 245 against enforcement by SC of its security right because the licence is not on substantially the same terms as other licences of the same intellectual property.

37. Before O and L enter into the licence agreement, L discovers the notice filed to make SC's security right effective against third parties and, accordingly, asks to see a copy of the security agreement relating to that notice. The security agreement is furnished to L by O. Upon reading the security agreement, L discovers that the licence to it would violate the rights of SC. Nonetheless, L enters into the licence agreement with O. O defaults on the obligation secured by the security right, and SC sets out to enforce its security right. The right of L to use the intellectual property is not protected by recommendation 245 against enforcement by SC of its security right because L had knowledge that the licence agreement would violate SC's rights.

38. However, if O does not furnish a copy of the security agreement to L and, as a result, L does not know that the licence would violate the rights of SC, the right of L to use the intellectual property is protected by recommendation 245 against enforcement by SC of its security right because the licence and the transaction satisfy each provision of recommendation 245.

39. After SC takes the steps to make its security right effective against third parties, O offers to license the intellectual property but only to parties who have experience in using this type of intellectual property. O grants a licence to L, who has that experience. O defaults on the obligation secured by the security right, and SC sets out to enforce its security right. The right of L to use the intellectual property is not protected by recommendation 245 against enforcement by SC of its security right because O did not make a licence of the intellectual property available on substantially the same terms to any person who agreed to perform the obligations of the licensee under the licence agreement in accordance with such terms.

40. After SC registers its security right, O grants a non-exclusive licence to a patent pool. The patent pool will grant a non-exclusive licence to any interested person. SC forecloses on the intellectual property. The licence is not discharged as a result of the foreclosure because the licence and the transaction satisfy each provision of recommendation 245.

I. Priority of a security right in intellectual property granted by a licensor as against a security right granted by a licensee

41. Under the law recommended in the *Guide*, with limited exceptions (see recommendations 80, subparagraphs (b) and (c), and 245), a licensee takes its rights subject to a security right granted by the licensor in its rights (see recommendation 79). As already explained (see paras. 22-23 above), this means that, upon default, the secured creditor may enforce its security right and sell or licence the grantor's rights in the intellectual property. If the licensee also grants a security right in its rights as a sub-licensor against the sub-licensee, no priority conflict arises under the law recommended in the *Guide* between the two security rights because they encumber different assets. The licensor's secured creditor has a security right in the licensor's right to the payment of the royalties owed to the licensor by the licensee under the licence agreement, while the licensee's secured creditor has a security right in any sub-royalties due to the licensee (as sub-licensor) by a sub-licensee under a sub-licence agreement.

42. However, a security right created by a licensee as a sub-licensor in sub-royalties can have an impact on the licensee's ability to pay royalties to the licensor if the licensee is in default with respect to its obligations to its secured creditor inasmuch as that secured creditor may seek to collect the sub-royalties itself. In addition, if the licensee, in payment of royalties owed by the licensee to the licensor, assigns to the licensor the right to the payment of a percentage of the sub-royalties that the licensee will obtain as a sub-licensor from sub-licensees, then a priority conflict may arise between a secured creditor of the licensor and a secured creditor of the licensee under the law recommended in the *Guide*. In such a case, if the assignment of the sub-royalties takes place before a licence is granted and a security right is created and made effective by the licensee, the licensee does not have a right in the assigned sub-royalties at the time it creates a security right and thus a secured creditor of the licensee takes its security right in the sub-royalties subject to the security right of the licensor's secured creditor. If, however, the assignment takes place after a licence is granted and a security right is created and made effective by the licensee in all its future royalties, the licensor takes the assignment subject to the security right of the licensee's secured creditor and thus the licensor's secured creditor takes its security right also subject to the security right of the licensee's secured creditor (see recommendations 13 and 31).

43. The following example may be useful in illustrating the problem. A creates a security right in all its future assets or royalties in favour of secured creditor SC1. A then takes an intellectual property licence from licensor B and, in payment of royalties owed to B, licensee A assigns to licensor B the right to payment of a percentage of the sub-royalties payable to licensee A as a sub-licensor. Licensor B creates and makes effective against third parties a security right in these royalties in favour of secured creditor SC2. Licensee A's secured creditor SC1 will prevail as licensor B took the assignment of the sub-royalties subject to licensee A's secured creditor SC1 security right and licensor B's secured creditor SC2 can have no greater rights than licensor B.

44. In this regard, it should be noted that the licensor has, under the law recommended in the *Guide*, numerous ways to protect itself in this circumstance. For example, the licensor can protect its rights by: (a) ensuring that its secured

creditor registers first a notice of its security right in the general security rights registry; (b) ensuring that its secured creditor registers a notice or document in the relevant intellectual property registry; (c) requiring the secured creditor of the licensee to enter into a subordination agreement with the licensor's secured creditor before granting a licence; (d) prohibiting the licensee from granting a security right in its right to the payment of sub-royalties; (e) terminating the licence in cases where the licensee created a security right in its sub-royalties in breach of such a prohibition; or (f) prior to the licensee as sub-licensor granting a security right to its secured creditor, granting a security right in its right to payment of a percentage of the sub-royalties payable to the licensee as sub-licensor by sub-licensees and agreeing that any sub-licensee pay its sub-royalties directly to an account of the licensor. The *Guide* does not interfere with any agreements of this kind between licensor and licensee, if they are effective under law relating to intellectual property and contract law. In addition, the licensor could insist that the licensee grant to the licensor a security right in its right to the payment of sub-royalties and take as a secured creditor the steps just mentioned.

45. However, these steps may protect the licensor to a certain extent only, because, for example, rights in the encumbered intellectual property may not be subject to registration in an intellectual property registry or it may not be commercially practicable for the licensor to prohibit sub-licensing, terminate the licence agreement or obtain a subordination agreement. In addition, the priority of a security right created by the licensor as against another security right created by the licensee in its right to the payment of sub-royalties would be subject to the general rules explained above (see para. 41).

46. It should be noted that a secured creditor financing the acquisition of an intellectual property right or an intellectual property licence may have the special priority status of an acquisition secured creditor. However, this priority status will be relevant only if there is a priority dispute between security rights created by the same grantor in the same asset. Thus, this priority status does not apply to a priority dispute between a security right created by a licensor and a security right created by a licensee.

J. Priority of a security right in intellectual property as against the right of a judgement creditor

47. The *Guide* recommends that a security right that was made effective against third parties before a judgement creditor obtained rights in the encumbered asset has priority as against the right of the judgement creditor. However, if an unsecured creditor obtained a judgement against the grantor and took the steps necessary under the law governing the enforcement of judgements to acquire rights in the encumbered assets before the security right became effective against third parties, the right of the judgement creditor has priority (see recommendation 84).

48. This recommendation applies equally to security rights in intellectual property (subject to the principle embodied in recommendation 4, subparagraph (b)). In such a case, under law relating to intellectual property the judgement creditor may have to obtain a transfer of the intellectual property and a document or notice thereof may have to be registered in an intellectual property registry for the judgement creditor

to obtain priority. If this transfer takes place before a security right was made effective against third parties, both under the law recommended in the *Guide* (see recommendation 13) and law relating to intellectual property (*nemo dat*), the transferee of encumbered intellectual property will take the encumbered intellectual property free of the security right.

K. Subordination

49. The law recommended in the *Guide* recognizes the principle of subordination (see recommendation 94). The essence of this principle is that, as long as the rights of third parties are not affected, competing claimants may alter by agreement the priority of their competing claims in an encumbered asset. The principle applies equally to security rights in intellectual property.

Recommendation 245¹

Priority of rights of certain licensees of intellectual property

The law should provide that the enforcement of a security right in licensed intellectual property created before the licence was granted does not affect the rights of an end-user licensee of intellectual property under the licence agreement, provided that:

- (a) The licence is non-exclusive;
- (b) The licence covers [copyrighted or patented software] [one or more exclusive rights relating to copyrighted software];
- (c) At the time of the conclusion of the licence agreement:
 - (i) The licensor is generally in the business of granting non-exclusive licences in the intellectual property on substantially the same terms to any person that agrees to perform the licence agreement in accordance with such terms, and the licence agreement is on such terms; and
 - (ii) The licensee does not have knowledge that the licence violates the rights of the secured creditor under the security agreement; and
- (d) The licensed intellectual property and the rights and obligations under the licence agreement are not customized for the licensee.

¹ If this recommendation could be included in the *Guide*, it would be placed in the chapter on the priority of a security right as recommendation 81 bis. As an asset-specific recommendation, this recommendation would replace the general recommendation 81, subparagraph (c), to the extent that it applies to intellectual property licences.

A/CN.9/WG.VI/WP.42/Add.5 (Original: English)**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security rights in
intellectual property, submitted to the Working Group on Security
Interests at its seventeenth session****ADDENDUM****CONTENTS**

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VI. Rights and obligations of the parties to a security agreement relating to intellectual property

[*Note to the Working Group: For paras. 1-5, see A/CN.9/WG.VI/WP.39/Add.6, paras. 1-5, A/CN.9/685, paras. 73-75, A/CN.9/WG.VI/WP.37/Add.3, paras. 19-22, A/CN.9/670, paras. 96-103, A/CN.9/WG.VI/WP.35/Add.1, paras. 62-63, A/CN.9/667, paras. 104-108, A/CN.9/WG.VI/WP.33/Add.1, paras. 26-30, and A/CN.9/649, paras. 57-59.*]

A. Application of the principle of party autonomy

1. With few exceptions, the law recommended in the *Guide* generally recognizes the freedom of the parties to the security agreement to tailor their agreement so as to meet their practical needs (see recommendation 10). The principle of party autonomy applies equally to security rights in intellectual property, subject to any limitations specifically introduced by law relating to intellectual property (see recommendation 4, subparagraph (b)). For example, unless otherwise provided by law relating to intellectual property, an owner/grantor and its secured creditor may agree that: (a) the secured creditor may exercise some of the rights of the owner/grantor (for example, to deal with authorities and renew registration or pursue infringers; see A/CN.9/WG.VI/WP.42/Add.1, para. 23); (b) the owner/grantor may not grant licences (in particular exclusive licences) without the consent of the secured creditor; or (c) the secured creditor may collect royalties owed to the owner/grantor as a licensor even before default on the part of the grantor.

B. Preservation of the encumbered intellectual property

2. Under the law recommended in the *Guide*, the party in possession of an encumbered asset has the obligation to take reasonable steps to preserve it (see recommendation 111). Similar rules apply to intellectual property. For example, the grantor has an obligation to deal with authorities, pursue infringers and renew registrations. In some States, law relating to patents provides that the owner/grantor may not revoke or limit the encumbered patent without the consent of the secured creditor.

3. In addition, under the law recommended in the *Guide*, the secured creditor is free to agree with the owner/grantor that the secured creditor would be entitled to take steps to preserve the encumbered intellectual property by dealing with authorities, pursuing infringers or renewing registrations even before default (see recommendation 10), provided that this is not prohibited by law relating to intellectual property (see recommendation 4, subparagraph (b)). If the owner/grantor failed to exercise this right in a timely fashion, the encumbered intellectual property could lose its value, a result that could negatively affect the use of intellectual property as security for credit. This approach would not interfere with the rights of the owner/grantor as its consent would be necessary. Similarly, this approach would not interfere with law relating to intellectual property because such an agreement would be null and void, if it were concluded in violation of law relating to intellectual property. States enacting the recommendations of the *Guide* may wish to

consider their law relating to intellectual property so as to determine whether such agreements should be permitted, as this could facilitate the use of intellectual property as security for credit.

4. Moreover, under the law recommended in the *Guide*, the secured creditor should be able to request the owner/grantor to allow the secured creditor to protect the value of the encumbered intellectual property, for example, by renewing registrations or pursuing infringers (see recommendation 10), unless prohibited by law relating to intellectual property (see recommendation 4, subparagraph (b)). Otherwise, the value of the encumbered intellectual property could diminish and such a result could negatively affect the use of intellectual property as security for credit.

5. If the owner/grantor accepts this request, the secured creditor would be entitled to exercise those rights with the explicit consent of the owner/grantor; if the owner/grantor did not respond, the secured creditor would be entitled to exercise those rights with the implicit consent of the owner/grantor; and, if the owner/grantor rejected the request, the secured creditor would not be entitled to exercise those rights. In addition, if the owner/grantor failed to pursue infringers or renew registrations, the secured creditor could consider that that failure constitutes an event of default as described in the security agreement and could enforce its security right in the encumbered intellectual property. Again, these results would not interfere with law relating to intellectual property as recommendation 4, subparagraph (b) would defer to that law in case of any inconsistency.

Recommendation 246¹

Right of the secured creditor to preserve the encumbered intellectual property

The law should provide that it does not prevent the grantor of a security right in intellectual property and its secured creditor from agreeing that the secured creditor is entitled to take steps to preserve the encumbered intellectual property (for example, to deal with authorities, pursue infringers or renew registrations of the encumbered intellectual property).

[Note to the Working Group: The Working Group may wish to consider whether this recommendation is necessary, as it deals with an issue that will never arise under the law recommended in the Guide, as: (a) the law recognizes party autonomy; (b) does not include a limitation on the matter dealt with in this recommendation; and (c) defers to law relating to intellectual property to the extent that that law contains such a limitation (see recommendations 10 and 4, subparagraph (b)).

The Working Group may also wish to consider whether the recommendation could be retained if it were revised to:

(a) limit party autonomy as provided in recommendation 10, stating that the secured creditor may exercise this right only if permitted under law relating to intellectual property (see A/CN.9/WG.VI/WP.42/Add.2, paras. 10-12); or

¹ If this recommendation could be included in the *Guide*, it would be placed in the chapter on the rights and obligations of the parties to a security agreement as recommendation 116 bis.

(b) repeat the result of the application of recommendations 10 and 4, subparagraph (b), stating that the grantor and the secured creditor may agree that the secured creditor is entitled to take steps to preserve the encumbered intellectual property, unless otherwise provided by law relating to intellectual property.

The Working Group may also wish to note that paragraphs 1-5 of the commentary above, reflect the status of the law recommended in the Guide based on recommendations 10 and 4, subparagraph (b), and may need to be revised depending on the decision of the Working Group with regard to recommendation 246.]

VII. Rights and obligations of third-party obligors in intellectual property financing transactions

[Note to the Working Group: For paras. 6-7, see A/CN.9/WG.VI/WP.39/Add.6, paras. 6-7, A/CN.9/685, para. 76, A/CN.9/WG.VI/WP.37/Add.3, para. 23, A/CN.9/670, para. 104, A/CN.9/WG.VI/WP.35/Add.1, para. 64, A/CN.9/667, para. 109, A/CN.9/WG.VI/WP.33/Add.1, paras. 32, and A/CN.9/649, para. 60.]

6. Where a licensor assigns to its assignee its claim against a licensee for the payment of royalties under a licence agreement, the licensee (as the debtor of the assigned receivable) would be a third-party obligor under the *Guide* and its rights and obligations would be the rights and obligations of a debtor of a receivable. Similarly, where a licensee assigns to its assignee its claim against a sub-licensee for the payment of sub-royalties under a sub-licence agreement, the sub-licensee would be a third-party obligor with respect to the licensee's assignee in the sense of the *Guide*.

7. As a result, for example, in a claim by an assignee of a licensor's right to the payment of royalties, a licensee as a debtor of the assigned receivable may raise against the licensor's assignee all defences and rights of set-off arising from the licence agreement or any other agreement, which are part of the same transaction and of which the licensee could avail itself as if the assignment had not been made and such claim had been made by the licensor. In addition, the licensee may raise against the licensor's assignee of the right to the payment of royalties any other right of set-off, provided that that right was available to the licensee at the time notification of the assignment was received by the licensee. However, any defences or rights of set-off that may be available to the licensee under law other than secured transactions law for breach of an agreement between the licensor and the licensee that the licensor will not assign its rights to the payment of royalties are not available to the licensee against the licensor's assignee (see recommendation 120). This recommendation also is subject to the principle of deference to law relating to intellectual property embodied in recommendation 4, subparagraph (b).

VIII. Enforcement of a security right in intellectual property

[Note to the Working Group: For paras. 8-32, see A/CN.9/WG.VI/WP.39/Add.6, paras. 8-32, A/CN.9/685, paras. 77-86, A/CN.9/WG.VI/WP.37/Add.3, paras. 24-48, A/CN.9/670, paras. 105-114, A/CN.9/WG.VI/WP.35/Add.1, paras. 65-89,

A/CN.9/667, paras. 110-123, A/CN.9/WG.VI/WP.33/Add.1, paras. 35-44, and A/CN.9/649, paras. 61-73.]

A. Intersection of secured transactions law and law relating to intellectual property

8. States typically do not provide for specific enforcement remedies for security rights in intellectual property in their laws relating to intellectual property. The general law of secured transactions normally applies to the enforcement of security rights in intellectual property. To the extent that law relating to intellectual property in some States actually does address the enforcement of security rights in different types of intellectual property, it merely engrafts existing secured transactions enforcement regimes onto the regime governing intellectual property. As a consequence, States that enact the *Guide*'s recommendations will normally be simply substituting the *Guide*'s recommended enforcement regime for the prior enforcement regime derived from, for example, a civil code and code of civil procedure, the common law of floating and fixed charges, a mortgage act or some other general law of enforcement, as the case may be.

9. This approach to the enforcement of security rights applies not only to intellectual property (for example, a patent, a copyright or a trademark), but also to other rights that are derived from these types of intellectual property. Hence, consistently with the United Nations Assignment Convention, assets, such as royalties and licence fees, are treated as receivables and are subject to the enforcement regime recommended in the *Guide* for assignments (that is, outright transfers, security transfers and security rights) in receivables (see A/CN.9/WG.VI/WP.42/Add.2, paras. 21-29). Likewise, a licensor's or sub-licensor's other contractual rights as against a licensee or sub-licensee will also be governed by a State's general law of obligations, and security rights in these contractual rights will be enforced under a State's general secured transactions law. And again, a licensee's or sub-licensee's rights of use are treated in the same way as a lessee's or purchaser's rights, and are governed by a State's general law of obligations, except as regards questions of registration (where specifically mentioned in law relating to intellectual property).

10. On occasion, States incorporate special procedural controls on the enforcement of security rights in intellectual property into law relating to intellectual property. In addition, the general procedural norms of secured transactions law in a State may be given a specific content in the context of enforcement of security rights in intellectual property. So, for example, the determination of what is commercially reasonable where the encumbered asset is intellectual property may depend on law and practice relating to intellectual property. This standard of commercial reasonableness may well vary from State to State, as well as from intellectual property regime to intellectual property regime. The *Guide* recognizes this procedural variation and, in so far as any procedural rules apply specifically to security rights in intellectual property and impose greater obligations on parties than those of the enforcement regime set out in the recommendations of the *Guide*, they will, under the principle set out in recommendation 4, subparagraph (b), displace the general recommendations of the *Guide*. If these procedural rules and definitional specifications apply to security rights in assets other than intellectual property as

well, they will be displaced by the recommendations of the *Guide* in States that enact them.

11. As for substantive enforcement rights of secured creditors, once a State adopts the recommendations of the *Guide*, there is no reason to develop different or unusual remedial principles to govern enforcement of security rights in intellectual property serving as encumbered assets. The *Guide* merely recommends a more efficient, transparent and effective enforcement regime of a secured creditor's rights, without in any way limiting the rights that the owner of intellectual property may exercise to protect its rights against infringement or to collect royalties from a licensee or sub-licensee. As pointed out in the chapter of the draft Supplement on the creation of a security right in intellectual property (see A/CN.9/WG.VI/WP.42/Add.2, para. 9), the secured creditor generally cannot acquire security in more rights than the rights with which the grantor is vested at the time of the conclusion of the security agreement or when the grantor acquires rights in the encumbered asset or the power to encumber it (see recommendation 13).

B. Enforcement of a security right relating to different types of intellectual property

12. The *Guide* recommends a detailed regime governing the enforcement of security rights in different types of encumbered asset. Its basic assumption is that enforcement remedies must be tailored to ensure the most effective and efficient enforcement while ensuring appropriate protection of the rights of the grantor and third parties. This assumption and approach recommended in the *Guide* should apply equally to the enforcement of security rights in the various categories of intellectual property. Currently, the law of most States recognizes a wide variety of rights relating to intellectual property, including:

- (a) The intellectual property in itself;
- (b) Receivables arising under a licence agreement;
- (c) The licensor's other contractual rights under a licence agreement;
- (d) The licensee's rights under a licence agreement;
- (e) The owner's, licensor's and licensee's rights in tangible assets with respect to which intellectual property is used.

13. The enforcement regime recommended in the *Guide*, and applicable to each of these different rights in intellectual property, will be discussed separately in the following sections.

C. Taking "possession" of documents necessary for the enforcement of a security right in intellectual property

14. The right of the secured creditor to take possession of the encumbered asset as set out in recommendations 146 and 147 of the *Guide* is normally not relevant if the encumbered asset is an intangible asset such as intellectual property (as the term "possession", as defined in the *Guide*, means *actual* possession; see Introduction to the *Guide*, section B on terminology and interpretation). These

two recommendations deal only with the taking of possession of tangible assets. However, consistently with the general principle of extrajudicial enforcement, the secured creditor should be entitled to take possession of any documents necessary for the enforcement of its security right where the encumbered asset is intellectual property. Such a right will normally be provided for in the security agreement. In the event that the documents are necessary for the enforcement of a security right in the encumbered intellectual property, the creditor should be able to obtain possession whether or not those documents were specifically mentioned as encumbered assets in the security agreement.

15. It may be thought that, where a secured creditor takes possession of a tangible asset that is produced using intellectual property or in which a chip containing a programme produced using an intellectual property is included, the secured creditor is also taking possession of the encumbered intellectual property. This is not the case. It is important to distinguish properly the asset encumbered by the security right. Even though many tangible assets, whether equipment or inventory, may be produced through the application of intellectual property such as a patent, the security right is in the tangible asset and does not, absent specific language in the security agreement purporting to encumber the intellectual property itself, encumber the intellectual property with the use of which the asset was produced (the use meant here is use consistent with the authorization of the owner or other licensor; if the use is unauthorized, the products are unauthorized and the secured creditor may be an infringer if the secured creditor uses the encumbered asset in an unauthorized manner). So, for example, the secured creditor may take possession of a tangible asset, such as a compact disc or a digital video disc, and may exercise its enforcement remedies against the discs under the rules of the law recommended in the *Guide*. In cases where the secured creditor also wishes to obtain a security right in the intellectual property itself (including, to the extent the grantor has the right to sell or otherwise dispose of, or license the intellectual property, the right to sell or otherwise dispose of, or license), it would be necessary for the secured creditor to specifically mention such intellectual property as encumbered assets in the security agreement with the owner of such intellectual property (see A/CN.9/WG.VI/WP.42/Add.2, paras. 32-36 and recommendation 243).

D. Disposition of encumbered intellectual property

16. Under the law recommended in the *Guide*, upon the grantor's default, the secured creditor has the right to dispose of or grant a licence in the encumbered intellectual property (but always within the limits of the rights of the grantor; see recommendation 148). As a result, if the grantor is the owner, the secured creditor should, in principle, have the right to sell or otherwise dispose of, or license the encumbered intellectual property. However, if the grantor had previously granted an exclusive licence to a third party free of the security right, upon default, the secured creditor will be unable to grant another licence covering the same use in the same State, as the grantor had no such right at the time the secured creditor acquired its security right (*nemo dat quod non habet*). The situation will be different if, for example, the grantor grants an exclusive licence that is limited geographically. In such a case, the secured creditor may be able to grant another licence outside the geographic limits of the exclusive licence granted by the grantor.

17. In the above-mentioned situation, under the law recommended in the *Guide*, the enforcing secured creditor does not acquire the intellectual property against which the security right is being enforced. Instead, the secured creditor disposes of the encumbered intellectual property (by assigning, licensing or sub-licensing it) in the name of the grantor. Under law relating to intellectual property, until the assignee or licensee (as the case may be) that acquires the rights upon a disposition by the enforcing creditor registers a notice (or other document) of its rights in the relevant registry (assuming the rights in question may be registered), the grantor will appear on the registry as the owner of the relevant intellectual property.

E. Rights acquired through disposition of encumbered intellectual property

18. Under the law recommended in the *Guide*, rights in intellectual property acquired through judicial disposition would be regulated by the relevant law applicable to the enforcement of court judgements (see recommendation 160). In the case of an extrajudicial disposition in line with the provisions of secured transactions law, the first point to note is that the transferee or licensee takes its rights directly from the grantor. The secured creditor that chooses to enforce its rights in this manner does not become the owner as a result of this enforcement process, unless the secured creditor acquires the encumbered intellectual property in satisfaction of the secured obligation or at an enforcement sale (see recommendations 148 and 156).

19. The second point is that the transferee or licensee could only take such rights as were actually encumbered by the enforcing creditor's security right. Under the law recommended in the *Guide*, the transferee or licensee would take the intellectual property free of the security right of the enforcing secured creditor and any lower-ranking security rights, but subject to any higher-ranking security rights. Similarly, a good faith transferee or licensee that acquired a right in intellectual property pursuant to an extrajudicial disposition that is inconsistent with the provisions of the secured transactions law would take the intellectual property free of the security right of the enforcing secured creditor and any lower-ranking security rights (see recommendations 161-163).

20. Under the law recommended in the *Guide*, a security right in a tangible asset extends to and may be enforced against attachments to that asset (see recommendation 21 and 166). To ensure that the security right also covers assets produced or manufactured by the grantor from encumbered assets, the security agreement normally provides expressly that the security right extends to such manufactured assets. Where the encumbered asset is intellectual property, it is important to determine whether the asset that is disposed of to the transferee or licensee is simply the intellectual property as it existed at the time the security right became effective against third parties or whether it is that intellectual property including any subsequent enhancements to it (for example, an improvement to a patent). Generally, laws relating to intellectual property treat such improvements as separate assets and not as integral parts of existing intellectual property. As a result, the prudent secured creditor that wishes to ensure that improvements are encumbered with the security right should describe the encumbered asset in the

security agreement in a manner that ensures that enhancements are directly encumbered by the security right (see A/CN.9/WG.VI/WP.42/Add.2, para. 40-41).

F. Proposal by the secured creditor to acquire the encumbered intellectual property

21. Under the enforcement regime recommended in the *Guide*, the secured creditor has the right to propose to the grantor that it acquire the grantor's rights in total or partial satisfaction of the secured obligation. If the grantor is the owner of intellectual property, the secured creditor could itself become the owner in the way prescribed by law relating to intellectual property, provided that the grantor and any other interested party (such as the debtor, any other person owing performance of the secured obligation or any person with rights in the encumbered asset) do not object (see recommendations 156-159). Should the owner have licensed its intellectual property to a licensee that acquired its rights under the licence agreement free of the rights of the enforcing secured creditor, when the secured creditor acquires the intellectual property from the grantor, it acquires that right subject to the prior-ranking licence in accordance with the *nemo dat* principle. Once a secured creditor becomes the owner of intellectual property, its rights and obligations are regulated by the relevant law relating to intellectual property. In particular, the secured creditor may need to register a notice or document confirming that it acquired the intellectual property to enjoy the rights of an owner or to obtain any relevant priority. Finally, the secured creditor that acquires the encumbered intellectual property in total or partial satisfaction of the secured obligation would take the intellectual property free of the security right of any lower-ranking security rights, but subject to any higher-ranking security rights (see recommendation 161).

G. Collection of royalties and licence fees

22. Under the enforcement regime recommended in the *Guide*, where the encumbered asset is the right to receive payment of royalties or other fees under a licence agreement, the secured creditor should be entitled to enforce the security right by simply collecting the royalties and other licence fees upon default and notification to the person that owes the royalties or fees (see recommendation 168). In all these situations, the right to the payment of royalties and other licence fees is, for the purposes of secured transactions laws, a receivable (see A/CN.9/WG.VI/WP.42/Add.2, paras. 22-29). Thus, the rights and obligations of the parties will be governed by the principles pertaining to receivables that are elaborated in the United Nations Assignment Convention and the regime recommended in the *Guide* for receivables. Once again, the secured creditor that has taken a security right in the right to the payment of present and future royalties is entitled to enforce only such rights to the payment of royalties (including rights to the payment of future royalties under existing licenses) as were vested in the grantor (licensor) at the time of the conclusion of the security agreement or when the grantor acquired rights in the encumbered receivable or the power to encumber it (see recommendation 13). In addition, subject to any contrary provision of law relating to intellectual property (see recommendation 4, subparagraph (b)), the

secured creditor's rights to collect royalties includes the right to collect or otherwise enforce any personal or property right that secures payment of the royalties (see recommendation 169).

H. Licensor's other contractual rights

23. In addition to the right to collect royalties, the licensor will normally include a number of other contractual rights in its agreement with the licensee (see A/CN.9/WG.VI/WP.42/Add.2, para. 21). These may include, for example, a limitation in the licence agreement on the right of the licensee to grant any sub-licence or a prohibition on the granting of security rights by the licensee in its rights under the licence agreement, including the right to terminate the licence agreement under a set of specified conditions. These rights will remain vested in the licensor if the security right is only in the right to the payment of royalties. However, if the secured creditor also wishes to obtain a security right in these other rights of the licensor, they would have to be included in the description of the encumbered assets in the security agreement. It should also be noted that, if the secured creditor enforces its security right and takes the encumbered and licensed intellectual property subject to a licence, as a matter of contract law, the secured creditor will have to abide by the licence agreement.

I. Enforcement of security rights in tangible assets with respect to which intellectual property is used

24. In principle, except where the so-called "exhaustion doctrine" applies, the intellectual property owner has the right to control the manner and place in which tangible assets, with respect to which intellectual property is used (in line with the authorization of the owner), are sold. That is, in the event that the relevant intellectual property right has not been exhausted, the secured creditor should be able to dispose of the assets only upon default, if there is an authorization from the intellectual property owner. In both these cases, it is assumed that the security agreement does not encumber the intellectual property right itself (see A/CN.9/WG.VI/WP.42/Add.2, paras. 32-36 and recommendation 243).

25. As there is no universal understanding of the "exhaustion doctrine" (often referred to as "exhaustion of rights" or "first sale doctrine"), the draft Supplement makes reference to the doctrine not as a universal concept, but as it is actually understood in each State. Nonetheless, where the exhaustion doctrine applies under law relating to intellectual property, the basic idea is that an intellectual property owner will lose or "exhaust" certain rights when specific conditions are met, such as the first marketing or sale of the product embodying the intellectual property. For example, the ability of a trademark owner to control further sales of a product bearing its trademark is generally "exhausted" following the sale of that product. The rule serves to protect a person that resells that product from infringement liability. However, it is important to note that such protection extends only to the point where the products have not been altered so as to be materially different from those originating from the trademark owner. In addition, the exhaustion doctrine does not apply if a licensee produces products bearing the licensed trademark

without complying with the terms and conditions of the licence agreement (for example, as to quality or quantity).

26. In situations where a product is produced with the use of intellectual property that has been licensed to a grantor that attempts to create a security right in that product, under law relating to intellectual property, the licensor may provide that the licensee cannot grant security rights in such products or that a secured creditor may only enforce its security right in a manner agreed to by the licensor. In both these cases, the licensor will typically provide in the licence agreement that the licence may be revoked by the licensor if the licensee as grantor or the secured creditor acts in a manner that is contrary to the limitations contained in the licence agreement. As a consequence, to enforce effectively its security right in the product, in the absence of prior agreement between the secured creditor and the owner/licensor, the secured creditor would either need to obtain the consent of the owner/licensor or rely on the relevant law relating to intellectual property and the operation of the exhaustion doctrine.

27. In cases where the secured creditor also wishes to obtain a security right in the intellectual property itself (including, to the extent the grantor has the right to sell or license the intellectual property, the right to sell or license), it would be necessary for the secured creditor to specifically mention such intellectual property as an encumbered asset in the security agreement. Here, the encumbered asset is not the product produced using the intellectual property, but rather the intellectual property itself (or the licence to manufacture tangible assets using the intellectual property). A prudent secured creditor will normally seek to take a security right in such intellectual property so as to be able to enforce its security right and sell or license the intellectual property to ensure that the licensee will be able to continue the production of any partially completed products.

J. Enforcement of a security right in a licensee's rights

28. In the discussion above, the grantor of the security right has been assumed to be the owner of the relevant intellectual property. The encumbered asset is one or more of the following rights: the intellectual property itself; the right of the owner/licensor to receive royalties and fees; or the right of the owner/licensor to enforce other contractual terms relating to the intellectual property. Only in the discussion of security rights in tangible assets produced by using intellectual property (section I above) were the rights of the owner/licensor and the rights of the licensee treated together. However, most of the issues addressed in sections C to H also are relevant in situations where the encumbered asset is not the intellectual property itself but the rights of a licensee (or sub-licensee) arising from a licence agreement (see A/CN.9/WG.VI/WP.42/Add.2, paras. 30-31). In cases where the encumbered asset is merely a licence, the secured creditor obviously may only enforce its security right against the licensee's rights and may do so only in a manner that is consistent with the terms of the licence agreement.

29. In situations where the grantor is a licensee, upon the grantor's default, the secured creditor will have the right to enforce its security right in the licensee's rights under the licence agreement and to dispose of the licence to a transferee, provided that the licensor consents or the licence is transferable, which is rarely the

case. Likewise, the enforcing secured creditor may grant a sub-licence, provided that the licensor consents or the grantor-licensee had, under the terms of the licence agreement, the right to grant sub-licences. In situations where the secured creditor proposes to a grantor-licensee to acquire the licence in full or partial satisfaction of the secured obligation and neither the grantor nor any other interested party (such as the debtor, any other person owing performance of the secured obligation or any person with rights in the encumbered asset; see recommendations 157-158) object (and the licence agreement does not prohibit the transfer of the licence), the secured creditor becomes vested with the licence according to the terms of the licence agreement between the licensee and the licensor. Assuming that registration of licences is possible under law relating to intellectual property, registration of the licence by the licensee-secured creditor that acquires the licence in full or partial satisfaction of the secured obligation may be a condition of the effectiveness of the licensee's rights or may simply serve information purposes.

30. Where the encumbered asset is the sub-licensor's right to the payment of royalties under a sub-licence agreement, the regime recommended in the *Guide* treats the asset as a receivable. This means that the secured creditor of the licensee/sub-licensor may collect the royalties to the extent that these were vested in the grantor-sub-licensor at the time when the security right in the receivable is enforced. If creation by the licensee/sub-licensor of a security right in its right to royalties from its sub-licensee constitutes a breach of an initial or intervening licence agreement, then enforcement of that agreement may prevent the secured creditor from collecting royalties from the sub-licensee or otherwise deprive it of the benefits of its agreement.

31. Where the encumbered asset is another contractual right stipulated in the sub-licence agreement, the secured creditor may enforce its security right in this contractual right as if it were any other encumbered asset, and the fact that the licensor may have revoked the licence for the future, or may have itself claimed a prior right to receive payment of sub-royalties, has no direct bearing on the right of the secured creditor to enforce these other contractual rights set out in the licence agreement.

32. The rights acquired by a transferee or sub-licensee of the encumbered licensee's rights upon disposition by the secured creditor or by a secured creditor that acquires the licensee's rights in full or partial satisfaction of the secured obligation may be significantly limited by the terms of the licence agreement. For example, a non-exclusive licensee cannot enforce the intellectual property against another non-exclusive licensee or against an infringer of the intellectual property. Only the licensor (or the owner) may do so, although, in some States, exclusive licensees may join the licensor as a party to the proceedings or even pursue infringers on their own. In addition, depending upon the terms of the licence agreement and the description of the encumbered asset in the security agreement, a transferee of the licence may not have access to information such as a source code. In order to ensure the effectiveness of the licence being transferred or sub-licensed, the security agreement will have to include such rights within the description of the assets encumbered by the grantor-licensee, to the extent that the licence agreement and relevant law permits it to encumber these rights as well.

IX. Acquisition financing in an intellectual property context

[*Note to the Working Group: For paras. 33-57 and recommendations 247-252, see A/CN.9/WG.VI/WP.39/Add.5, note after para. 19, A/CN.9/685, paras. 66-70 and A/CN.9/670, paras. 32-36.*]

A. Introduction

33. Historically and in contemporary commercial and legal practice, many States have enacted a special regime to govern acquisition financing with respect to tangible assets. In accordance with these widespread practices, the discussion of acquisition financing in the *Guide* focuses on tangible assets such as consumer goods, equipment and inventory. The *Guide* does not make recommendations with respect to acquisition financing of other types of tangible assets such as negotiable instruments and negotiable documents. In addition, the *Guide* does not recommend that a special regime should be established for acquisition financing with respect to intangible assets. Moreover, the *Guide* does not address explicitly the question whether a security right, and in particular an acquisition security right in a tangible asset with respect to which software is used extends to the software (an intangible asset). However, the draft Supplement makes clear that a security right of any type in a tangible asset does not extend to intellectual property used with respect to that asset (see A/CN.9/WG.VI/WP.42/Add.2, paras. 32-36 and recommendation 243).

34. In particular, the *Guide* leaves open the question whether, in a modern credit economy, it would be useful to permit the creation of acquisition security rights in favour of lenders that finance the acquisition (but not the original creation) of intellectual property. Such an approach would provide general parity in the treatment of tangible assets and intellectual property assets. Given the important differences in legal regimes between intellectual property and other types of asset, if such an approach were adopted, the principles of the *Guide* on acquisition financing with respect to tangible assets could not simply be transposed to the intellectual property context. They would have to be adapted, as discussed in the sections B and C below, to apply with respect to intellectual property.

B. Unitary approach

35. The basic idea of providing a special regime of acquisition financing for intellectual property is not unknown. For example, in some legal systems, a creditor may obtain an acquisition security right in copyrighted software, but only if: (a) the security right accompanies a security right in a tangible asset; (b) the software is acquired by the grantor in a transaction integrated with the transaction in which the grantor acquired the tangible asset; and (c) the grantor acquires the software for the principal purpose of using the software in the tangible asset. In other legal systems, it is possible for a secured creditor to obtain an acquisition security right in intangible assets (including intellectual property, whether or not the intellectual property is used in connection with tangible assets). In yet other legal systems, where the general law as set out, for example, in a civil code does not contain the concept of an acquisition security right, a similar result may be achieved through a reservation of title, a financial lease or a hypothec securing the sales price of a

movable asset. In each of these cases, the transaction may relate to an intangible asset, including an intellectual property right, although this is not common. Finally, in yet other legal systems, it is possible to use a “mortgage” or “fixed charge” to secure the payment obligation of the purchaser of intellectual property and, in such cases, the “mortgage” or “fixed charge” may prevail over a pre-existing “floating charge”.

36. The rules on acquisition financing in the law recommended in the *Guide* are meant to rationalize and streamline different legal techniques by which creditors may obtain an acquisition security right in a tangible asset. To achieve general parity in regimes governing tangible assets and intellectual property rights the following basic adjustments to the law recommended in the *Guide* would be necessary:

(a) It would be necessary to provide explicitly that acquisition security rights can exist in intellectual property, as well as in a tangible asset;

(b) It would be necessary to provide that States could adopt either a unitary or a non-unitary approach to acquisition financing;

(c) It would be necessary to eliminate any references to possession and delivery of the encumbered asset; and

(d) It would be necessary to develop appropriate distinctions between the acquisition financing of the intellectual property right itself and the acquisition financing of a licence or sub-licence of that intellectual property right.

37. In addition to these general adjustments, a number of more specific adjustments would be required. These would relate to: (a) the third-party effectiveness and priority of an acquisition security right in intellectual property; (b) the priority of a security right registered in an intellectual property registry; and (c) the priority of a security right in proceeds of encumbered intellectual property. These specific adjustments are considered below in turn.

1. Third-party effectiveness and priority of an acquisition security right in intellectual property

38. In the chapter on acquisition financing, the *Guide* distinguishes among three different types of asset, namely consumer goods, inventory, and property that is neither consumer goods nor inventory (such as equipment). The law recommended in the *Guide* provides that an acquisition security right in consumer goods (goods held for personal, family or household purposes) is automatically effective against third parties upon its creation (that is, is effective against third parties without the need for registration) and has priority against a competing non-acquisition security right (recommendation 179).

39. The law recommended in the *Guide* offers alternatives for obtaining third-party effectiveness in relation to inventory and equipment. Under one alternative, an acquisition security right in assets other than consumer goods or inventory (that is, in assets not held by the grantor for sale, lease or licence in the ordinary course of the grantor’s business) would have priority over a competing non-acquisition security right granted in the same asset by the same grantor, provided that a notice of the acquisition security right would be registered in the general security rights registry within a short period of time after the grantor obtains

possession (recommendation 180, alternative A, subparagraph (a)). A different rule would apply with respect to security rights in inventory. In this situation, registration in the general security rights registry would have to occur before delivery of the inventory to the grantor and secured creditors with earlier registered non-acquisition security rights are notified of the acquisition secured creditor's intention to claim an acquisition security right (see recommendation 180, alternative A, subparagraph (b)). By contrast, under a second alternative, no distinction would be drawn between inventory and assets other than consumer goods or inventory. The rule applicable to assets other than inventory would apply to all types of assets other than consumer goods (see recommendation 180, alternative B).

40. To adapt the law recommended in the *Guide* to intellectual property rights, the following adjustments would be necessary. In cases in which the intellectual property that is subject to an acquisition security right is held by the grantor for personal, family or household purposes, the acquisition security right would be treated according to the same rules as the rules that govern an acquisition security right in consumer goods. In cases in which the intellectual property that is subject to an acquisition security right is held by the grantor for sale, lease or licence in the ordinary course of the grantor's business, the acquisition security right would be treated according to the same rules as the rules that govern an acquisition security right in inventory. And in cases in which the intellectual property that is subject to an acquisition security right is not held by the grantor for sale, lease or licence in the ordinary course of the grantor's business or for personal, family or household purposes, the acquisition security right would be treated according to the same rules as the rules that govern an acquisition security right in tangible assets other than inventory or consumer goods.

41. If these adjustments were made, the law relating to third-party effectiveness and priority of acquisition security rights in intellectual property would be as follows. In cases where the intellectual property right is acquired for personal, family or household purposes the acquisition security right would be automatically effective against third parties upon its creation (that is, is effective against third parties without the need for registration) and would have priority against a competing non-acquisition security right (transposing recommendation 179). In cases involving inventory and equipment, it would be necessary to transpose both alternatives set out in the *Guide*. Under alternative A, an acquisition security right in intellectual property or a licence for use in its business and not for licensing or sub-licensing respectively would have priority over another security right granted in the same asset by the same grantor, provided that a notice of the acquisition security right would be registered in the general security rights registry within a short period of time after the grantor acquired the intellectual property or licence (transposing recommendation 180, alternative A, subparagraph (a)). Also under this alternative, an acquisition security right in intellectual property or a licence not held by the grantor for use in its business but meant for licensing or sub-licensing respectively would have priority over another security right granted in the same asset by the same grantor, provided that a notice of the acquisition security right would be registered in the general security rights registry prior to the license being granted and secured creditors with earlier registered non-acquisition security rights are notified of the acquisition secured creditor's intention to claim an acquisition security right before the grant of the license (transposing recommendation 180, alternative A, subparagraph (b)). Under alternative B, the regime governing

intellectual property rights held for use in the grantor's business and not for licensing or sub-licensing would apply for all types of intellectual property or licences (transposing recommendation 180, alternative B).

2. Priority of a security right registered in an intellectual property registry

42. As a general rule, the law recommended by the *Guide* does not seek to modify any rules set out in other law that are applicable to specialized registries whether in relation to third-party effectiveness (recommendations 34, 38 and 42) or priority (recommendations 77, 78). This policy is also adopted in the chapter on acquisition financing (recommendation 181). Two consequences follow. First, the special priority status granted to an acquisition security right over prior registered non-acquisition security rights refers only to security rights registered in the general security rights registry and not to security rights registered in specialized registries. Second, the general priority afforded by other law to security rights registered in specialized registries is maintained by the law recommended in the *Guide*, regardless of whether the security right is or is not an acquisition security right. Thus, the priority of an acquisition security right in intellectual property registered in an intellectual property registry does not override the priority of an earlier-registered security right registered in the intellectual property registry. If the priority rules set out by other law governing the specialized registry itself afford priority to a later-registered acquisition security right, this priority would not be affected by the law recommended in the *Guide*.

43. The approach recommended in the *Guide* is justified by the need to avoid interfering with specialized registration regimes. However, it may create an obstacle to acquisition financing to the extent an acquisition security right in intellectual property would not have a special priority status as against any type of security right registered in an intellectual property registry. As already mentioned (see A/CN.9/WG.VI/WP.42/Add.3, para. 9), States enacting the recommendations of the *Guide* may wish to review their law relating to intellectual property with a view to determining whether the registration of notices of security rights in an intellectual property registry should be permitted. States may also wish to consider extending the special priority status of an acquisition security right to an acquisition security right registered in an appropriate manner in an intellectual property registry.

44. The following example may be useful in clarifying why such a regime might merit consideration. State A that has enacted the recommendations of the *Guide* also decides to permit registration of notices of security rights in intellectual property (even future intellectual property) in the relevant intellectual property registry as a method of achieving third-party effectiveness. A bank has extended credit to the grantor, and this credit is secured by a security right in all present and future intellectual property rights. The bank has made that right effective against third parties by registering in the specialized registry. The security right in each future item of intellectual property is not effective against third parties until the grantor acquires that item. Nonetheless, under the general priority principles recommended in the *Guide*, which the State would presumably adopt if it were to permit registration of notices of security rights in future intellectual property, priority dates from the date of registration (see recommendation 76).

45. The grantor then wants to buy a particular item of intellectual property on credit. The seller is willing to sell on credit only if it is granted a security right in

the item to secure the remaining payment obligation. Under the rules of the law recommended in the *Guide*, there is no way that the seller can achieve the status of an acquisition financier with a special priority over already registered non-acquisition security rights. If the seller registers in the intellectual property registry, it will be second in line behind the bank. That is to say, even if the seller wishing to achieve the special priority status of an acquisition security right follows all the steps necessary to claim such a right, and files a notice in the general security rights registry (see recommendation 180 as transposed), recommendation 181 will cede before the priority set out in the specialized registry (which typically provide that registration in a specialized registry always beats registration in the general registry (see recommendation 77)). Thus, if the earlier-registered security right in present and future intellectual property is registered in the relevant intellectual property registry, there is no way for an acquisition financier that takes a security right in the intellectual property being sold to achieve a special priority with respect to that property. Such a seller would have to rely on a transaction by which it retained title to the intellectual property right in question (see section C below).

3. Priority of security right in proceeds of encumbered intellectual property

46. A key feature of the regime of acquisition financing recommended in the *Guide* relates to the manner in which the general rules recommended in the *Guide* with respect to security rights in proceeds of encumbered assets should be applicable to acquisition security rights. The general rule in the law recommended by the *Guide* is that the priority of a security right in proceeds should follow that of the security right in the original encumbered assets (recommendations 76, 100). By contrast, the priority of a security right in proceeds of an asset that was subject to an acquisition security right does not automatically follow that of the initial encumbered asset. Once again, a distinction is drawn among consumer goods, inventory and assets that are neither consumer goods nor inventory, such as equipment (see recommendation 185). As in the case of the original encumbered asset, the *Guide* offers alternatives.

47. Under alternative A, a security right in proceeds of assets other than inventory or consumer goods has the same priority as the acquisition security right itself (recommendation 185, alternative A, subparagraph (a)). However, a security right in proceeds of inventory only has this priority if the proceeds are not in the form of receivables, negotiable instruments, rights to payment of funds credited to a bank account or rights to receive proceeds under an independent undertaking (recommendation 185, alternative A, subparagraph (b)). Under alternative B, the security right in proceeds of an original encumbered asset has only the priority of a non-acquisition security right (recommendation 185, alternative B). The consequence is that, when either of the alternatives of recommendation 185 is transposed to acquisition security rights in intellectual property, the revenue stream generated by the licensing or sub-licensing of an intellectual property right continues to be encumbered with the security right, but that the security right in the royalties will not have the special priority of an acquisition security right.

48. It might be argued that this direct transposition is not optimal in the case of acquisition security rights in intellectual property. For example, intellectual property owners and licensors typically rely on their rights to payment of royalties so as to be able to develop new ideas protected by intellectual property rights and give a

licence to others to use them. Additionally, if the general secured creditors of licensees always had priority over the secured creditors of intellectual property owners or licensors, owners or licensors would not be able to use their rights to payment of royalties as security for credit. By contrast, it might also be argued that intellectual property owners and licensors could achieve an equivalent result by ensuring that they or their secured creditors obtained: (a) a security right in or an outright assignment of a right to payment of a percentage of the sub-royalties payable to the licensee as a sub-licensor by sub-licensees and registered a notice thereof in the relevant intellectual property registry; (b) a security right in or an outright assignment of a right to payment of a percentage of the sub-royalties payable to the licensee as a sub-licensor by sub-licensees and registered first a notice thereof in the general security rights registry; or (c) a subordination agreement from the secured creditor of the licensee.

49. As the objective of transposing the recommendations of the *Guide* to the intellectual property context is to ensure a parity of treatment between acquisition security rights in tangible assets and acquisition security rights in intellectual property tangible, it is preferable to retain the same outcome in both cases. This would be particularly important where a grantor constitutes a general security right over present and future tangible and intangible property. As a result, in the draft Supplement, it is recommended that the rules recommended in the *Guide* with respect to security rights in proceeds of original encumbered tangible assets subject to an acquisition security right be transposed without further modification into the regime governing acquisition financing of intellectual property.

4. Examples illustrating how the acquisition financing recommendations of the *Guide* could apply in an intellectual property context

50. The following may be useful in clarifying how the recommendations of the *Guide* could apply in an intellectual property context. In all these examples, the owner or a later secured creditor financing the acquisition of intellectual property or a licence in intellectual property has an acquisition security right with special priority over a non-acquisition security right under the conditions described in the examples.

(a) Acquisition security right in intellectual property securing the purchase price of the intellectual property (assets other than inventory or consumer goods)

51. B creates a security right in all of its present and future movable assets (including intellectual property) in favour of SC, who takes the actions necessary to make that security right effective against third parties. Subsequently, B acquires a patent from O to be used in B's business. Pursuant to the agreement between B and O, B agrees to pay the purchase price to O over time and B grants O a security right in the patent to secure B's obligation to pay the purchase price. O makes that security right effective against third parties within a short period of time such as 20 or 30 days of B obtaining the patent. O's security right is an acquisition security right and has priority over the security right of SC (see recommendation 180, alternative A, subparagraph (a), or alternative B, subparagraph (b)). Whether the priority of O's security right extends to proceeds of the patent in the form of receivables, negotiable instruments, rights to payment of funds credited to a bank account or rights to receive proceeds under an independent undertaking depends on

which version of recommendation 185 a State enacts. Under alternative A, the priority of O's security right carries over into the proceeds (see recommendation 185, alternative A, subparagraph (a), as transposed). Under alternative B, O's security right in the proceeds would have only the priority of a non-acquisition security right (see recommendation 185, alternative B, as transposed).

(b) Acquisition security right in intellectual property securing the purchase price of the intellectual property (inventory)

52. B creates a security right in all of its present and future movable assets (including intellectual property) in favour of SC1, who takes the actions necessary to make the security right effective against third parties. Subsequently, B acquires a patent from O for the purpose of licensing it to third parties in the ordinary course of B's business. B obtains the money necessary to pay the purchase price to O by borrowing money from SC2, to whom B grants a security right in the patent to secure B's repayment obligation. Before B obtains the patent, SC2: (a) takes the actions necessary to make its security right effective against third parties, and (b) notifies SC1 that SC2 will have an acquisition security right. SC2's security right is an acquisition security right and has priority over the security right of SC1 (see recommendation 180, alternative A, subparagraph (b), and alternative B, subparagraph (b), as transposed). The priority of SC2's security right does not extend to proceeds of the patent in the form of receivables, negotiable instruments and rights to payment of funds credited to a bank account or rights to receive proceeds under an independent undertaking (see recommendation 185, alternative A, subparagraph (b), and alternative B, as transposed).

(c) Acquisition security right in an intellectual property licence securing the purchase price of the licence (assets other than inventory or consumer goods)

53. B has created a security right in all of its present and future movable assets (including intellectual property) in favour of SC, who has taken the actions necessary for that security right to be effective against third parties. Subsequently, B obtains a licence from O to use a patent owned by O in B's business. B agrees to pay the licence fee to O over time and grants O a security right in B's rights as licensee to secure B's payment obligation. O makes that security right effective against third parties within a short period of time such as 20 or 30 days of B obtaining the licence. O's security right in B's rights under the licence agreement is an acquisition security right and has priority over the security right of SC (see recommendation 180, alternative A, subparagraph (a), or alternative B, subparagraph (b)). Whether the priority of O's security right extends to proceeds of B's rights as licensee in the form of receivables, negotiable instruments and rights to payment of funds credited to a bank account or rights to receive proceeds under an independent undertaking depends on which version of recommendation 185 a State enacts. Under alternative A, the priority of O's security right carries over to the receivables (see recommendation 185, alternative A, subparagraph (a), as transposed). Under alternative B, O's security right in the receivables would have only the priority of a non-acquisition security right (see recommendation 185, alternative B, as transposed). It should be noted that O's rights pursuant to its security right are separate from and subject to different requirements than are

O's rights under the licence agreement to terminate the licence agreement upon B's default in its obligations under the licence agreement.

(d) Acquisition security right in an intellectual property licence securing the purchase price of the licence (inventory)

54. B grants a security right in all of its present and future movable assets (including intellectual property) to SC1, who takes the actions necessary to make the security right effective against third parties. Subsequently, B obtains a licence from O, the patent owner, for the purpose of sub-licensing the patent to third parties in the ordinary course of B's business. B obtains the money necessary to pay its licence fee by borrowing money from SC2, to whom B grants a security right in B's rights as licensee to secure B's repayment obligation. Before B obtains the licence, SC2: (a) takes the actions necessary to make its security right effective against third parties; and (b) notifies SC1 that SC2 will have an acquisition security right. SC2's security right is an acquisition security right and has priority over the security right of SC1 (see recommendation 180, alternative A, subparagraph (b), and alternative B, subparagraph (b), as transposed). The priority of O's security right does not extend to proceeds of the licence in the form of receivables, negotiable instruments and rights to payment of funds credited to a bank account (see recommendation 185, alternative A, subparagraph (b), and alternative B, as transposed).

C. Non-unitary approach

55. The above paragraphs address the issue of intellectual property acquisition financing on the hypothesis that a State adopts the "unitary approach" to acquisition financing as provided in recommendations 178-186 of the *Guide*. They are based on the assumption that, if a State adopts the unitary approach to acquisition financing of tangible assets, it would also adopt the unitary approach to acquisition financing of intellectual property. To do otherwise would risk creating unnecessary confusion in relation to creation, third party effectiveness, priority and enforcement of transactions providing for acquisition financing.

56. For the same reasons, if a State adopts the "non-unitary approach" to acquisition financing of tangible assets, it is reasonable to assume that the State would also adopt the non-unitary approach to acquisition financing of intellectual property. The non-unitary approach to acquisition financing of intellectual property rights might be reflected, for example, by contractual terms providing for a conditional transfer (which, under law relating to intellectual property, may include a conditional exclusive licence), a retention-of-title right, a financial lease right or a similar transaction with respect to an intellectual property right. Under the non-unitary approach, in addition, it is possible for an owner or for a third-party financier such as a bank to take an acquisition security right of the type available under the unitary approach.

57. Each of these acquisition financing transactions can be adapted relatively easily to the financing of intellectual property rights. Unlike the case with the unitary approach, however, it is not possible to directly transpose the recommendations governing retention-of-title rights and financial lease rights to

situations where the licensee is acquiring a non-exclusive licence. In these situations, there is no particular right that is being retained by the licensor in addition to its continuing right as owner (subject to the terms of the licence). The normal remedy for the licensor in such cases is simply to revoke the licence. By contrast, a non-licensor acquisition financier (for example, a bank that finances acquisition of the licence by the licensee) would take an ordinary acquisition security right in the licensee's rights.

58. In drafting provisions to enact a non-unitary regime for acquisition financing States would have to take into account two considerations. First, in order to ensure the same functional outcomes as would result were the unitary approach to be adopted, States will have to address all the issues covered by the six recommendations relating to the unitary approach as set out in this chapter (see recommendations 247-252). Second, specific provisions of the law to be enacted would have to be adjusted in the same manner that, for tangible assets, recommendations 192-194 and recommendation 199 of the *Guide* (non-unitary approach) were adjusted to mirror recommendations 180 and 185 of the *Guide* (unitary approach) respectively. In other words, to achieve a non-unitary regime for acquisition financing of intellectual property rights, States would need to provide detailed rules to address issues of third-party effectiveness and the transformation of a transferee's ownership right, retention-of-title or similar right into a security right in the proceeds of the intellectual property that was transferred or title in which was retained (for a discussion of these adjustments in the case of the non-unitary approach to acquisition financing, see Chapter IX, Acquisition financing).

Recommendations 247-252

Application of acquisition financing provisions to intellectual property

247. The law should provide that the provisions on acquisition security rights in a tangible asset also apply to an acquisition security right in intellectual property or a licence of intellectual property.

Acquisition security right in intellectual property held for sale or licence

248. The law should provide that, if intellectual property or a licence in intellectual property that is subject to an acquisition security right is held for sale or licence in the ordinary course of the grantor's business, the acquisition security right is treated as an acquisition security right in inventory.

Acquisition security right in intellectual property held for personal, family or household purposes

249. The law should provide that, if intellectual property or a licence in intellectual property that is subject to an acquisition security right is used or intended by the grantor to be used for personal, family or household purposes, the acquisition security right is treated as an acquisition security right in consumer goods.

Inapplicability of the concept of possession to an acquisition security right in intellectual property

250. The law should provide that, if intellectual property or a licence in intellectual property is subject to an acquisition security right, any reference in such provisions to possession of the encumbered asset by the secured creditor does not apply.

Relevance of time when the grantor acquires the encumbered intellectual property

251. The law should provide that, if intellectual property or a licence in intellectual property is subject to an acquisition security right, any reference in such provisions to the time of possession of the encumbered asset by the grantor refers to the time the grantor acquires the encumbered intellectual property or licence.

252. The law should provide that, if intellectual property or a licence in intellectual property is subject to an acquisition security right, any reference in such provisions to time of the delivery of the encumbered asset to the grantor refers to the time the grantor acquires the encumbered intellectual property or licence.

A/CN.9/WG.VI/WP.42/Add.6 (Original: English)

**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security
rights in intellectual property, submitted to the Working Group on
Security Interests at its seventeenth session**

ADDENDUM

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X. Law applicable to a security right in intellectual property

[*Note to the Working Group: For paras. 1-46, see A/CN.9/WG.VI/WP.39/Add.7, paras. 1-23, A/CN.8/685, paras. 87-94, A/CN.9/WG.VI/WP.37/Add.4, paras. 1-21, A/CN.9/670, para. 115, A/CN.9/WG.VI/WP.35/Add.1, paras. 90-98, A/CN.9/667, paras. 124-128, A/CN.9/WG.VI/WP.33/Add.1, paras. 53-57, and A/CN.9/649, paras. 77-80.*]

A. Law applicable to property matters

1. Purpose and scope

1. Generally, the conflict-of-laws rules recommended in the *Guide* deal with the law applicable to the creation, effectiveness against third parties, priority as against the rights of competing claimants and enforcement of a security right. They also determine the territorial scope of the substantive law rules recommended in the *Guide*, that is, if and when the substantive law rules of the State enacting the law recommended in the *Guide* apply (see chapter X on conflict of laws, paras. 1-9 of the *Guide*).

2. The conflict-of-laws chapter of the *Guide* does not define the security rights to which the conflict-of-laws rules apply. Normally, the characterization of a right as a

security right for conflict-of-laws purposes reflects the substantive secured transactions law in a State. However, the *Guide* recommends that a State that enacts the recommendations of the *Guide* following a non-unitary approach to acquisition financing should apply the conflict-of-laws provisions governing security rights to retention-of-title rights or financial leases (see recommendation 201). Similarly, (as the term security right includes the right of an outright assignee of receivables; see the term “security right”, Introduction to the *Guide*, section B on terminology and interpretation), the *Guide* recommends that such a State should apply the conflict-of-laws provisions governing security assignments of receivables to outright assignments of receivables (see recommendation 208).

3. In principle, a court or other authority will use its own law whenever it is required to characterize an issue for the purpose of selecting the appropriate conflict-of-laws rule. As the conflict-of-laws recommendations of the *Guide* have been prepared to reflect the substantive law recommendations of the *Guide*, a State that enacts both the substantive law and the conflict-of-laws recommendations of the *Guide* will have no difficulty in applying either. If, however, a State does not enact the substantive law recommendations of the *Guide*, it may find it difficult to apply the conflict-of-laws recommendations of the *Guide*. This may be so to the extent that that State treats creation and third-party effectiveness as one issue, while the conflicts-of-laws recommendations in the *Guide* treat them as two separate issues and refer them to the laws of different States. This difficulty will not arise, however, with regard to the distinction between the creation of a security right in an intangible asset (referred to the law of the grantor’s location; see recommendation 208) and the mutual rights and obligations of the parties (referred to the law chosen by them; see recommendation 216). This is so, because the *Guide* follows the approach followed in most States, drawing a distinction between property rights (referred to a specific law) and contractual rights (typically referred to the law chosen by the parties).

4. In any case, the question whether an asset (including intellectual property) may be transferred or encumbered is a preliminary issue to be addressed before the creation of a security right and is not addressed by the conflict-of-laws recommendations of the *Guide*. Thus, to the extent that conflict-of-laws rules outside those recommended in the *Guide* refer issues of transferability of intellectual property rights to the law of the State in which the intellectual property is protected (*lex loci protectionis*; hereinafter referred to as the “*lex protectionis*”), the *Guide* does not affect them. This is so not because the law recommended in the *Guide* defers to law relating to intellectual property but because the law recommended in the *Guide* does not address these issues. Following the same approach, the substantive law provisions recommended in the *Guide* do not override statutory limitations to transferability (see recommendation 18).

5. When the conflict of laws rules of the law recommended in the *Guide* refer a matter relating to security rights to the law of a particular State, the reference is to the entire body of law in effect in that State, including not only statutory and non-statutory law (see Introduction to the *Guide*, para. 19) and the law in effect in particular territorial units of a multi-unit State (see recommendations 224-227) but also legal rules in effect in that State as a result of treaties, conventions, and other international obligations. Thus, for example, if a conflict-of-laws rule refers a matter relating to security rights in intellectual property to the law of a State in

which the law for that matter has been promulgated by a regional economic integration organization, the reference to the law of that State.

6. Finally, it should be noted that, like all the other provisions of the law recommended in the *Guide*, the conflict-of-laws provisions as well do not apply in so far as they are inconsistent with national law or international agreements, to which the State is a party, relating to intellectual property, if any (see recommendation 4, subparagraph (b)).

2. The approach recommended in the *Guide*

7. In many States, the conflict-of-laws rules that apply to security rights in intangible assets apply also to security rights in intellectual property. Similarly, the conflict-of-laws rules recommended in the *Guide* with respect to security rights in intangible assets would also apply to security rights in intellectual property, if no asset-specific rule is provided for intellectual property. Thus, if a State enacts the conflict-of-laws recommendations of the *Guide*, making them applicable to security rights in intellectual property without any change, the law of the State in which the grantor is located would apply to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property (see recommendations 208, and 218, subparagraph (b)). The location of the grantor is defined as its place of central administration, that is, the real rather than the statutory seat, of the grantor (see recommendation 219). Recommendation 4, subparagraph (b), would also apply and, to the extent of any inconsistency between the conflict-of-laws rules recommended in the *Guide* and those of the law relating to intellectual property that applied specifically to intellectual property, defer to any conflict-of-laws rule of the law relating to intellectual property.

8. The principal advantage of an approach based on the law of the grantor's location is that it leads to the application of a single law to the creation, third-party effectiveness, priority and enforcement of a security right. So, for example, a secured creditor that obtains a security right in all present and future intangible assets (including both intellectual property and other assets) of a grantor could obtain a security right, make it effective against third parties, ascertain its priority and have it enforced by referring to the law of a single State, even if the assets have connections with several States. In particular, both registration and searching costs would in most cases be reduced, as a secured creditor would need to register and a searcher would need to search only in the State in which the grantor is located. This would reduce transaction costs and enhance certainty, a result that is likely to have a beneficial impact on the availability and the cost of credit.

9. Another particularly important advantage of an approach based on the law of the grantor's location results from the meaning attributed in the *Guide* to the term "location" in cases where the grantor has a place of business in more than one State (see recommendation 219). In this case, "location" refers to the State in which the grantor has its place of central administration (that is, its real, rather than its statutory, seat). This is also the law of the State in which the main insolvency proceedings with respect to the grantor are likely to be administered (as to the meaning of a main proceeding, see, for example, articles 2, subparagraph (b), and 16, paragraph 3 of the UNCITRAL Model Law on Cross-Border Insolvency). As a result, the law governing the creation, third-party effectiveness, priority and enforcement of a security right and the law governing, for example, stays, avoidance

proceedings, treatment of assets and ranking of claims are likely to be the law of one and the same State. It should be noted that, while in some cases the statutory seat may be easier to determine than the real seat, referring to the statutory seat would result to a conflict of the law of the statutory seat with the law of the State in which insolvency proceedings will be opened (*lex fori concursus*), a conflict which is likely to be resolved in favour of the application of the *lex fori concursus*.

10. However, the approach based on the law of the grantor's location has also disadvantages. For example, if the grantor is not the initial owner of the encumbered asset but a transferee that has not taken the asset free of a security right or other right created by the initial or intermediate owner, a potential secured creditor would need to conduct a search outside the security rights registry to determine the chain of transferees. The potential secured creditor would then need to conduct another search in the security rights registry (and possibly in the relevant intellectual property registry, if any) to determine if the initial or intermediate owner has created a security right in the same intellectual property. In addition, if the initial or intermediate owner is located in a State other than the State of the grantor's location, the secured creditor would have to search in the security rights registry (and possibly in the relevant intellectual property registry, if any) of any such other State. Moreover, a conflict-of-laws rule based on the grantor's location would nevertheless require a reference to the *lex protectionis* for certain issues. In particular, as the *lex protectionis* is typically the law governing ownership in intellectual property, a priority conflict between a security right in intellectual property and the ownership right of an outright transferee of the encumbered intellectual property would have to be governed by the *lex protectionis*, at least insofar as determination of the rights of the putative transferee is concerned.

3. The law of the State of protection (*lex protectionis*)

11. Although international conventions designed to protect intellectual property do not expressly address the law applicable to issues arising with respect to security rights in intellectual property, they generally adopt the principle of territoriality. Thus, in States parties to these conventions, the law applicable to ownership and issues of protection of intellectual property rights (such as the comparative rights of an intellectual property owner in one State as against a licensee in another State) is the *lex protectionis*.

12. The view is expressed¹ that the principle of national treatment embodied in international conventions protecting intellectual property implicitly imposes a universal rule in favour of the *lex protectionis* for determining the law applicable not only to ownership of intellectual property but also to issues arising with respect to security rights in intellectual property. In accordance with that view, it is asserted that provisions such as Article 2(1) of the Paris Industrial Property Convention or Article 5(2) of the Berne Intellectual Property Convention leave no room for a connecting factor other than the place of protection of the relevant intellectual property right. In other words, under this view, States parties to any of these international conventions cannot freely determine their conflict-of-law rules and no

¹ See report of Working Group VI (Security Interests) on the work of its sixteenth session (A/CN.9/685, para. 90).

law other than the *lex protectionis* could be applied to issues arising with respect to security rights in intellectual property.

13. As a result of this view, in order for a secured creditor to be able to obtain an effective and enforceable security right in an intellectual property right in a State, in which the intellectual property right exists, the secured creditor would have to fulfil the requirements of that State. So, the principal advantage of the *lex protectionis* is that, in recognition of the principle of territoriality adopted in international conventions for the protection of intellectual property, its application would result in the same law applying to both security rights and ownership rights in intellectual property.

14. However, there are also disadvantages to an approach based on the *lex protectionis* as the applicable law for security rights, especially in transactions in which a portfolio of intellectual property rights is used as security for credit or transactions in which the encumbered assets are not limited to intellectual property that is used and protected under the law of a single State.

4. Other approaches

15. The view mentioned above (see paras. 12-13 above), attributing such an extensive effect to international intellectual property conventions with respect to the issue of the law applicable to issues relating to security rights in intellectual property, is not universally accepted. In addition, there is very little precedent on the application of the *lex protectionis* to issues arising with respect to security rights in intellectual property. Even assuming that these international conventions could impose a given conflict-of-laws rule, it would still be questionable whether the scope of application of this rule would cover all property effects contemplated by the draft Supplement, that is, the creation, effectiveness against third parties, priority as against the rights of competing claimants and enforcement of a security right in intellectual property.

16. Accordingly, even if one accepts the extensive effect of international intellectual property conventions described in paragraphs 12-13 above, it would still be necessary or useful to formulate a recommendation on the law applicable to issues arising with respect to security rights in intellectual property. Such a recommendation would, at the very least, perform a gap-filling function with regard to any possible conflict-of-laws consequences resulting from existing international intellectual property conventions.

17. In view of the above-mentioned considerations, to combine consistency with the law applicable to ownership rights and the benefits of the application of a single law for security rights issues, the *lex protectionis* approach could be combined with the law of the grantor's location approach in the sense that some issues could be referred to the law of the grantor's location, while other issues could be referred to the *lex protectionis*.

18. For example, issues arising with respect to a security right in intellectual property that is subject to registration in an intellectual property registry may be referred to the law of the State under whose authority the registry is maintained (this approach is followed in the *Guide* with respect to security rights in tangible assets that are subject to specialized registration; see recommendation 205). At the same time, issues arising with respect to a security right in intellectual property that

is not subject to such registration may be referred to the law of the State in which the grantor is located. This combination of the two approaches might, however, add cost and complexity to outright transfers of intellectual property rights that are not subject to such registration under the *lex protectionis*. This is so because an outright transferee of such an intellectual property right would have to investigate the law of the State of the grantor's location to ensure that the transfer is not subject to a prior security right.

19. Other combinations of the two approaches might also be possible. For example, the approach based on the law of the grantor's location could be subject to a variation whereby the third-party effectiveness and priority of a security right as against the rights of an outright transferee or licensee of intellectual property would be governed by the *lex protectionis* (whether or not the *lex protectionis* provides for registration of a security right in intellectual property in an intellectual property registry). With this variation, a secured creditor would also need to establish its right under the *lex protectionis* only in instances where a competition with an outright transferee is a concern. In the typical case where the insolvency of the grantor is the main concern (because the grantor cannot pay all its creditors), it would be sufficient for the secured creditor to rely on the law of the State in which the grantor is located, as would be the case for other types of intangible asset (such as receivables).

20. The advantages and disadvantages of the approaches mentioned above (see paras. 7-20 above) may be illustrated with the examples discussed below (see paras. 21-35), dealing separately with creation, third-party effectiveness, priority and enforcement issues.

5. Examples for a comparative analysis of the various approaches

(a) Creation issues

21. Intellectual property owner A, located in State X, creates pursuant to a single security agreement with secured creditor SC1, located in State Y, a security right in a copyright portfolio, protected under the laws of State X, and in a patent and trademark portfolio, protected under the laws of State Y.

22. Under the law of the grantor's location approach, A and SC1 would need to meet the requirements of State X for the creation of its security right in all intellectual property rights (that is, for the security right to be effective between grantor A and secured creditor SC1).

23. Under the *lex protectionis* approach, A and SC1 would have to meet the creation requirements of State X with respect to the copyright portfolio protected under the law of State X and the requirements of State Y with respect to patent and trademark portfolio protected under the law of State Y. If they fail to do so, the security agreement will achieve only part of its intended purpose, that is, create a security right under the law of State X, but fail to create a security right under the law of State Y.

24. Under the approach that distinguishes between security rights in intellectual property rights that may be registered in an intellectual property registry and those that may not be registered in such a registry, creation issues with respect to the security right in the copyright portfolio would be referred to the law of State X

(assuming that copyrights may not be registered in a specialized registry); and creation issues with respect to the security right in the patent and trademark portfolio would be referred to the law of State Y (assuming that rights in patents and trademarks may be registered in specialized registries in that State).

25. When the only difference between the laws of States X and Y with respect to the creation of a security right lies in the fact that, for example, State X that has not enacted the recommendations of the *Guide* requires more formalities in a security agreement than does State Y that has enacted the recommendations of the *Guide*, this difficulty can be overcome by preparing the security agreement so that it satisfies the requirements of the most stringent law (although even that will create additional costs for the transaction). However, when States X and Y have inconsistent requirements with respect to formalities, this approach will not suffice to overcome this problem. Similarly, where the agreement contemplates multiple present and future intellectual property rights as encumbered assets, difficulties cannot be overcome. This is so in particular when a State has enacted the recommendations of the *Guide* (allowing a single security agreement to create security rights in multiple present and future assets), while another State does not allow a security agreement to create a security right in assets not yet in existence or not yet owned by the grantor, or does not allow multiple assets to be encumbered in one and the same agreement. It should finally be noted that, as creation of a security right means that it is effective between the grantor and the secured creditor (and not as against third parties), the policy that underlies the *lex protectionis* does not appear to dictate referring the creation of a security right to that law.

(b) Third-party effectiveness issues

26. In order to make its security right effective against third parties, under the law of the grantor's location approach, it would be sufficient for secured creditor SC1 to meet the third-party effectiveness requirements of State X. Any potential creditors of intellectual property owner A would need to search only in the relevant registry in State X.

27. Under the *lex protectionis* approach, however, secured creditor SC1 would need to meet the third-party effectiveness requirements of State X to make its security right in the copyright portfolio effective against third parties and the requirements of in State Y to make its security right in the patent and trademark portfolio effective against third parties. This would possibly necessitate the registration of multiple notices with respect to the security right in the relevant registries of those States; and potential creditors would have to search in all those registries. This situation could be further complicated by the fact that some of those States might utilize the general security rights registry for such notices, other States might provide the option of utilizing a specialized registry, and still other States, might utilize an intellectual property registry that is mandatory under recommendation 4, subparagraph (b). This disadvantage would be alleviated if there were an international registry in which notices with respect to security rights, the third-party effectiveness of which is governed by the law of different States, could be registered.

28. Under the approach that distinguishes between security rights in intellectual property that may be registered in an intellectual property registry and security rights in intellectual property that may not be so registered, SC1 would need to meet

the third-party effectiveness requirements of State X with respect to the security right in the copyright portfolio and the third-party effectiveness of State Y respect to the security right in the patent and trademark portfolio.

(c) Priority issues

29. If intellectual property owner A creates another security right in its patent and trademark portfolios protected in State Y in favour of secured creditor SC2, there will be a priority conflict between the security rights of SC1 and SC2 in the patents and trademarks protected in State Y.

30. Under the law of the grantor's location approach, this priority conflict would be governed by the law of State X in which the grantor is located. Under the *lex protectionis* approach, however, this priority conflict would be governed by the laws of State Y. The law of State Y would govern this priority conflict also under the approach referring priority of a security right in intellectual property that may be registered in an intellectual property registry to the law of the State under whose authority the registry is maintained.

31. Another example will illustrate how the *lex protectionis* will apply in the case of multiple transfers in a chain of title, where the transferor and each of the transferees create security rights. A, located in State X, owns a patent in State X. Owner A grants a security right in the patent to secured creditor SC1. A then transfers the patent to B, located in State Y, who creates a security right in favour of SC2. Whether transferee B obtains the patent subject to the security right of SC1 will be determined in accordance with the *lex protectionis*, that is, the law of State X, which happens to be also the law of the grantor's location. Whether secured creditor SC2 takes its security right in the patent from transferee B subject to the security right of SC1 will also be determined in accordance with the *lex protectionis* (normally, under the *nemo dat* principle, SC2 will acquire no more rights than B had).

(d) Enforcement issues

32. If intellectual property owner A does business in States X, Y and Z and uses a particular trademark under the law of each of those States, those trademark rights may well have greater value taken together than they do separately because they operate collectively. Thus, if A grants a security right in those trademarks, secured creditor SC1 would likely prefer to dispose of them together upon A's default because such a disposition would likely yield greater proceeds (thus also benefitting A). Yet, this is likely to be difficult or impossible if States X, Y and Z have different rules for disposition of encumbered intellectual property rights. If State X allows only a judicial disposition of an encumbered asset, while States Y and Z allow a non-judicial disposition, disposition of the trademark rights in a single transaction might be impossible. Even if all of the relevant States allow non-judicial disposition, the differences in required procedures may make a disposition of the rights in a single transaction inefficient at best.

33. Moreover, enforcement of a security right is not a single event; rather it is a series of actions. So, upon A's default, secured creditor SC1, located in State Y, may notify A, located in State X, that it will enforce its security right in its trademark rights protected under the laws of States X, Y and Z. Secured creditor SC1 may then

advertise the disposition of the trademark right in States X, Y and Z; indeed, it may advertise the disposition worldwide by use of the Internet. Secured creditor SC1 may then identify a buyer located in State Z, who buys the encumbered asset pursuant to a contract governed by the laws of State X.

34. Under an approach based on the *lex protectionis* (or the law of the State under whose authority the registry is maintained), secured creditor SC1 would need to enforce its security right in the trademark protected in State X in accordance with the law of State X, its security right in the trademark protected in State Y in accordance with the law of State Y and its security right in the trademark protected in State Z in accordance with the law of State Z. Under the law of the grantor's location approach, enforcement of the security right in the trademark would be governed by the law of the State in which grantor A is located. It should be noted that, no matter which approach is followed, if secured creditor SC1 sells the encumbered trademarks, the transferee has to register its rights in the trademark registry of each State in which the trademark is registered and protected, that is, States X, Y and Z.

35. Where grantor A, located in State X, creates a security right in a patent registered in the national patent office in State Y and then grantor A becomes insolvent, the law applicable to the creation, third-party effectiveness, priority and enforcement of the security right will be the law of State X or Y, depending on whether an approach based on the law of the grantor's location or an approach based on the *lex protectionis* is followed in the forum State. Under the law recommended in the *Guide*, the application of any of these laws is subject to the *lex fori concursus* with respect to issues such as avoidance, treatment of secured creditors, ranking of claims or distribution of proceeds (see recommendation 223). Where the insolvency proceeding is opened in State X in which the grantor is located, the *lex fori concursus* and the law of the grantor's location will be the law of one and the same jurisdiction. Where the insolvency proceeding is opened in another State, where, for example, the grantor has assets, that may not be the case.

(e) Change of location of the grantor or the encumbered asset and relevant time for determining location

36. It should be noted that where the grantor or the encumbered asset moves from one State to another State that has enacted the recommendations of the *Guide*, different rules apply. According to these rules, if the grantor or the encumbered asset (whichever determines the applicable law under the relevant conflict-of-laws provisions) moves to a State that has enacted the recommendations of the *Guide*, a security right remains effective against third parties for a short period of time without any action on the part of the secured creditor and then only if the third-party effectiveness requirements of the State of the new location are met (see recommendation 45).

37. For example, grantor A, located in State X, creates a security right in favour of secured creditor SC1 in a copyright protected in States X and Y, and then A moves to State Y that has enacted the recommendations of the *Guide* and creates another security in the copyright in favour of secured creditor SC2 in State Y. If State Y has enacted the recommendations of the *Guide*, the security right of SC1 has priority over the security right of SC2 for a short period of time without any action on the part of SC1 and then only if SC1 meets the third-party effectiveness requirements of

State Y. This result is the result of a rule based on recommendation 45 and not of a conflict-of-laws rule. If A, instead of moving to State Y, transfers the copyright to transferee B in State Y, as mentioned above (see para. 31 above), whether transferee B obtains the copyright subject to the security right of secured creditor SC1 will be determined in accordance with the *lex protectionis*. Similarly, whether secured creditor SC2 takes its security right subject to the security right of SC1 will be determined in accordance with the *lex protectionis*.

38. It should also be noted that, under the law recommended in the *Guide*, the relevant time for determining the location of the grantor for creation issues is the time of the putative creation of a security right and for third-party effectiveness and priority issues the time the issue arises (see recommendation 220). As a result, under the law recommended in the *Guide*, the creation of the security right of SC1 would be subject to law of State X and the creation of the security right of SC2 would be subject to the law of State Y. The third-party effectiveness and priority of the security right of SC1 as against transferee B and its secured creditor SC2 would, after a short grace period (see recommendation 45), be subject to the law of State Y.

B. Law applicable to contractual matters

39. Under the law recommended in the *Guide*, the law applicable to the mutual rights and obligations of the grantor and the secured creditor arising from the security agreement (the contractual aspects of the security agreement) is left to party autonomy. In the absence of a choice of law by the parties, the law applicable to these matters is the law governing the security agreement as determined by the conflict-of-laws rules generally applicable to contractual obligations (see chapter X of the *Guide*, para. 61 and recommendation 216).

40. In view of the wide acceptability of the application of the principle of party autonomy to contractual matters,² the same rule should apply to the mutual rights and obligations of the grantor and the secured creditor in the case of a security right in intellectual property.

Recommendation 253³

Law applicable to a security right in intellectual property

Alternative A

The law should provide that the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in intellectual property is the law of the State in which the intellectual property is protected.

² See www.hcch.net/upload/wop/genaff_concl09e.pdf on the development of a future instrument on the choice of law in international contracts by the Hague Conference on Private International Law.

³ If this recommendation could be included in the *Guide*, it would be placed in chapter X on conflict of laws as recommendation 214 bis.

Alternative B

The law should provide that the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in intellectual property that may be registered in an intellectual property registry is the law of the State under whose authority the registry is maintained. The law applicable to those matters with respect to a security right in intellectual property that may not be registered in an intellectual property registry is the law of the State in which the grantor is located.

Alternative C

The law should provide that the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in intellectual property is the law of the State in which the grantor is located. However, the law applicable to the effectiveness against third parties and priority of a security right in intellectual property as against the right of a transferee or licensee of the encumbered intellectual property is the law of the State in which the intellectual property is protected.

XI. Transition

41. Under the recommendations of the *Guide*, the law should set out the date as of which it will come into force (the “effective date”) and specify the extent to which, after the effective date, the new law applies to security rights that existed before the effective date (see chapter XI on transition, paras. 1-3).

42. The different approaches to establishing an effective date as set out in the *Guide* offer States different possibilities for doing so. Whichever is selected, however, will provide a clear mechanism for determining when the law or its various parts will come into force (chapter XI on transition, paras. 4-6). Neither the *Guide* nor the draft Supplement recommends that the effective date of the provisions of the law relating to security rights in intellectual property should be different than the effective date of other provisions of the law. Thus, the approaches discussed in chapter XI of the *Guide* can be applied without modification to determine the date at which the provisions with respect to security rights in intellectual property will come into force. The only additional considerations are the following: (a) the entire law recommended in the *Guide* must come into force either at the time or before the provisions relating to security rights in intellectual property come into force; and (b) the provisions with respect to intellectual property rights must come into force as a whole. In other words, States may defer the coming into force of the provisions relating to security rights in intellectual property until a date after the general law has come into force, but when they decide to proclaim in force the provisions relating to security on intellectual property, they must do so in a manner that ensures that all these provisions come into force at the same time.

43. The *Guide* also contains recommendations relating to the protection of rights acquired before the effective date of the new law. The general principle is that the new law applies even security rights that exist at the effective date. Consequently, if registration of a notice of a security right in the general security rights registry or in the relevant intellectual property registry becomes newly possible, States will have

to provide for a grace period to enable notices of these security rights to be registered (thereby protecting both third-party effectiveness and priority as it existed under prior law). This principle and its implications are elaborated in the *Guide* (see chapter XI on transition, paras. 20-26).

44. A particular transition issue arises in relation to enforcement, that is, whether enforcement proceedings that had commenced prior to the effective date of the new law would have to be abandoned and recommenced under the new law. To avoid this result, the law recommended in the *Guide* provides that, once enforcement proceedings have been commenced in a court or binding arbitral tribunal, they may continue under prior law. However, it is possible for the enforcing secured creditor to abandon proceedings under prior law and recommence enforcement under the new law, in particular if the new law recommended in the *Guide* provides secured creditors with remedies not available under prior law (see chapter XI on transition, paras. 27-33). This principle should be equally applicable to enforcement proceedings commenced in respect of security rights in intellectual property.

45. Because the recommendations of the *Guide* relating to security rights in intellectual property offer financing and transactional opportunities that have not heretofore existed in many States, it might be thought that special provisions to govern transition to the new law would be required. The above review suggests, however, that the basic transition principles set out in the law recommended in the *Guide* can be applied without modification to the regime of security rights in intellectual property as recommended in the draft Supplement. No additional recommendations are needed for this purpose.

XII. The impact of insolvency of a licensor or licensee of intellectual property on a security right in that party's rights under a licence agreement

[*Note to the Working Group: For paras. 46-54, see A/CN.9/WG.VI/ WP.37/Add.7, paras. 24-42, A/CN.9/685, para. 95, A/CN.9/WG.V/ WP.87, A/CN.9/WG.VI/ WP.37/Add.4, paras. 22-40, A/CN.9/671, paras. 125-127, A/CN.9/670, para. 116-122, A/CN.9/WG.VI/ WP.35/Add.1, chapter XI, A/CN.9/667, paras. 129-140, A/CN.9/WG.VI/ WP.33/Add.1, paras. 58-72, A/CN.9/649, paras. 98-103 and A/63/17, para. 326.*]

A. General

46. A licensor or a licensee of intellectual property under a licence agreement may create a security right in its rights under the licence agreement. If the grantor is the licensor, typically its secured creditor will have a security right in the licensor's right to receive royalties from the licensee as well as the right to enforce non-monetary terms of the licence agreement and the right to terminate the licence agreement upon breach. If the licensee is the grantor, typically its secured creditor will have a security right in the licensee's right to use or exploit the licensed intellectual property subject to the terms of the licence agreement, but not a security right in the intellectual property itself. The secured creditor may then take the steps

necessary to make that security right effective against third parties (see recommendation 29).

47. Insolvency law, subject to avoidance actions, will typically respect the effectiveness of such a security right (see recommendation 88 of the Insolvency Guide). Similarly, insolvency law, subject to any limited and clearly stated exceptions, will respect the priority of a security right that is effective against third parties (see recommendations 238-239). However, if the licensor or the licensee becomes subject to insolvency proceedings, there may be an effect on the rights of the parties to the licence agreement that will have an impact on a security right granted by the licensor or the licensee. In the case of a chain of licence and sub-licence agreements, the insolvency of any party in the chain will have an impact on several other parties in the chain and their secured creditors. For example, an insolvency of a party in the middle of the chain will affect the licence of subsequent sub-licensees and sub-licensors, but will not have any legal effect on previous ones. The terms of a licence agreement may provide for different results (for example, automatic termination of all licences upon the insolvency of any licensee up or down in the chain from the insolvent licensee), but these results will be subject to limitations under insolvency law (for example, rendering unenforceable automatic termination clauses).

48. Outside of insolvency, there may be statutory or contractual limitations on the ability of the licensor and the licensee to grant and enforce a security right in a right to the payment of royalties. Secured transactions law will typically not affect statutory limitations, other than mainly those relating to a future receivable, or a receivable assigned in bulk or in part on the sole ground that it is a future receivable, or a receivable assigned in bulk or in part (see recommendation 23). Secured transactions law may affect contractual limitations (see recommendations 18 and 24-25). What effect, if any, an insolvency proceeding may have on those limitations on the assignment of receivables independent of secured transactions law is a matter of insolvency law (see recommendations 83-85 of the Insolvency Guide).

49. The Insolvency Guide contains extensive recommendations concerning the impact of insolvency proceedings on contracts with respect to which both the debtor and its counterparty have not fully performed their obligations under the contract (see recommendations 69-86 of the Insolvency Guide). A licence agreement could be such a contract, if it has not been fully performed by both parties and the term of the licence agreement has not been completed (so that there is remaining performance by the licensor). However, a licence agreement is not such a contract, if it has been fully performed by the licensee through an advance payment of the entire amount of the royalties owed by the licensee to the licensor, as may be the case in the event of an exclusive licence agreement, and the absence of any ongoing obligations of the licensor. The insolvent debtor could be the licensor (owing the licensee the right to use or exploit the licensed intellectual property in line with the terms and conditions of the licence agreement) or the licensee (owing payment of royalties and the obligation to use or exploit the licensed intellectual property in accordance with the licence agreement).

50. The Insolvency Guide recommends that any contractual clauses that automatically terminate and accelerate a contract upon an application for commencement, or commencement, of insolvency proceedings or upon the

appointment of an insolvency representative should be unenforceable as against the insolvency representative and the debtor (see recommendation 70 of the Insolvency Guide). The Insolvency Guide also recommends that the insolvency law should specify the contracts that are exempt from the operation of this recommendation, such as financial contracts, or are subject to special rules, such as labour contracts (see recommendation 71 of the Insolvency Guide).

51. The commentary of the Insolvency Guide states that some laws uphold these clauses in some circumstances and explains the reasons for this approach. These reasons include “the need for creators of intellectual property to be able to control the use of that property and the effect on a counterparty’s business of termination of a contract, especially one with respect to an intangible” (see part two, chapter II, para. 115 of the Insolvency Guide). For example, automatic termination and acceleration clauses contained in intellectual property licence agreements may be upheld as the insolvency of the licensee may have a negative impact not only on the licensor’s rights but also on the intellectual property right itself. This is the case, for example, where the insolvency of a licensee of a trademark used on products may affect the market value of the trademark and the trademarked products. In any case, clauses included in intellectual property licence agreements that provide, for example, that a licence terminates after X years or upon material breach such as failure of the licensee to upgrade or market the licensed products on time (that is, where the event that triggers the automatic termination is not insolvency) are not affected (see footnote 39, recommendation 72 of the Insolvency Guide).

52. The commentary of the Insolvency Guide also states that other laws override these clauses and explains the relevant reasons (see part two, chapter II, paras. 116 and 117 of the Insolvency Guide). The commentary further explains that, although some insolvency laws do permit these types of clause to be overridden if insolvency proceedings are commenced, this approach has not yet become a general feature of insolvency laws. In this regard, the commentary speaks of an inherent tension between promoting the debtor’s survival, which may require the preservation of contracts, and affecting commercial dealings by creating a variety of exceptions to general contract rules. The commentary concludes by expressing the desirability that an insolvency law permit such clauses to be overridden (see part two, chapter II, para. 118 of the Insolvency Guide).

53. Under the recommendations of the Insolvency Guide, the insolvency representative may continue or reject a licence agreement as a whole, if it has not been fully performed by both parties (see recommendations 72-73 of the Insolvency Guide). In the case of one licence agreement, continuation or rejection of the licence agreement by the insolvency representative of one party will affect the rights of the other party. In the case of a chain of licence and sub-licence agreements, continuation or rejection of a licence agreement will affect the rights of all subsequent parties in the chain. Finally, in the case of cross-licensing agreements (where a licensor grants a licence, the licensee then further develops the licence and grants a licence in the further developed licensed product to the licensor), continuation or rejection of a licence agreement will affect each party both in its capacity as licensor and licensee.

54. If the insolvency representative chooses to continue a licence agreement, which has not been fully performed by both parties and as to which the insolvent debtor (licensor or licensee) is in breach, the breach must be cured, the

non-breaching counterparty must be substantially returned to the economic position that it was in before the breach, and the insolvency representative must be able to perform the licence agreement (see recommendation 79 of the Insolvency Guide). In this case, the insolvency proceedings will have no impact on the legal status of a security right granted by the licensor or the licensee. However, if the insolvency representative chooses to reject the licence agreement, there will be an impact on a security right granted by the licensor or the licensee (for a full understanding of the treatment of contracts in the case of insolvency, see part two, chapter II, section E of the Insolvency Guide).

B. Insolvency of the licensor

55. If the licensor's insolvency representative decides to continue a licence agreement, there will be no impact on a security right granted by the licensor or the licensee. If the licensor is the insolvent debtor and has granted a security right in its rights under the licence agreement, and the licensor's insolvency representative decides to continue the licence agreement, the licence agreement will remain in place, the licensee will continue to owe royalties under the licence agreement and the licensor's secured creditor will continue to have a security right in those royalty payments. In this case of the licensor's insolvency, if the licensee has granted a security right in its rights under the licence agreement, the licensor will continue to owe the licensee unimpeded use of the licensed intellectual property under the licence agreement and the licensee's secured creditor will continue to have a security right in the licensee's rights under that agreement.

56. However, if the licensor's insolvency representative decides to reject the licence agreement, there will be an impact on a security right granted by the licensor or the licensee. If the licensor has granted a security right in its rights under the licence agreement, the licence agreement will no longer be effective, the licensee will no longer owe royalties under the licence agreement, and, thus, there will be no royalties for the licensor's secured creditor to be able to apply to satisfy the secured obligation. In this case of the licensor's insolvency, if the licensee has granted a security right in its rights under the licence agreement, the licensee will no longer have the authority to use the licensed intellectual property and its secured creditor will lose its security right in the encumbered asset (that is, the licensee's authority to use or exploit the licensed intellectual property).

57. As a practical matter, a secured creditor with a security right in a licensor's rights under a licence agreement may protect itself from the consequences of a rejection of the licence agreement by the licensor's insolvency representative. Such a secured creditor may, for example, protect itself by obtaining and making effective against third parties (in addition to a security right in the licensor's rights under the licence agreement, that is, principally the royalties), a security right in the licensed intellectual property itself. Then, if the insolvency representative of the licensor rejects the licence agreement, the secured creditor of the licensor (subject to the stay and any other limitations imposed by insolvency law on the enforcement of a security right in insolvency proceedings) can enforce its security right in the licensed intellectual property by disposing of it or by entering into a new licence agreement with a new licensee similar to the licence that had been rejected and thus re-establishing the royalty stream (see recommendation 149). The funds received

from the disposition of the encumbered intellectual property or the royalties received pursuant to this new licence agreement would then be distributed to the secured creditor pursuant to recommendations 152-155. As a practical matter, however, this arrangement would be worthwhile only for significant licence agreements.

58. Similarly, a secured creditor with a security right in a licensee's rights under a licence agreement may seek to protect itself from the consequences of a rejection of the licence agreement by the licensor's insolvency representative, by, for example, declining to make the secured loan unless the licensee obtains and makes effective against third parties a security right in the licensed intellectual property to secure the licensee's rights under the licence agreement. Then, if the insolvency representative of the licensor rejects the licence agreement, the licensee (subject to the stay and any other limitations imposed by insolvency law on the enforcement of security rights in insolvency proceedings) can enforce the security right in the licensed intellectual property itself by disposing of it or by entering into a new licence agreement with a new licensor, and the rights thereby obtained would be proceeds in which the secured creditor would have a security right. As a practical matter, this arrangement too would be worthwhile only for significant licence agreements.

59. As already mentioned, if at least one party has fully performed its obligations with respect to a licence agreement, the licence agreement is not subject to the recommendations of the Insolvency Guide concerning treatment of contracts. Where neither the licensor nor the licensee has fully performed its obligations under the licence agreement, however, the licence agreement would be subject to rejection under those recommendations. To protect long-term investments of licensees and in recognition of the fact that a licensee may depend on the use of rights under a licence agreement, some States have adopted rules that give additional protection to a licensee (and, in effect, its secured creditor) in the case of a licence agreement that would otherwise be subject to rejection in the insolvency of the licensor. Such protection is particularly important where there is a chain of licence and sub-licence agreements and thus several parties may be affected by the insolvency of one party in the chain.

60. For example, some States give a licensee the right to continue to use or exploit the licensed intellectual property, following the rejection of the licence agreement by the licensor's insolvency representative, as long as the licensee continues to pay royalties to the estate as provided in the licence agreement and otherwise continues to perform the licence agreement. The only obligation imposed upon the licensor's estate as a result of this rule is the obligation to continue honouring the terms and conditions of the licence agreement, an obligation that does not impose upon the resources of the licensor's estate. This approach has the effect of balancing the interest of the insolvent licensor to escape affirmative burdens under the licence agreement and the interest of the licensee to protect its investment in the licensed intellectual property.

61. In other States, licence agreements may not be subject to rejection under insolvency law because: (a) a rule that excludes the leases of immovable property from insolvency rules on rejection of contracts in the case of the lessor's insolvency applies by analogy to licence agreements in the licensor's insolvency; (b) licence agreements relating to exclusive licences create property rights (rights in rem) that

are not subject to rejection (but may be subject to avoidance); (c) licence agreements are not regarded as contracts that have not been fully performed by both parties as the licensor has already performed its obligations by granting the licence; (d) they are registered in the relevant intellectual property registry. In these States, the licensee may be able to retain the licence as long as it pays the royalties owed under the licence agreement.

62. In yet other States, licence agreements may be rejected, subject to the application of the so-called “abstraction principle”. Under this principle, the licence does not depend on the effectiveness of the underlying licence agreement. Thus, the licensee may retain the right to use or exploit the licensed intellectual property, even if a licence agreement has been rejected by the licensor’s insolvency representative. However, the licensor’s insolvency representative has a claim for the withdrawal of the licence based on the principle of unjust enrichment. Until such withdrawal, the licensee has to pay for the use of the licensed intellectual property on the basis of the principle of unjust enrichment an amount equal to the royalties owed under the licence agreement that was rejected.

63. It should be noted that the Insolvency Guide provides that “Exceptions to the power to reject may also be appropriate in the case of labour agreements, agreements where the debtor is a lessor or franchisor or a licensor of intellectual property and termination of the agreement would end or seriously affect the business of the counterparty, in particular where the advantage to the debtor may be relatively minor, and contracts with government, such as licensing agreements and procurement contracts” (see Insolvency Guide, part two, chapter II, paragraph 143). To protect long-term investments and expectations of licensees and their creditors from the ability of the licensor’s insolvency representative in effect to renegotiate licence agreements existing at the commencement of insolvency proceedings, States may wish to consider adopting rules similar to those described in the preceding paragraphs. Any such rules would have to take account of the general rules of insolvency law and the overall effect on the insolvency estate, as well as law relating to intellectual property. States may also wish to consider to what extent the commercial practices described in paragraphs 30 and 31 above would provide adequate practical solutions.

C. Insolvency of the licensee

64. If the licensee is the insolvent debtor and has granted a security right in its rights under the licence agreement, and the licensee’s insolvency representative decides to continue the licence agreement, the licence agreement will remain in place, the licensee will continue to have its rights under the licence agreement to use or exploit the licensed intellectual property (in accordance with the terms and conditions of the licence agreement) and the licensee’s secured creditor will continue to have a security right in those rights. In this case, if the licensor has granted a security right in its rights to the payment of royalties under the licence agreement, the licensor’s secured creditor will continue to have a security right in the licensor’s right to the payment of royalties.

65. In cases in which the licensee’s insolvency representative decides to reject the licence agreement, however, and the licensee has granted a security right in its

rights under the licence agreement, the licence agreement will no longer be effective, the licensee will no longer have a right to use or exploit the licensed intellectual property and the licensee's secured creditor will not be able to use the value of the licensee's rights under the licence agreement to satisfy the secured obligation. In this case too, if the licensor has granted a security right in its right to the payment of royalties under the licence agreement, the licensor will lose its royalty stream and its secured creditor will lose its encumbered asset.

66. A secured creditor with a security right in a licensor's or licensee's rights under a licence agreement may seek to protect itself from the consequences of a rejection of the licence agreement by the licensee's insolvency representative by adopting comparable measures as described above (see paras. 32-33 above).

67. In the case of the insolvency of the licensee, it is important to ensure that the licensor either receive its royalties and the licensee otherwise performs the licence agreement, or that the licensor has a right to terminate the licence agreement. Insolvency law rules, such as those relating to curing any default of the licence agreement in the event that the licence agreement is continued (see para. 29 above), are essential. In addition, in situations where the insolvent licensee has granted a security right in its rights to receive sub-royalties, those sub-royalties will likely be a source of funds for the licensee to pay the royalties that it owes to the licensor. If the licensee's secured creditor claims all the royalties and the licensee does not have another source for payment of royalties to the licensor, it is essential that the licensor has a right to terminate the license to protect its rights.

Appendix

The following text briefly describes the impact of the insolvency of a licensor or licensee on a security right that party's in rights under a licence agreement.

	<i>Licensor is insolvent</i>	<i>Licensee is insolvent</i>
<i>Licensor grants a security right in its rights under a licence agreement (primarily the right to receive royalties)</i>	<p>Question:</p> <p>What happens if the licensor or its insolvency representative decides to continue the performance of the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?^a</p> <p>Answer:</p> <p>The licensee continues to owe royalties under the licence agreement and the secured creditor of the licensor continues to have a security right both in the licensor's right to royalties under the licence agreement and in the proceeds of that right, in other words, any royalty payments that are paid.</p>	<p>Question:</p> <p>What happens if the licensee or its insolvency representative decides to continue the performance of the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer:</p> <p>The licensor continues to have a right to receive royalties under the licence agreement and thus the secured creditor of the licensor continues to have a security right both in the licensor's right to royalties under the licence agreement and in the proceeds of that right, in other words, any royalty payments that are made.</p>
	<p>Question:</p> <p>What happens if the licensor or its insolvency representative rejects the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer:</p> <p>The licensee does not owe royalties under the licence agreement with respect to periods after rejection, but still owes any unpaid royalties for periods before rejection; the secured creditor of the licensor thus has a security right in the right to collect such royalties for periods prior to the rejection and in the royalties paid for those periods, but has no security right in rights to any future royalties because there will be no future royalties under the rejected agreement.</p>	<p>Question:</p> <p>What happens if the licensee or its insolvency representative rejects the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer:</p> <p>The licensee does not continue to owe royalties under the licence agreement with respect to periods after rejection, but still owes any unpaid royalties for periods before rejection; the secured creditor of the licensor thus has a security right in the right to collect such royalties for periods prior to the rejection and in the royalties paid for those periods, but has no security right in rights to any future royalties because there will be no future royalties under the rejected agreement.</p>

	<i>Licensor is insolvent</i>	<i>Licensee is insolvent</i>
<i>Licensee grants a security right in its rights under a licence agreement (primarily the right to use the intellectual property)</i>	<p>Question:</p> <p>What happens if the licensor decides to continue the performance of the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer:</p> <p>The licensee continues to have rights under the licence agreement and the secured creditor of the licensee continues to have a security right in those rights under the licence agreement.</p> <p>Question:</p> <p>What happens if the licensor or its insolvency representative rejects the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer:</p> <p>The licensee does not have rights under the licence agreement with respect to periods after rejection, but retains any rights it may still have with respect to periods before rejection; the secured creditor of the licensee continues to have a security right in those rights of the licensee with respect to periods before rejection.</p>	<p>Question:</p> <p>What happens if the licensee decides to continue the performance of the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer:</p> <p>The licensee continues to have rights under the licence agreement and the secured creditor of the licensee continues to have a security right in those rights under the licence agreement.</p> <p>Question:</p> <p>What happens if the licensee or its insolvency representative rejects the licence agreement under the insolvency law (see recommendations 69-86 of the <i>UNCITRAL Legislative Guide on Insolvency Law</i>)?</p> <p>Answer:</p> <p>The licensee does not have rights under the licence agreement with respect to periods after rejection, but retains rights it may still have with respect to periods before rejection; the secured creditor of the licensee continues to have a security right in those rights of the licensee with respect to periods before rejection.</p>

^a United Nations publication, Sales No. E.05.V.10.

A/CN.9/WG.VI/WP.42/Add.7 (Original: English)**Note by the Secretariat on the Draft Supplement to the UNCITRAL
Legislative Guide on Secured Transactions dealing with security rights in
intellectual property, submitted to the Working Group on Security
Interests at its seventeenth session****ADDENDUM****CONTENTS****Annex I**

Terminology and recommendations of the draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property	
Terminology	
Recommendations 243-253	

Annex I**Terminology and recommendations of the draft
Supplement to the UNCITRAL Legislative Guide on
Secured Transactions dealing with security rights in
intellectual property****Terminology¹**

“Acquisition security right” includes a security right in intellectual property or a licence of intellectual property, provided that the security right secures the obligation to pay any unpaid portion of the acquisition price of the encumbered asset or an obligation incurred or credit otherwise provided to enable the grantor to acquire the encumbered asset.

“Consumer goods” includes intellectual property or a licence of intellectual property used or intended by the grantor to be used for personal, family or household purposes.

“Inventory” includes intellectual property or a licence of intellectual property used or intended by the grantor to be used for sale or licence in the ordinary course of the grantor’s business.

¹ If it could be included in the *Guide*, this text would be included in the relevant terms in section B, terminology and interpretation.

Recommendations

Security rights in tangible assets with respect to which intellectual property is used²

243. The law should provide that, in the case of a tangible asset with respect to which intellectual property is used, unless otherwise agreed by the parties to a security agreement, a security right in the tangible asset does not extend to the intellectual property and a security right in the intellectual property does not extend to the tangible asset. However, to the extent permitted by law relating to intellectual property, nothing in this recommendation limits the enforcement remedies of a secured creditor with a security right in the tangible asset or in the intellectual property.

[Note to the Working Group: The Working Group may wish to consider whether the words “unless otherwise agreed by the parties to the security agreement”, included in the first sentence of this recommendation, should be retained. The Working Group may wish to note that recommendation 10 states that the law should provide that the grantor and the secured creditor may derogate by agreement from the provisions of the law relating to their respective rights and obligations, unless otherwise provided in the law. As a result, the reference to party autonomy in the first sentence of this recommendation may create doubt as to the application of the principle of party autonomy to other provisions of the law that do not include similar language and thus create problems of interpretation. The Working Group may also wish to consider whether the second sentence of this recommendation could be placed in the commentary as it addresses an issue discussed in the enforcement chapter (see A/CN.9/WG.VI/WP.42/Add.5, paras. 24-27).]

Impact of a transfer of encumbered intellectual property on the effectiveness of the registration³

244. The law should provide that the transfer of intellectual property that is subject to a security right does not affect the effectiveness of registration of the security right. As a result, the secured creditor does not have to register an amendment notice indicating the name of the transferee of the encumbered intellectual property.

[Note to the Working Group: The Working Group may wish to consider whether the second sentence of recommendation 244 should be moved to the commentary as it deals with the result of the application of this recommendation.]

² If it could be included in the *Guide*, this recommendation would be included in chapter II on the creation of a security right as recommendation 28 bis.

³ If it could be included in the *Guide*, this recommendation would be included in chapter IV on the registry system as recommendation 62 bis.

Priority of rights of certain licensees of intellectual property⁴

245. The law should provide that the enforcement of a security right in licensed intellectual property created before the licence was granted does not affect the rights of an end-user licensee of the intellectual property under the licence agreement, provided that:

- (a) The licence is non-exclusive;
- (b) The licence covers [copyrighted or patented software] [one or any of the exclusive rights relating to copyrighted software];
- (c) At the time of the conclusion of the licence agreement:
 - (i) The licensor is generally in the business of granting non-exclusive licences in the intellectual property on substantially the same terms to any person that agrees to perform them in accordance with such terms, and the licence agreement is on such terms; and
 - (ii) The licensee does not have knowledge that the licence violates the rights of the secured creditor under the security agreement; and
- (d) The licensed intellectual property and the rights and obligations under the licence agreement are not customized for the licensee.

Right of the secured creditor to preserve the encumbered intellectual property⁵

246. The law should provide that it does not prevent the grantor of a security right in intellectual property and its secured creditor from agreeing that the secured creditor is entitled to take steps to preserve the encumbered intellectual property (for example, to deal with authorities, pursue infringers or renew registrations of the encumbered intellectual property).

[Note to the Working Group: The Working Group may wish to consider whether this recommendation is necessary, as it deals with an issue that will never arise under the law recommended in the Guide, as: (a) the law recognizes party autonomy; (b) does not include a limitation on the matter dealt with in this recommendation; and (c) defers to law relating to intellectual property to the extent that that law contains such a limitation (see recommendations 10 and 4, subparagraph (b)).]

The Working Group may also wish to consider whether the recommendation could be retained if it were revised to:

- (a) *Limit party autonomy as enshrined in the law recommended in the Guide, stating that the secured creditor may exercise this right only if permitted under law relating to intellectual property; or*

⁴ If this recommendation could be included in the *Guide*, it would be placed in the chapter on the priority of a security right as recommendation 81 bis. As an asset-specific recommendation, this recommendation would replace the general recommendation 81, subparagraph (c), to the extent it applies to intellectual property licences.

⁵ If this recommendation could be included in the *Guide*, it would be placed in the chapter on the rights and obligations of the parties to a security agreement as recommendation 116 bis.

(b) Repeat the result of the application of recommendations 10 and 4, subparagraph (b), stating that the grantor and the secured creditor may agree that the secured creditor is entitled to take steps to preserve the encumbered intellectual property, unless otherwise provided by law relating to intellectual property.]

Application of acquisition financing provisions to intellectual property⁶

247. The law should provide that the provisions on acquisition security rights in a tangible asset also apply to an acquisition security right in intellectual property or a licence of intellectual property.

Acquisition security right in intellectual property held for sale or licence

248. The law should provide that, if intellectual property or a licence of intellectual property that is subject to an acquisition security right is held for sale or licence in the ordinary course of the grantor's business, the acquisition security right is treated as an acquisition security right in inventory.

Acquisition security right in intellectual property held for personal, family or household purposes

249. The law should provide that, if intellectual property or a licence of intellectual property that is subject to an acquisition security right is used or intended by the grantor to be used for personal, family or household purposes, the acquisition security right is treated as an acquisition security right in consumer goods.

Inapplicability of the concept of possession to an acquisition security right in intellectual property

250. The law should provide that, if intellectual property or a licence of intellectual property is subject to an acquisition security right, any reference in such provisions to possession of the encumbered asset by the secured creditor does not apply.

Relevance of time when the grantor acquires the encumbered intellectual property

251. The law should provide that, if intellectual property or a licence of intellectual property is subject to an acquisition security right, any reference in such provisions to the time of possession of the encumbered asset by the grantor refers to the time the grantor acquires the encumbered intellectual property or licence.

252. The law should provide that, if intellectual property or a licence of intellectual property is subject to an acquisition security right, any reference in such provisions to time of the delivery of the encumbered asset to the grantor refers to the time the grantor acquires the encumbered intellectual property or licence.

⁶ If recommendations 247-252 could be included in the *Guide*, they would be placed in the chapter on acquisition financing after recommendation 186.

Law applicable to a security right in intellectual property⁷

253.

Alternative A

The law should provide that the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in intellectual property is the law of the State in which the intellectual property is protected.

Alternative B

The law should provide that the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in intellectual property that may be registered in an intellectual property registry is the law of the State under whose authority the registry is maintained. The law applicable to those matters with respect to a security right in intellectual property that may not be registered in an intellectual property registry is the law of the State in which the grantor is located.

Alternative C

The law should provide that the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in intellectual property is the law of the State in which the grantor is located. However, the law applicable to the third-party effectiveness and priority of a security right in intellectual property as against the right of a transferee or licensee of the encumbered intellectual property is the law of the State in which the intellectual property is protected.

⁷ If this recommendation could be included in the *Guide*, it would be placed in chapter X on conflict of laws as recommendation 214 bis.

III. INSOLVENCY LAW

A. Report of the Working Group on Insolvency Law on the work of its thirty-seventh session (Vienna, 9-13 November 2009) (A/CN.9/686)

[Original: English]

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I. Introduction

1. At its thirty-ninth session in 2006, the Commission agreed that the topic of the treatment of corporate groups in insolvency was sufficiently developed for referral to Working Group V (Insolvency Law) for consideration and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending upon the substance of the proposed solutions to the problems the Working Group would identify under that topic.

2. The Working Group agreed at its thirty-first session, held in Vienna from 11 to 15 December 2006, that the UNCITRAL Legislative Guide on Insolvency Law and the UNCITRAL Model Law on Cross-Border Insolvency provided a sound basis for the unification of insolvency law, and that the current work was intended to complement those texts, not to replace them (see A/CN.9/618, para. 69). A possible method of work would entail the consideration of those provisions contained in existing texts that might be relevant in the context of corporate groups and the identification of those issues that required additional discussion and the preparation of additional recommendations. Other issues, although relevant to corporate groups, could be treated in the same manner as in the Legislative Guide and Model Law. It was also suggested that the possible outcome of that work might be in the form of legislative recommendations supported by a discussion of the underlying policy 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 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, its thirty-fourth session in March 2008, its thirty-fifth session in November 2008 and its thirty-sixth session in May 2009, 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 (A/CN.9/WG.V/WP.78 and Add.1, A/CN.9/WG.V/WP.80 and Add.1, A/CN.9/WG.V/WP.82 and Add.1-4 and A/CN.9/WG.V/WP.85 and Add.1). At its thirty-sixth session, the Working Group decided that the draft recommendations on the international treatment of enterprise groups in insolvency should be included in part three of the Legislative Guide and adopt the same format as the preceding parts of the Legislative Guide (see A/CN.9/671, para. 55).

II. Organization of the session

5. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-seventh session in Vienna from 9 to 13 November 2009. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Belarus, Bolivia (Plurinational State of), Bulgaria, Canada, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Iran (Islamic Republic of), Italy, Japan, Lebanon, Malaysia, Mexico, Mongolia, Paraguay, Republic of Korea, Russian Federation, Senegal, Serbia, 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: Argentina, Belgium, Croatia, Denmark, Dominican Republic, Indonesia, Lithuania, Philippines, Portugal, Romania, Slovakia, Slovenia and United Republic of Tanzania.

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

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF) and the World Bank;

(b) *Invited international non-governmental organizations*: American Bar Association (ABA), American Bar Foundation (ABF), Center For International Legal Studies (CILS), INSOL International (INSOL), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (III), International Swaps And Derivatives Association (ISDA), International Women's Insolvency & Restructuring Confederation (IWIRC) and Union internationale des Avocats (UIA).

8. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Mme. Kaïré Sow FALL (Senegal)

9. The Working Group had before it the following documents:
 - (a) Annotated provisional agenda (A/CN.9/WG.V/WP.89);
 - (b) A note by the Secretariat on the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.90 and Add.1-2).
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.90 and Add.1-2 and other documents referred therein. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Treatment of enterprise groups in insolvency

12. The Working Group commenced its work with a discussion on the inclusion of a general purpose clause for the recommendations applicable to enterprise groups in part three of the Legislative Guide.

A. General purpose clause

13. It was generally agreed that there was a need to include a statement of general purpose for the recommendations applicable to enterprise groups in part three of the Legislative Guide. To that end, a text along the following lines was proposed: “The purpose of this part of the Legislative Guide is to permit the courts to consider the insolvency of one or more enterprise group members, within the context of the group where the group is found to exist, in order to promote the key objectives in recommendation 1 in both the domestic and cross-border contexts.” Another suggestion made was to include only the wording contained in document A/CN.9/WG.V/WP.90/Add.2, paragraph 3 that “The purpose of this part of the Legislative Guide is to achieve a better, more effective result for the enterprise group as a whole.” A further proposal to combine those two suggestions was widely supported.

14. Noting that the insolvency laws of different jurisdictions accorded different roles to the courts in insolvency, a more general formulation deleting the reference

to the court was proposed. It was also observed that the purpose was not only better solutions for the enterprise group members, but also for the creditors. The Secretariat was requested to prepare a draft text for further consideration taking account of those various proposals.

15. The Working Group considered and adopted the draft general purpose clause for part three prepared by the Secretariat along the following lines:

“The purpose of this part is to permit, in both domestic and cross-border contexts, treatment of the insolvency proceedings of one or more enterprise group members within the context of the enterprise group to address the issues particular to insolvency proceedings involving enterprise groups and to achieve a better, more effective result for the enterprise group as a whole and its creditors and, in particular:

“(a) To promote the key objectives of recommendation 1; and

“(b) To more effectively address, in the context of recommendation 5, instances of cross-border insolvency proceedings involving enterprise group members.”

16. The Secretariat was requested to place the new purpose clause in the appropriate position in the revised text of part three of the Legislative Guide.

B. International issues

17. The Working Group continued its discussion on the international treatment of enterprise groups in insolvency on the basis of document A/CN.9/WG.V/WP.90/Add.1.

18. It was observed that an element missing from the current draft text was that of recognition of foreign proceedings and enforcement of foreign orders, which were regarded as prerequisites for cross-border cooperation and coordination in many jurisdictions. The concern was expressed that recognition and enforcement were difficult issues, which could require lengthy discussion and might delay the completion of this work. One view was that document A/CN.9/WG.V/WP.90/Add.1, paragraphs 8-10 sufficiently addressed those issues. Another view was that the draft recommendations might be indicated as applying in the international context only where a State had enacted the Model Law. In response, it was said that such wording would unnecessarily limit the application of part three, which was intended to extend the operation of the Model Law and to apply to cross-border insolvency proceedings between jurisdictions that had not enacted the UNCITRAL Model Law, as discussed in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the “Practice Guide”). In that regard, it was suggested that the Practice Guide should be treated more comprehensively in the commentary.

19. In order to reconcile the different views, it was proposed that a recommendation to the effect that foreign proceedings should be recognized under domestic law should be included. A further proposal was to extend the recommendation to provide for access of foreign insolvency representatives to the courts and for recognition of relief. It was observed that providing for recognition and relief might be too ambitious and unnecessarily complex. After discussion, the

Working Group agreed to include a new recommendation along the lines that the insolvency law should provide direct access to courts for the foreign insolvency representative.

20. The Working Group considered a draft recommendation prepared by the Secretariat. The substance of a draft recommendation along the following lines was adopted:

Access to courts and recognition of foreign proceedings

“The insolvency law should provide, in the context of insolvency proceedings with respect to enterprise group members,

“(a) Access to the courts for foreign representatives and creditors; and

“(b) Recognition of the foreign proceedings, if necessary under applicable law.”

21. The Secretariat was requested to place the draft recommendation in the appropriate position in the revised text of part three of the Legislative Guide.

Draft recommendations 240-247

Purpose Clause

22. The Working Group agreed to include the words “involving courts” after the word “cooperation” in the chapeau, in order to clarify its relationship with the following draft recommendations on cooperation between the courts.

Draft recommendation 240: cooperation between the court and foreign courts or foreign representatives

23. It was observed that the word “other” should be inserted before the words “members of that enterprise group” in the second last line of draft recommendation 240.

24. With respect to the text in square brackets, support was expressed for its deletion as it was viewed as redundant. In support of deletion, it was further stated that the reference to the term “court” could lead to confusion, as in some jurisdictions the competent authority was an administrative authority rather than the courts. In response, it was recalled that the glossary of the Legislative Guide made it clear that the term “court” included a reference to an administrative authority. It was also recalled that the draft recommendation reflected article 27(a) of the Model Law, which referred to that person “acting at the direction of the court” rather than to that person being appointed by the court. Moreover, it was clarified that the reference to the person appointed for that purpose was not a reference to a person who was either an additional insolvency representative or a substitute for an insolvency representative, but rather to a person appointed solely for the purpose of facilitating cooperation, whether between the courts or between the courts and insolvency representatives.

25. After discussion, the Working Group agreed to remove the square brackets, retain the text and align the wording of the draft recommendation with the wording used in the Model Law. The Working Group further agreed to include a footnote to

the term “foreign representative” referring to the definition in article 2(d) of the Model Law, in order to clarify its meaning.

Draft recommendation 241: cooperation between the insolvency representative and foreign courts

26. The Working Group adopted draft recommendation 241 in substance.

Draft recommendation 242: cooperation to the maximum extent possible involving courts

27. As a matter of drafting, it was proposed that the reference to recommendations 240 and 241 in the chapeau of draft recommendation 242 was not required and could be deleted. That proposal was supported. A further suggestion was that the words “to the maximum extent possible” should also be deleted from the chapeau on the basis that they might unnecessarily restrict the notion of cooperation. That suggestion was not supported.

28. Other proposals were that the examples of means of communication included in paragraph (b) and the types of documents referred to in paragraphs (c) and (d) should be moved to the commentary and that, since paragraphs (b) to (d) were simply examples of means of communication referred to in paragraph (a), they could be included in that paragraph. The Secretariat was requested to consider redrafting the recommendation along those lines.

29. Concern was expressed with respect to paragraph (e) and the possibility that it might be interpreted as supporting substantive consolidation in a cross-border context. For that reason, it was suggested that the paragraph should focus on consideration, in a coordinated manner, of insolvency solutions available for group members subject to insolvency proceedings. A further suggestion was to add the words “to facilitate coordination” at the end of paragraph (f). Those proposals were not supported.

30. The relationship in those draft recommendations between cooperation, coordination and communication was questioned. It was suggested, in particular, that coordination and cooperation were distinct concepts and that while paragraphs (a) to (d) of draft recommendation 242 addressed examples of cooperation, paragraphs (e) to (g) related to coordination, which should be addressed in a separate recommendation. While it was recalled that the Model Law treated communication and coordination as examples of how cooperation might be achieved, it was observed that since coordination was of relatively greater importance in the context of enterprise groups than in the case of an individual debtor, a slightly different approach might be justified in those recommendations. A different proposal was that the drafting of recommendation 242 should make it clear that communication and coordination were examples of how cooperation might be achieved. The Working Group supported the latter proposal and agreed that paragraphs (e) to (g) should be retained in the draft recommendation as currently drafted with the deletion of the square brackets.

Draft recommendation 243: direct communication between the court and foreign courts or foreign representatives

31. The concern was expressed that draft recommendation 243 might permit unconditioned communication between courts and foreign courts or foreign

representatives. To address that concern, a closer link with draft recommendation 245 was required. Another concern was that since in some jurisdictions such direct communication was not allowed, the provision would create difficulties. In response, it was observed that draft recommendations 243 and 244 were only permissive in nature, not directive. It was further explained that draft recommendations 243-244 were consistent with the corresponding articles of the Model Law.

32. A different concern raised was whether communication between courts and foreign representatives could take place without recognition of the relevant foreign proceedings as provided in the Model Law. The Working Group recalled that it had already discussed that issue and agreed to include a recommendation on access to courts and granting of recognition (see paragraph 20 above). It was also noted that the issue of communication was independent from recognition, which was generally regulated by domestic procedural law and adoption of the Model Law. It was further noted that the Model Law did not condition communication upon recognition.

33. After discussion, the Working Group adopted draft recommendation 243 in substance.

Draft recommendation 244: direct communication between the court and foreign courts or foreign representatives

34. The Working Group adopted draft recommendation 244 in substance and requested the Secretariat to include appropriate references to the Model Law when preparing the final document.

Draft recommendation 245: conditions applicable to cross-border communications involving courts

35. Paragraph (a) was adopted in substance, with the deletion of the alternative text in square brackets.

36. Concern was expressed that paragraph (b) established an obligation to provide notice that was too broad and could operate to hinder, rather than to facilitate communication. It was proposed that if notice were required, it could be provided after the communication had taken place. Alternatively, since the issue of provision of notice was often determined by procedural rules rather than the insolvency law, it was suggested that the recommendation could refer to provision of notice in accordance with applicable law. That approach was widely supported.

37. Further concerns related to the use of the term “affected persons”. The first was that it was not a term used in the Legislative Guide and for consistency, the term “parties in interest” should be used. The second was that in the context of the draft recommendation it could be interpreted to include creditors and might therefore be too broad and onerous to implement. After discussion, the Working Group agreed that “affected persons” should be replaced with “parties in interest”.

38. The scope of paragraph (c) was also felt to be too broad and potentially difficult to implement, particularly when there were numerous parties that might participate in person in a communication. It was noted that in some States it would be difficult to restrict a party in interest’s right to appear and be heard and that the scope of the court’s discretion to limit participation in a communication might vary

from State to State. A proposal was made to limit the paragraph to participation by insolvency representatives and parties in interest along the following lines: “The insolvency representative should be entitled to participate in person in a communication. A party in interest may participate in accordance with applicable law and when determined by the court to be appropriate.” That proposal, with the deletion of the phrase “in person”, received support.

39. It was pointed out with respect to paragraph (d) that if the transcript was made part of the record of the proceedings it would be publicly available and the requirement to make it available to specified parties was unnecessary. The Working Group agreed that the draft recommendation should end with the words “as part of the record of the proceedings”, with the remaining text deleted.

40. Paragraphs (e) and (f) were approved in substance with the words “affected persons” replaced by the words “parties in interest”.

41. The Working Group adopted the substance of draft recommendation 245 with those amendments.

Draft recommendation 246

42. A proposal to revise the chapeau of the draft recommendation as follows was supported: “The insolvency law should specify that a communication made in accordance with these recommendations shall not imply:”. For greater clarity, it was proposed that the reference to “these recommendations” be replaced with a specific reference to recommendations 240-245 and that the words “between the courts” be added after the word “communication”.

43. A concern was expressed with respect to the use of the words “in controversy” in paragraph (b) and the words “lacking consensus” were proposed as an alternative. Another proposal was to delete the words “in controversy” completely, so that the recommendation would simply refer to “any matter before the court”. That proposal was supported. A further concern with respect to paragraph (b) was that it might prevent the courts, in the course of a communication, from reaching agreement with respect, for example, to approval of an agreement in accordance with draft recommendation 254. In response, it was pointed out that paragraph (b) was not intended to exclude explicit agreements being reached, but rather sought to prevent agreement being implied from the fact of communication. It was suggested that that concern might be addressed in the commentary, rather than by adding further text to the recommendation. That solution was supported.

44. The Working Group agreed that the words “[or the foreign court]” should be deleted from paragraphs (b) and (d) on the basis that domestic legislation generally would not address what occurred in a foreign court and, in any event, could not affect decisions taken in those courts.

45. The Working Group adopted the substance of draft recommendation 246 with those amendments.

Draft recommendation 247: coordination of hearings

46. Various views were expressed with respect to the reference to “joint” hearings. One view referred to practical experience with such hearings and suggested that the reference might be retained as reflecting that practical experience, albeit that it was

not widespread. Another view was that joint hearings could not be contemplated under domestic law and that the reference should be to “coordinated” hearings. Yet another view was that since the recommendations sought to promote and develop practice with respect to coordination, the reference to “joint” hearings should be retained. It was pointed out that since paragraph 35 of the commentary indicated that the reference to “coordinated hearings” might include joint, simultaneous or parallel hearings, all that was required in the recommendation was a reference to “coordinated hearings”. The Working Group agreed to delete the references to “joint” hearings.

47. The Working Group agreed that the last sentence should be retained without the brackets. Since that sentence emphasized the independence of each court, the words “and independence” in the second sentence of the draft recommendation were not required. That solution was agreed.

48. The Working Group adopted the substance of draft recommendation 247 with those amendments.

Draft recommendations 248-250

Purpose Clause

49. The Working Group adopted the draft purpose clause in substance.

Draft recommendation 248: cooperation between insolvency representatives

50. General support was expressed for draft recommendation 248. One suggestion made was to clarify that the “foreign representatives” referred to in draft recommendations 248 and 249 were appointed in insolvency proceedings commenced in other States with respect to other members of that enterprise group. After discussion, the Working Group agreed to include the suggested modification and to retain the text of draft recommendation 248 without the brackets.

Draft recommendation 249: communication between insolvency representatives

51. The Working Group agreed to retain the text of the draft recommendation without the brackets, and to align it with the modification agreed for draft recommendation 248. A proposal to delete the second sentence of draft recommendation 249 was supported.

Draft recommendation 250: cooperation to the maximum extent possible between insolvency representatives

52. A proposal to replace the words “should be implemented” in the chapeau with the words “may be implemented” was broadly supported.

53. The Working Group adopted paragraph (a) of draft recommendation 250 in substance.

54. A proposal to replace the word “use” with the word “conclusion” in paragraph (b) was not supported. After discussion, the Working Group adopted paragraph (b) of draft recommendation 250 in substance without any modification.

55. The concern was expressed that the words “division of the exercise of powers” at the beginning of paragraph (c) suggested that the legal obligations of insolvency

representatives could be reduced. To address that concern, it was suggested that the words “division of the exercise of powers and” be deleted. That proposal found broad support. Another proposal made was to delete the words “or leading” in front of the word “role”. That proposal was also widely supported. The Working Group adopted paragraph (c) of draft recommendation 250 in substance with both proposed modifications.

56. The Working Group adopted paragraphs (d)-(e) of draft recommendation 250 in substance.

57. A proposal to align the wording of paragraph (e) of draft recommendation 242 with the wording used in paragraph (d) of draft recommendation 250 to avoid the reference to “assets” was supported.

Draft recommendations 251-252

Purpose clause

58. The Working Group agreed that the draft purpose clause should more closely reflect the content of draft recommendations 251 and 252 and include the idea that the appointment of the same or a single insolvency representative was only appropriate in some cases and would be the result of careful consideration by the court, as well as noting the need to address conflicts of interest.

59. It was also suggested that those ideas should be discussed in the commentary, with emphasis being given to the need for the insolvency representative appointed in such circumstances to have the necessary qualifications and international experience.

Draft recommendation 251: appointment of the same insolvency representative and draft recommendation 252: conflict of interest

60. The Working Group agreed to retain the text “in appropriate cases” in draft recommendation 251, deleting the brackets, and to move the second text in brackets to the purpose clause. The Working Group also agreed to retain draft recommendation 252 as drafted and delete the brackets. It was noted that the use of the phrase “the same or a single” was not consistent in that section and should be aligned.

61. The Working Group adopted the substance of draft recommendations 251 and 252 with those amendments.

Draft recommendations 253-254

Purpose clause

62. A proposal was made to add a reference to approval by the creditor committee to the draft purpose clause. Although acknowledging that creditor committees may have a role to play with respect to approving cross-border insolvency agreements, the Working Group adopted the substance of the draft purpose clause with the deletion of the brackets.

Draft recommendations 253: authority to enter into cross-border insolvency agreements and draft recommendation 254: approval or implementation of cross-border insolvency agreements

63. Despite initial support for retaining the text “to the extent permitted or in the manner required by applicable law” in draft recommendation 253, it was agreed, after discussion, that those words should be deleted as they might unnecessarily limit the use of insolvency agreements where applicable law contained such limitations. It was emphasized that the purpose of the recommendation was to promote the use of such agreements, particularly in situations where the law currently contained potential barriers to their use.

64. The retention of the text “involving two or more members of an enterprise group” without the brackets in both draft recommendations was generally supported.

65. The Working Group adopted the substance of draft recommendations 253 and 254 with those amendments.

Commentary

66. It was agreed that the Secretariat would revise the commentary to reflect the issues raised in the course of the Working Group’s deliberations on draft recommendations 240 to 254, including the issues of recognition and access, and include more comprehensive references to, and material from, the UNCITRAL Practice Guide.

C. Domestic issues

67. The Working Group continued its deliberations on enterprise groups in insolvency in the domestic context as set forth in A/CN.9/WG.V/WP.90, commencing with the glossary and recommendations 211-216 on post-commencement finance.

1. Glossary

68. The Working Group adopted the glossary in substance.

2. Post-commencement finance — draft recommendations 211-216

Purpose clause

69. It was proposed that at the end of paragraph (d) the words “affected by or benefitting from the post-commencement finance” should replace the word “involved”, to ensure greater clarity of meaning. In response, it was observed that addition of the word “involved” had been agreed at the last session of the Working Group (A/CN.9/671, paragraph 82) and that it was clear from the context that the reference was to the creditors involved in the post-commencement finance.

70. The Working Group adopted the substance of the draft purpose clause without modification.

Draft recommendation 211: provision of post-commencement finance by a group member subject to insolvency proceedings to another group member subject to insolvency proceedings

71. Concern was expressed as to whether paragraph (b) of draft recommendation 211 adequately addressed the situation of an insolvent group member receiving post-commencement finance based on the granting of a security interest by another insolvent group member, in accordance with recommendations 65-67. In response, it was confirmed that those recommendations should apply to the receiving group member in the same way as they applied to any other debtor receiving post-commencement finance, but that that issue could be expressly addressed in the commentary to ensure the connection between the earlier recommendations and the recommendations on enterprise groups. The situation of a solvent group member receiving finance on the basis of a security interest provided by an insolvent group member had previously been discussed in the context of disposal of assets (see A/CN.9/666, paragraph 67).

72. The Working Group agreed to remove the brackets and adopt the substance of recommendation 211.

Draft recommendation 212: provision of post-commencement finance by a group member subject to insolvency proceedings to another group member subject to insolvency proceedings

73. As a general consideration, it was suggested that the commentary should discuss the manner in which post-commencement finance in the group context might be negotiated between insolvency representatives and occur only as the result of an agreement between them.

74. General preference was expressed in favour of using the word “provided” in the chapeau to align the draft recommendation with the general usage in the Guide concerning post-commencement finance.

75. The Working Group discussed the question of whether paragraphs (a) to (c) should be cumulative or whether paragraphs (a) and (b) should be alternatives. One view was that the three paragraphs should be cumulative. Another view was that paragraphs (a) and (b) should be alternatives: paragraph (a) was appropriate in the case of reorganization, paragraph (b) related more to liquidation and was not required in cases of reorganization and paragraph (c) should apply in both of those cases. After discussion, it was agreed that paragraphs (a) and (b) were alternatives and could be combined in a single paragraph and that paragraph (c) would then form a second requirement.

76. With respect to paragraph (c), the Working Group agreed to delete the words in brackets and to add the words “of that group member” after the word “creditors”.

77. The Working Group agreed to remove the brackets and adopted the substance of the following revision of draft recommendation 212:

“The insolvency law should specify that post-commencement finance may be provided in accordance with recommendation 211, where the insolvency representative of the group member advancing finance, granting a security interest or providing a guarantee or other assurance:

“(a) Determines it to be necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of the estate of that enterprise group member; and

“(b) Determines that any harm to creditors of that group member is offset by the benefit to be derived from advancing finance, granting a security interest or providing a guarantee or other assurance.”

Draft recommendation 213

78. The Working Group agreed that the words “advancing finance, granting a security interest or providing a guarantee or other assurance” as used in draft recommendation 212 should be repeated in draft recommendation 213 as follows:

“The insolvency law may require the court to authorize or creditors to consent to the advancing of finance, granting of a security interest or provision of a guarantee or other assurance in accordance with recommendations 211 and 212.”

79. The Working Group agreed to remove the brackets and adopted the substance of draft recommendation 213 with that amendment.

Draft recommendation 214: post-commencement finance obtained by a group member subject to insolvency proceedings from another group member subject to insolvency proceedings

80. It was clarified that draft recommendation 214 was based upon recommendation 63 and addressed the situation of an enterprise group member receiving post-commencement finance, as distinct from draft recommendations 211 and 212, which addressed the situation of an enterprise group member advancing post-commencement finance.

81. The Working Group agreed to remove the brackets and adopted the substance of draft recommendation 214.

Draft recommendation 215: priority for post-commencement finance

82. The Working Group recalled that the purpose of draft recommendation 215 was to draw the attention of the legislator to the need to address the priority applying to the provision of post-commencement finance by one enterprise group member subject to insolvency proceedings to another group member subject to insolvency. It was further recalled that draft recommendation 215 left that priority to be regulated by domestic law, as the Working Group had agreed not to specify the ranking of priorities in the group context. The Working Group agreed to remove the brackets and adopted the substance of draft recommendation 215.

Draft recommendation 216: security for post-commencement finance

83. The Working Group agreed to remove the brackets and adopted the substance of draft recommendation 216.

3. Joint application for commencement — draft recommendations 199-201

Purpose clause

84. The Working Group adopted paragraph (a) of the draft purpose clause in substance.

85. A proposal was made to include words along the lines of “a court of competent jurisdiction” in paragraph (b) of the draft purpose clause, to clarify that, in some States, different courts might have jurisdiction with respect to commencement of insolvency concerning different enterprise group members. A different understanding was that a joint application should be considered by a single court, as otherwise coordination would be required. After discussion, the Working Group adopted paragraph (b) of the draft purpose clause in substance and agreed to address the issue of more than one competent court in the commentary.

86. It was noted that the benefit of a joint application was the overall benefit to the administration. In that light, it was suggested that the words “associated with commencement of those insolvency proceedings” following the word “costs” in paragraph (c) should be deleted. That proposal found broad support. The Working Group adopted paragraph (c) of the draft purpose clause in substance with the suggested modification.

Draft recommendation 199: joint application for commencement of insolvency proceedings

87. The Working Group adopted draft recommendation 199 in substance.

Draft recommendation 200: persons permitted to apply

88. The Working Group agreed that since paragraph (a) included a reference to recommendation 15, paragraph (b) should include a reference to recommendation 16. The Working Group adopted the substance of draft recommendation 200 with that amendment.

Draft recommendation 201: competent court

89. The Working Group adopted draft recommendation 201 in substance.

4. Procedural coordination — draft recommendations 202-210

Purpose clause and draft recommendations 202-203: procedural coordination of two or more insolvency proceedings

90. The Working Group adopted the draft purpose clause on procedural coordination and draft recommendations 202-203 in substance.

Draft recommendation 204: procedural coordination of two or more insolvency proceedings

91. The Working Group agreed to delete the text in brackets and adopted the substance of draft recommendation 204.

Draft recommendation 205: timing of application and draft recommendation 206: persons permitted to apply

92. The Working Group adopted draft recommendations 205-206 in substance.

Draft recommendation 207: coordinating consideration of an application

93. The Working Group recalled its discussion on “joint hearings” in the international context (see paragraph 46 above) and agreed that the same approach should be adopted in the domestic context, replacing the word “joint” with “coordinated”. The Working Group adopted the substance of draft recommendation 207 with that amendment.

Draft recommendations 208: modification or termination of an order for procedural coordination, draft recommendation 209: competent courts and draft recommendation 210: notice of procedural coordination

94. The Working Group adopted draft recommendations 208-210 in substance.

5. Avoidance proceedings — draft recommendations 217-218

Purpose Clause

95. In response to a question, it was clarified that the draft purpose clause on avoidance proceedings was to draw the attention of legislators to the need to give special consideration to the avoidance of transactions occurring in the context of enterprise groups. For that reason, it was proposed that the words “to take into account” should be replaced with the words “to examine the transaction”. Another proposal was to delete the word “specific” before the word “circumstances”, to show the general nature of the purpose clause. After discussion, the Working Group agreed to retain the text of the draft purpose clause without the brackets and with the deletion of the word “specific”.

Draft recommendation 217: avoidable transaction and draft recommendation 218: elements of avoidance and defences

96. The Working Group adopted draft recommendations 217-218 in substance.

6. Substantive consolidation — draft recommendations 219-232

Purpose clause

97. The Working Group adopted the substance of the draft purpose clause.

Draft recommendation 219: exceptions to the principle of separate legal identity

98. The Working Group adopted the substance of draft recommendation 219 and agreed to revise the heading to “The principle of separate legal identity”.

Recommendation 220: circumstances in which substantive consolidation may be available

99. A proposal to delete the brackets and retain the text in the chapeau with the addition of the word “only” before “in the following limited circumstances” was widely supported.

100. The reference to “disproportionate” in paragraph (a) was questioned on the basis that the concept implied a comparison that was missing from the text of the paragraph.

101. A proposal to redraft paragraph (b) in order to align it with paragraph (a), as follows, was widely supported:

“Where the court is satisfied that enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential to rectify that scheme or activity.”

102. The Working Group adopted the substance of draft recommendation 220 with those amendments.

Draft recommendation 221: Exclusions from substantive consolidation

103. The Working Group discussed the circumstances that would give rise to the desirability of excluding assets and related claims from an order for substantive consolidation in order to provide greater clarity to the draft recommendation and guidance to legislators and judges. Examples of those circumstances included where part of the business activities of the group could be separated from the intermingled assets or the fraudulent scheme or where the ownership of certain assets could readily be identified. It was proposed that those examples be discussed in more detail in the commentary.

104. Since it was agreed, after discussion, that it was not possible to identify with clarity all situations in which it might be appropriate to exclude assets and claims, it was proposed that the draft recommendation should operate to permit exclusions, that the word “specified” should be deleted, and that an insolvency law should include appropriate standards or guidelines to cover those situations. Noting that draft recommendation 220 was a permissive provision, it was agreed that draft recommendation 221 should be revised along the following lines:

“Where the insolvency law provides for substantive consolidation in accordance with recommendation 220, the insolvency law should permit the court to exclude assets and claims from an order for substantive consolidation and specify standards applicable to those exclusions.”

Draft recommendation 222: application for substantive consolidation — timing of an application

105. The Working Group agreed that the proviso at the end of the draft recommendation should be deleted and that the word “impracticability” in the footnote should be replaced with the word “possibility”. It was also agreed that that footnote should be aligned with the footnote to draft recommendation 205, which addressed a similar issue of timing.

106. The Working Group adopted the substance of draft recommendation 222 with those amendments.

Draft recommendation 223: application for substantive consolidation — persons permitted to apply

107. A proposal to align the order of the persons permitted to apply under the draft recommendation with the order in which they were discussed in paragraph 153 of

the commentary was supported. The Working Group adopted the substance of draft recommendation 223 with that amendment.

Draft recommendation 224: effect of an order for substantive consolidation

108. Several views were expressed with respect to the words in brackets in paragraph (c). One view was that in order to align that paragraph with paragraph (a) and the definition of substantive consolidation, the word “single” should be used. Another view was that while it was acceptable to use the word “single” in the context of the phrase “treated as if they were part of a single insolvency estate”, that formulation was not used in paragraph (c) and to avoid confusion, the word “consolidated” was preferred. After discussion, the Working Group agreed to retain the word “single”, without the brackets and delete the word “consolidated”.

109. Another view with respect to paragraph (c) was that it essentially repeated the ideas contained in paragraph (a) and was thus superfluous. A different view was that it addressed a different situation and could be retained in order to make it clear how claims were treated.

110. A question was raised as to the impact of paragraph (c) on guarantees. Three situations in which that question might be relevant were identified. The first involved a guarantee provided by one group member to another group member, where they were both subject to the order for substantive consolidation. The second also involved an intra-group guarantee, but the guarantor was not subject to the order for substantive consolidation. The third situation involved provision of a guarantee by an external guarantor to a group member that was subject to substantive consolidation. It was pointed out that in the first situation, where both group members were consolidated, the guarantee and any associated claims would be extinguished under paragraph (b). The second situation might be addressed by provisions in the Legislative Guide on related person transactions. The third situation was not covered by draft recommendation 226 and would therefore be subject to treatment under domestic law, which very often restricted the guarantor’s claim where it had made a payment under the guarantee, unless the Working Group decided to recommend the adoption of special rules. After discussion, the Working Group agreed that it would not address that issue in a recommendation, but that it should be discussed in the commentary.

111. A question was raised with respect to the effect of substantive consolidation on the avoidance of intra-group transactions. It was noted that the other recommendations of the Guide would address the question of transactions between external entities and consolidated members of the group. Moreover, draft recommendation 229 addressed calculation of the suspect period when substantive consolidation was ordered. However, the question raised was not specifically addressed, but could be included in the commentary.

112. After discussion, the Working Group approved the substance of draft recommendation 224, with the amendment to paragraph (c) noted above.

Draft recommendation 225: effect of an order for substantive consolidation

113. The Working Group was reminded that draft recommendation 225 responded to a request at the last session of the Working Group to include a recommendation to the effect that labour and secured creditors should not be able to enhance their

position as the result of an order for substantive consolidation (see A/CN.9/671, para. 110). Several concerns were expressed with respect to the draft recommendation. One concern expressed was that referring only to labour claims and claims by creditors holding a security interest over an asset of an enterprise group member was discriminatory and neither reasonable nor desirable. If any priority claims were to be addressed, the draft recommendation should refer to all priority claims. In addition, the Working Group was cautioned that in draft recommendation 225 there might be a confusion between the issue of priority of a claim and its value as opposed to the amount recovered on the claim; the value of a claim would not be affected by substantive consolidation, whereas the actual recovery might be. Another concern was expressed with regard to a security interest covering all of the assets of a group member (floating charge) and, in particular whether, as a result of substantive consolidation, the assets covered by that security interest could be extended to all assets included in the consolidated estate.

114. Various proposals were made to address the concerns expressed. One proposal was to broaden the scope of draft recommendation 225 by replacing the word “labour” with the words “a creditor holding a” or by referring generally to all priority claims. Another proposal was to include in draft recommendations 226 and 227 the purpose of draft recommendation 225. Another proposal was to replace the word “should” with the word “may”. A different proposal was to delete draft recommendation 225 and to reflect the issues discussed in the Working Group in the commentary. It was emphasized that draft recommendations 226 and 227 sufficiently addressed the issue of respecting priorities by use of the words “as far as possible”, noting that an order for substantive consolidation would occur only in the case of intermingling of assets or fraud, when priorities could not be easily identified or quantified. After discussion, the prevailing view was to delete draft recommendation 225 and to reflect the discussion in the commentary.

Draft recommendation 226: treatment of security interests in substantive consolidation

115. A proposal to broaden the types of secured claim referred to in draft recommendation 226 did not find support, as it would require earlier parts of the Legislative Guide to be reconsidered, in particular the approach to, and possibly the definition of, security interests. The Working Group adopted draft recommendation 226 in substance.

Draft recommendation 227: recognition of priorities in substantive consolidation and draft recommendation 228: meetings of creditors

116. The Working Group adopted draft recommendations 227-228 in substance.

Draft recommendation 229: calculation of the suspect period in substantive consolidation

117. Concern was expressed that draft recommendation 229 provided unnecessary detail by specifying the different ways of calculating the suspect period in substantive consolidation. In response, it was observed that the draft recommendation should include sufficient details to provide guidance to the legislator. After discussion, the Working Group agreed to adopt draft recommendation 229 in substance.

Draft recommendation 230: modification of an order for substantive consolidation

118. A concern was expressed that the current language of draft recommendation 230 was not satisfactory as it would not be possible to modify an order for substantive consolidation without affecting actions or decisions already taken. It was observed that the purpose of the modification might be to undo what had already been done, but what should be avoided was unjustly affecting vested rights and interests arising from the original order. A proposal was made to revise draft recommendation 230 along the lines of “Without prejudice to the effects of what has already occurred, the insolvency law may specify that an order substantive for consolidation may be modified.” In response, it was said that the current drafting of the recommendation adequately conveyed that purpose and that the concerns expressed could be further addressed in the commentary. After discussion, the Working Group adopted draft recommendation 230 in substance.

Draft recommendations 231: competent court and draft recommendation 232: notice

119. The Working Group adopted draft recommendations 231-232 in substance.

7. Participants — draft recommendations 233-237*Purpose clause*

120. The Working Group adopted the draft purpose clause in substance. It was agreed that the commentary could address issues relating to the appointment of an interim insolvency representative and clarify that the objectives of cooperation noted in paragraph (b) of the purpose clause related to the determination that the appointment of a single or the same insolvency representative would be in the best interest of the administration of the insolvency. It was also agreed that the domestic commentary would be aligned with the international commentary.

Draft recommendation 233: appointment of a single or the same insolvency representative, draft recommendation 234: conflict of interest, draft recommendation 235: cooperation between two or more insolvency representatives in a group context and recommendation 236: cooperation between two or more insolvency representatives in procedural coordination

121. The Working Group adopted draft recommendations 233-236 in substance.

Draft recommendation 237: forms of cooperation [cooperation to the maximum extent possible]

122. The Working Group agreed with the deletion of the reference limiting the substance of draft recommendation 237 to what was permitted under applicable law as noted in paragraph 12 of document A/CN.9/WG.V/WP.90/Add.2. A concern was expressed that draft recommendation 237 included too much detail and might be misinterpreted. A proposal to include the words “including intra-group claims” after the word “claims” found broad support. A proposal to align draft recommendation 237 with draft recommendation 250 on cooperation between insolvency representatives in the international context received support. Accordingly, draft recommendation 237 would have the same heading as draft recommendation 250 and paragraph (b) of draft recommendation 237 would follow the changes agreed with respect to paragraph (c) of draft recommendation 250. After discussion, the Working Group adopted the substance of draft recommendation 237 with the amendments noted above.

8. Reorganization of two or more enterprise group members — draft recommendations 238-239

Purpose clause and draft recommendations 238-239: reorganization plans

123. The Working Group adopted the draft purpose clause and draft recommendations 238-239 in substance.

9. Commentary

124. The Working Group made the following proposals with respect to the commentary:

- (a) To add further explanation of what is meant by vertical or horizontal integration of enterprise groups;
- (b) To add a reference to insolvency representatives in paragraph 8;
- (c) To include “income trusts” in paragraph 9 as an additional example of the types of entity that might be part of an enterprise group;
- (d) To address a concern with respect to paragraph 28 by deleting the sentences beginning with “The opportunities for...”;
- (e) To add further explanation to the final sentence of paragraph 54;
- (f) To modify the reference in paragraph 57 to “all parties in interest, including creditors” on the basis that it was too broad;
- (g) To delete the reference to “very small claims” in paragraph 77;
- (h) To modify paragraphs 103 and 109 to capture concerns expressed in the course of discussions in the Working Group with respect to post-commencement finance; in particular, to replace the word “applying” in the penultimate sentence of paragraph 103 with the word “including”;
- (i) To simplify the last sentence of paragraph 144;
- (j) To provide more detail of the operation of contribution orders;
- (k) To reflect, in paragraphs 176-177, the need to consider the nature of the group — including the level of integration and business structure — in deciding whether it is appropriate to appoint a single/same insolvency representative and to stress the importance of the competence, knowledge and expertise of any person to be appointed in that capacity; and
- (l) Generally to align the commentary to take account of revisions made to the recommendations.

10. Completion of work

125. The Working Group agreed that its work on the treatment of enterprise groups in insolvency would be sufficiently mature to be considered by the Commission for finalization and adoption in 2010 and requested the Secretariat to circulate the draft of part three to Governments as soon as possible to ensure sufficient time was available for comment and for compilation of those comments for the next session of the Commission.

D. Future work

126. The Working Group had a preliminary exchange of views on possible topics for future work.

127. It had before it a proposal by the Union Internationale des Avocats (UIA) on a possible international convention in the field of international insolvency law, which might cover the following issues:

- (a) Granting of access to courts to foreign insolvency representatives;
- (b) Recognition of foreign insolvency proceedings (with the effect of granting the foreign proceeding the rights of a national proceeding or triggering a secondary proceeding); and
- (c) Cooperation and communication between insolvency representatives and courts.

128. If agreement on those issues seemed possible, the proposal suggested the international convention might also contain provisions on:

- (a) Direct competence (“convention double”);
- (b) Applicable law (“convention triple”, could be part of a separate protocol).

129. Other topics proposed for consideration included: liability of directors and officers of enterprises in insolvency or in proximity to insolvency; insolvency of banks and financial institutions; the concept of centre of main interests (COMI) of an enterprise and the factors relevant to its determination, as well as issues of jurisdiction and recognition; the development of a Model Law based on the Legislative Guide or on some aspects of the Legislative Guide, including the recommendations currently being finalized on international aspects of the treatment of enterprise groups; review of the enactment of the Model Law and promotion of its wider adoption; sovereign insolvency; and the insolvency of public or State-owned enterprises.

130. Preliminary support was expressed in favour of various proposals, noting that more detailed information would be required in order to facilitate discussion, possibly at the next session of the Working Group. It was suggested that the feasibility of some proposals would depend upon the scope of the work proposed and, in the case of the proposal for an international convention, upon support from Governments and cooperation with other international organizations with competence in related areas. Support was expressed in favour of the goal of developing an international convention, but there were reservations with respect to the feasibility of reaching agreement, particularly in view of the difficulties encountered in the past in the area of international insolvency law. With respect to other proposals, in particular the insolvency of banks and financial institutions, more information was required with respect to work currently being undertaken by other international organizations in order to consider whether there was any scope for work by UNCITRAL.

131. The Working Group agreed that it should discuss those proposals further and in more detail at its next session.

**B. Note by the Secretariat on the treatment of enterprise groups
in insolvency, submitted to the Working Group on Insolvency Law
at its thirty-seventh session
(A/CN.9/WG.V/WP.90 and Add.1-2)**

[Original: English]

1. This note sets forth the draft commentary and recommendations of part three of the UNCITRAL Legislative Guide on Insolvency Law. The commentary is a revised version of the text previously included in documents A/CN.9/WG.V/WP.82 and Addenda 1-3. The recommendations are based on the recommendations set forth in document A/CN.9/WG.V/WP.85 and Add.1 and revised on the basis of the Report of Working Group V on the work of its thirty-sixth session in May 2009 (A/CN.9/671).
2. A/CN.9/WG.V/WP.90 addresses the treatment of enterprise groups in the domestic context, while A/CN.9/WG.V/WP.90/Add.1 addresses the international context. A/CN.9/WG.V/WP.90/Add.2 is provided for the information and consideration of the Working Group. It includes some explanatory notes that are intended to explain revisions made to the draft recommendations, to facilitate discussion and to raise questions for consideration by the Working Group; it is not intended that the content of A/CN.9/WG.V/WP.90/Add.2 would form part of the text of part three of the Legislative Guide.

UNCITRAL Legislative Guide on Insolvency Law
Part three: Treatment of enterprise groups in insolvency

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Introduction

UNCITRAL Legislative Guide on Insolvency Law

Part three: Treatment of enterprise groups in insolvency

1. Part three of the *Legislative Guide* focuses on the treatment of enterprise groups in insolvency. Where an approach different to that taken in part two might be required with respect to a particular issue as it affects an enterprise group or where the treatment of enterprise groups in insolvency raises issues additional to those discussed in part two, they are addressed in this part. Where the treatment of an issue in the context of an enterprise group is the same as discussed above, it is not repeated in this part. The substance of part two is therefore applicable to enterprise groups unless otherwise indicated in this part.

2. Chapter I addresses general features of enterprise groups. Chapter II deals with the insolvency of group members in a domestic context and proposes a number of recommendations to supplement the recommendations of part two, in so far as additional issues arise by virtue of the group context. Chapter III addresses the cross-border insolvency of enterprise groups, building upon the UNCITRAL Model

Law on Cross-Border Insolvency, which is relevant to cross-border insolvency proceedings with respect to an individual group member, but does not address issues pertinent to the insolvency of different group members in different States.

Glossary

3. The following additional terms relate specifically to enterprise groups and should be read in conjunction with the terms and explanations included in the main glossary above.

(a) “Enterprise group”: two or more enterprises that are interconnected by control or significant ownership;

(b) “Enterprise”: any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;¹

(c) “Control”: the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

(d) “Procedural coordination”: coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct;²

(e) “Substantive consolidation”: the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate.³

I. Enterprise groups: general features

A. Introduction

4. Most jurisdictions recognize the legal concept of “corporation”, an entity which has a legal personality separate from the individuals comprising it, whether as owners, managers, or employees. As a legal or juristic person, a corporation is capable of enjoying and being subject to certain legal rights, duties and liabilities, such as the capacity to sue and be sued, to hold and transfer property, to sign contracts and to pay taxes. The corporation also enjoys the characteristic of perpetuity, in the sense that its existence continues, independent of its members at any given time and over time, and shareholders can transfer their shares without affecting the entity’s corporate existence. Corporations may also have limited

¹ Consistent with the approach adopted with respect to individual debtors, the focus of this part is upon the conduct of economic activities by entities that would conform to the types of entities described as an “enterprise”. It is not intended to include consumers or other entities of a specialized nature (e.g. banks and insurance companies) that would not be governed by insolvency law pursuant to recommendations 8 and 9 (see above, footnote 6 to recommendation 9). The special considerations arising from the insolvency of such debtors are not specifically addressed in the *Legislative Guide* (see above, part two, chap. I, paras. 1-11).

² The concept of procedural coordination is explained in detail in the commentary, see below paras. 63-66.

³ For the effects of substantive consolidation and the treatment of security interests, see below, recommendations 224 to 226 and the commentary at paras. 159-162.

liability, whereby investors will only be liable for the amount they have intentionally put at risk in the enterprise, providing certainty and encouraging investment; without that limitation, investors would put their entire assets at risk for every business venture they entered into. A corporation depends on a legal process to obtain its legal persona and once formed, will be subject to the regulatory regime applying to entities so formed. That law generally will determine not only the requirements for formation, but also the consequences of formation, such as the powers and capacities of the company, the rights and duties of its members and the extent to which members may be liable for the company's debts. The corporate form can thus be seen as promoting certainty in the ordering of business affairs, as those dealing with a corporation know that they can rely upon its legal personality and the rights, duties and obligations that attach to it.

5. The business of corporations is increasingly conducted, both domestically and internationally, through "enterprise groups". The term "enterprise group" covers different forms of economic organization based upon the single entity and for a working definition may be loosely described as two or more corporations that are linked together by some form of control (whether direct or indirect) or ownership (see below). The size and complexity of enterprise groups may not always be readily apparent, as the public image of many is that of a unitary organization operating under a single corporate identity.

6. Enterprise groups have been in existence for some time, emerging in some countries, according to commentators, at the end of the 19th and beginning of the 20th centuries through a process of internal expansion, which involved companies taking control of their own financial, technical or commercial capacities. These single entity enterprises then expanded externally to take legal or economic control of other corporations. Initially these other corporations may have been in the same market, but eventually the expansion encompassed corporations working in related fields and later in fields that were different or unrelated, whether by reference to a product or geographical location or both. One of the factors supporting this expansion, at least in some jurisdictions, was the legitimatization of ownership of the shares of one corporation by another corporation; a phenomenon originally prohibited in both common law and civil law systems.

7. Throughout this expansion, corporations retained and continue to retain, their separate legal personality even though individual corporations are now probably the typical form of organization only for small private businesses. Enterprise groups are ubiquitous in both emerging and developed markets, with a common characteristic of operations across a large number of often-unrelated industries, often with family ownership in combination with varying degrees of participation by outside investors. The largest economic entities in the world include not only States, but also equal numbers of multinational enterprises. Major multinational groups may be responsible for significant percentages of Gross National Product worldwide and have annual growth rates and turnovers that exceed those of many States.

8. Despite the reality of the enterprise group, however, much of the legislation relating to corporations and particularly to their treatment in insolvency, deals with the single corporate entity. Despite the absence of legislation, judges in many countries, faced with issues that may be addressed by reference to a single

enterprise rather than a single corporate entity,⁴ have developed solutions to achieve results that better reflect the economic reality of modern business.

B. Nature of enterprise groups

9. Enterprise group structures may be simple or highly complex, involving numbers of wholly or partly owned subsidiaries, operating subsidiaries, sub-subsidiaries, sub-holding companies, service companies, dormant companies, cross directorships, equity ownership and so forth. They may also involve other types of entity, such as special purpose entities (SPE),⁵ joint ventures,⁶ offshore trusts⁷ and partnerships.

10. Enterprise groups may have a hierarchical or vertical structure, with succeeding layers of parent and controlled companies, which may be subsidiaries or other types of affiliated or related companies, operating at different points in a production or distribution process. They may also have a more horizontal structure, with many sibling group members, often with a high degree of cross-ownership, operating at the same level in that process. The businesses they conduct may be in a related field or in a diverse range of unrelated fields. It has been suggested that horizontal groups are more common in some parts of the world, such as Europe, while vertical groups are more common in others, such as the USA and Japan.

⁴ Discussed further below, see E, paras. 34-42.

⁵ Special purpose entities (SPE, also known as a “special purpose vehicle” or “bankruptcy-remote entity”) are created to fulfil narrow or temporary objectives, such as the acquisition and financing of specific assets, primarily to isolate financial risk or enhance tax efficiency. An SPE is typically a subsidiary owned almost entirely by the parent corporation; certain jurisdictions require that another investor own at least 3 per cent. Its asset and liability structure and legal status generally makes its obligations secure even if the parent becomes insolvent. The corporation establishing the SPE can accomplish its purpose without having to carry any of the associated assets or liabilities on its own balance sheet, thus they are “off-balance sheet.” SPEs may also be used for competitive reasons to ensure intellectual property, such as for the development of new technology, is owned by a separate entity that is not affected by pre-existing licence agreements.

⁶ A joint venture is often a contractual arrangement or partnership between two or more parties to pursue a joint business purpose. Such an arrangement may sometimes result in the formation of one or more legal entities that may involve both parties contributing equity, and sharing in the revenues, expenses, and control of the enterprise. The venture could be for one specific project only, or a continuing business relationship. Joint ventures are widely used in an international context, as some countries require foreign corporations to form joint ventures with a domestic partner in order to enter a market. This requirement often results in technology and managerial control being transferred to the domestic partner. Forming a joint venture might assist in spreading costs and risks; improving access to financial resources; providing economies of scale and advantages of size; and facilitating access to new technologies and customers or to innovative managerial practices. It may also serve competitive and strategic goals such as influencing structural evolution of an industry; pre-empting competition; creating stronger competitive units; and facilitating transfer of technology and skills, as well as diversification.

⁷ An offshore trust is a conventional trust that is formed under the laws of an offshore jurisdiction. They are similar in nature and effect to onshore trusts, involving a transfer of assets to a trustee to manage for the benefit of a person or class of persons. Offshore trusts may be formed for tax purposes or asset protection. In practice the effectiveness of such trusts may be limited if the insolvency law of the home jurisdiction of the person transferring the assets operates to set aside transfers to the trusts, and transactions entered into to defraud creditors.

11. The research literature on enterprise groups clearly shows that they can be based on different types of alliances such as bank relationships, interlocking board directorates, owner alliances, information sharing, joint ventures, and cartels. The research also shows that enterprise group structures vary across corporate governance systems. In some States, they are organized either vertically or horizontally and develop across industries. They generally include a bank, a parent or holding company⁸ (referred to as “parent company”) or a trading company, and a diverse group of manufacturing firms. In contrast, in other States such groups are typically controlled by a single family or a small number of families and are uniformly vertically organized or have strong ties to the State, but not to particular families. Degrees of diversification also vary considerably, with some groups involving significant intra-group trading and other not.⁹

12. The degree of financial and decision-making autonomy in enterprise groups can vary considerably. In some groups, members may be active trading entities, with primary responsibility for their own business goals, activities and finances. In others, strategic and budgetary decisions may be centralized, with group members operating as divisions of a larger business and exercising little independent discretion within the cohesive economic unit. A parent company may exercise close control by allocating equity and loan capital to group members through a central group finance operation, deciding their operational and financial policies, setting performance targets, selecting directors and other key personnel, and continuously monitoring their activities. The power of the group may be centralized in the ultimate parent company or in a company further down the group chain, with the parent company owning the key group shares, but not having any direct productive or managerial role. The largest groups might have their own banks and perform the principal functions of a capital market. Group financing might involve intra-group lending between the parent company and subsidiaries, involving loans both from and to the parent company and the granting of cross-guarantees.¹⁰ Intra-group lending might be working capital or unpaid short-term debt, such as unpaid

⁸ A holding company or parent company is a company that directly or indirectly owns enough voting stock in another firm to control management and operations by influencing or electing its board of directors. The term may signify a company that does not produce goods or services itself, but whose purpose is to own shares of other companies (or own other companies outright).

⁹ Some research suggests that groups in Chile, for example, are more diverse than groups in South Korea, while groups in the Philippines are more vertically integrated than groups in India and far more involved in financial services than groups in Thailand. See T. Khanna and Y. Yafeh, *Business Groups in Emerging Markets: Paragons or Parasites?* *Journal of Economic Literature*, Vol. XLV (June 2007) pp331-372.

¹⁰ In many countries a significant method of enterprise group capital raising is cross-guarantee financing, where each company within a group guarantees the performance of the others. Implementing cross-guarantee claims in liquidation has proved difficult in some jurisdictions and they have sometimes been set aside. In one jurisdiction, cross-guarantees may operate to reduce the regulatory burden on companies by bestowing accounting and auditing relief on companies that are party to the arrangement. The deed of cross-guarantee makes the group of companies that are party to that deed akin to a single legal entity in many respects and operates as a form of voluntary contribution or pooling in the event that one or more of the companies party to the deed goes into liquidation while the cross-guarantee is still operative. One advantage of this arrangement is that creditors and potential creditors can focus on the consolidated position for those entities, rather than on the individual financial statements of the wholly owned subsidiaries that are party to the deed.

dividends or credit in respect of intra-group trading; they may or may not involve the payment of interest.

13. In some States, family ties play an important connecting factor in enterprise groups and it may be the case, for example, that the more important family members and close associates of family members will sit on the board of the parent company of a group, with members of that board spread around the boards of group members so that there is a web of interlinked common directorships, enabling the family to maintain control over the group. For example, the chart of a large group in India shows a complex web of shared directorships between the board of the parent company and 45 other group members.¹¹

14. In some countries, enterprise groups have enjoyed close ties to governments and government policies, such as those affecting access to credit and foreign currency and competition, which have significantly influenced the development of groups. Equally, there are examples where government policies have targeted the operations of enterprise groups, removing certain types of preferential treatment, such as access to capital.

15. The structure of many enterprise groups shows the dimension and potential complexity of the arrangements. They may involve many layers of different companies controlled to a greater or lesser extent by the level or levels above, in some cases involving hundreds if not thousands of different companies.¹²

16. A study based upon the 1979 accounts and reports of a number of large British-based multinationals, for example, had to be abandoned with respect to two of the largest groups, with 1,200 and 800 subsidiaries respectively, because of the impossibility of completing the task. Researchers noted that few people inside the group could have had a clear understanding of the precise legal relationships between all group members and that none of the groups studied appeared to have its own complete chart.¹³ Similarly, the group charts of several Hong Kong property groups such as Carrian, which failed over 20 years ago, ran to several pages and a reader would have needed a good magnifying glass to identify the subsidiaries. The group chart of the Federal Mogul group, an automotive component supplier, when blown up to the point where you can read the names of all the subsidiaries, fills a wall of a small office. The group chart of Collins and Aikman, another automotive group, is printed in a book, with sub-sub-groups having the complexity of structure of many domestic enterprise groups.

17. The degree of integration of a group might be determined by reference to a number of factors, which might include the economic organization of the group

¹¹ See Khanna and Yafeh, note 9.

¹² A 1997 survey in Australia of the Top 500 listed companies showed that 89 per cent of those companies controlled other companies; the greater the market capitalization of a listed company, the more companies it was likely to control (this ranged from an average of 72 controlled companies for those companies with the largest market capitalization to an average of 9 for the smallest); 90 per cent of controlled companies were wholly owned; the number of vertical subsidiary levels in an enterprise group ranged from 1 to 11, with an overall average of 3 to 4. In other countries the figures are much larger. Cited in Companies and Securities Advisory Committee (CASAC), Corporate Groups Final Report, 2000 (Australia), paragraph 1.2.

¹³ Hadden, Inside Corporate Groups, 1984 *International Journal of Sociology of Law*, 12, 271-286, p. 273.

(e.g., whether the administrative structure is arranged centrally or maintains the independence of the various members, whether subsidiaries depend on the enterprise group for financing or loan guarantees, whether personnel matters are handled centrally, the extent to which the parent makes key decisions on policy, operations and budget and the extent to which the businesses of the group are integrated vertically or horizontally); how the group manages its marketing (e.g., the importance of intra-group sales and purchases, the use of common trademarks, logos and advertising programmes and the provision of guarantees for the products); and the public image of the group (e.g., the extent to which the group presents itself as a single enterprise and the extent to which the activities of the constituent companies are described as operations of the group in external reports, such as those for shareholders, regulators and investors).

18. The legal structure of a group as a number of separate legal entities is not necessarily determinative of how the business of the group is managed. While each group member is a separate entity, management may be arranged in divisions along product lines and subsidiaries may have one or many product lines with the result that they fall across different divisions. In some cases, management may treat wholly owned subsidiaries as if they were branches of the parent company.

C. Reasons for conducting business through enterprise groups

19. Diverse factors shape the formation, operation and evolution of enterprise groups, ranging from legal and economic factors to societal, cultural, institutional and other norms. State leadership, inheritance customs, kinship structures (including inter-generational considerations), ethnicity and national ideology, as well as the level of development of the legal (e.g., effectiveness of contract enforcement) and institutional framework supporting commercial activity may influence enterprise groups in different environments. Some studies suggest that group structures can make up for under-developed institutions, with consequent benefits for transaction costs.

20. The advantages of conducting business through an enterprise group structure may include reduction of commercial risk and maximization of financial returns, by enabling the group to diversify its activities into various types of businesses, each operated by a separate group company. One company may acquire another to expand and increase market power, at the same time preserving the acquired company and continuing to operate it as a separate entity to utilize its corporate name, goodwill and public image. Expansion may occur to acquire new, technical or management skills. Once formed, groups may continue to exist and proliferate because of the administrative costs associated with rationalizing and liquidating redundant subsidiaries.

21. A group structure may enable a group to attract capital to only part of its business without forfeiting overall control, by incorporating that part of the business as a separate subsidiary and allowing outside investors to acquire a minority shareholding in it. A group structure may enable a group to lower the risk of legal liability by confining high liability risks, such as environmental and consumer liability, to particular group members, thus isolating the remaining group assets from this potential liability. Better security for debt or project financing may be

facilitated by moving specific assets into a separate member incorporated for that purpose, thus ensuring that the lender has a first priority over the whole or most of the new member's property. A separate group member may also be formed to undertake a particular project and obtain additional finance by means of charges over its own assets and undertaking or may be required for the purpose of holding a government license or concession. A group structure can simplify the partial sale of a business as it may be easier, and sometimes more tax effective, to transfer the shares of a group member to the purchaser, rather than sell discrete assets. A group may also be formed incidentally when a company acquires another company, which in turn might be a parent company for various other companies.

22. Meeting prudential or other statutory requirements may be easier where the companies subject to those regulatory requirements are separate group members. In the case of multinational groups, the domestic law of particular countries in which the group wishes to conduct business may require that local businesses be conducted through separate subsidiaries (sometimes subject to minimum local equity requirements) or impose other requirements or limitations, relating for example to employment and labour regulation. Arrangements not involving equity have been used for foreign expansion because of, for example, local obstacles to equity participation, the level of regulation imposed upon foreign investment operations and the relative cost advantages of those types of arrangement. Another relevant factor for multinational groups may be geographical imperatives, such as the need to acquire raw materials or to market products through a subsidiary established in a particular location. A related consideration of increasing importance that perhaps relates more to where parts of the groups structure are to be located than to the question of whether or not to organize a business through a group structure, is the importance of local law on issues such as cost and simplicity of incorporation in the first instance, obligations of incorporated entities and treatment of the group in insolvency. Differences in law across jurisdictions can significantly complicate these issues.

23. Other key drivers for complicated group structures include fiscal considerations and their influence on the flow of money within groups. The incidence of tax is often cited as the reason for the formation of and subsequent growth of enterprise groups and many legal systems have traditionally given weight to the economic unity of related entities. While separate taxation of individual entities might be the underlying principle, it may be qualified to fulfil basic purposes such as protecting the revenue interests of governments and alleviating the tax burden that would otherwise result from the separate taxation of each group member.¹⁴ Measures that take into account the connections between parent and subsidiary companies include tax exemptions for intra-group dividends; group relief; and measures aimed at combating tax evasion. Tax exemptions may be available, for example, on the dividends paid by a company to its resident corporate shareholders and for intra-group dividends where companies are linked by substantial ownership. Tax credits may be allowed for the foreign tax paid on the underlying profits of the subsidiary and for the foreign tax that is charged directly on a dividend. Group relief might be available where related companies can be treated as a single fiscal unit and file consolidated accounts. The losses of

¹⁴ International Investment and Multinational Enterprises — Responsibility of parent companies and their subsidiaries, OECD, 1979.

one subsidiary may be offset against the income of another or profits and losses may be pooled amongst group members.

24. As a result of the importance of fiscal considerations, inter-group pricing policies and national taxation rates and policies often determine the distribution of assets and liabilities within enterprise groups. Differential corporate tax rates across jurisdictions, as well as certain exceptions (such as reduced tax rates for profits from manufacturing activities or financial services income) applicable in some jurisdictions may make those jurisdictions more attractive than others that have higher tax rates and fewer or no exceptions. Nevertheless, tax authorities may have the right to revisit transfer-pricing structures aimed at locating profits in low taxation domiciles.

25. Choices such as between establishing a branch or a subsidiary might also be affected by fiscal regulation where, for example, repatriation of profits from a foreign subsidiary may be effected tax free by loan repayments to a parent company or may be tax free provided the parent owns a specified percentage (ranging from 5-20 per cent) of the foreign company's share capital; interest on funds borrowed to finance the acquisition of a subsidiary can be offset against their profits and as already noted, the subsidiaries profits and losses can be offset against each other in a consolidated tax return. Business activities have also been divided between two or more corporations to exploit tax allowances, limits imposed on the amounts of tax allowances or progressive rates of taxation. Other reasons might include: taking advantage of differences in accounting methods, taxable years, depreciation methods, inventory valuation methods and foreign tax credits; segregating activities that if combined in a single taxable entity, might be disadvantageous in fiscal terms; and taking advantage of favourable treatment for certain activities (e.g., anticipated or potential sales, mergers, liquidations or intra-family gifts or bequests) that is available for some operations, but not for others.

26. Accounting requirements also have a role to play in determining the structure of enterprise groups. In some jurisdictions, certain devices such as "agent only" subsidiaries might be created to manage certain aspects of the business and enable the parent company to avoid submitting detailed trading accounts for that subsidiary, which is just an agent of the parent company that owns all of the relevant assets.

27. Many of these benefits of conducting business through an enterprise group may be illusory. Protection against devastating losses may fall away as a result of group financing agreements; intra-group trading; cross-guarantees; and letters of comfort¹⁵ given to group auditors and the inclination of major creditors, and particularly bankers, to ensure that they have the indemnity of the top member in any group.

¹⁵ A letter of comfort is generally provided by a parent company to persuade another entity to enter into a transaction with a subsidiary. It may include various types of undertaking, none of which would amount to a guarantee, which may include an undertaking to maintain its shareholding or other financial commitment to a subsidiary; using its influence to see that the subsidiary meets its obligation under a primary contract; or confirming that it is aware of a contract with the subsidiary, but without any express indication that it will assume any responsibility for the primary obligation.

28. To avoid doubt, group structures are not required from the accounting point of view — accountants are just as happy with consolidating branches as groups of subsidiaries. It seems probable that the banking, commercial and legal sectors often fail to appreciate the accounting aspects of enterprise groups. The opportunities for misunderstanding will increase in the transition to new international financial reporting standards and as many groups change their consolidation approach from one that has regard for the substance of transactions, to one that requires legal form to prevail over substance. It was the “off-balance” accounting structures that made Enron, WorldCom and other failures possible and the need for clarity of financial statements is widely acknowledged.

D. Defining the “enterprise group” — ownership and control

29. Although the existence of enterprise groups and the importance of relationships between the group members are increasingly acknowledged, both in legislation and court decisions, there is no coherent body of rules that directly governs those relationships in a comprehensive manner. In jurisdictions where there is legislation that recognizes enterprise groups, it may not specifically deal with the regulation of such groups, by way of commercial or corporate legislation, but rather be contained in legislation on taxation, corporate accounting, competition and mergers or other issues; legislation addressing the treatment of enterprise groups in insolvency is rare. Furthermore, an analysis of legislation that does address aspects of enterprise groups reveals a diversity of approaches to the various issues associated with groups, not only between jurisdictions, but also on a comparison of the different legislation within a single jurisdiction. Thus different tests may apply to what constitutes a group for different purposes, although there may be common elements, and where those tests employ a particular concept, such as “control”, definitions may be broader or narrower, depending upon the purpose of the legislation, as noted above.

30. While much legislation avoids specifically defining the term “enterprise group”, several concepts are common to determining what relationships between companies will be sufficient to constitute them as an enterprise group for certain specific purposes, such as extending liability, accounting purposes, taxation and so on. These concepts are found both in legislation and in numerous court decisions on groups in various countries and generally include aspects of ownership and control or influence, both direct and indirect, although in some examples only direct ownership or control or influence is considered. The choice between the two concepts often reflects a balance between the desirability of certainty, which can be achieved by setting a prescribed level of ownership, and flexibility, which might be better achieved by referring to control and acknowledging the diverse economic realities of enterprise groups.

31. Some examples consider ownership by reference to a formal relationship between the companies, such as what constitutes a parent-subsidiary relationship. This may be determined by reference to a formal standard — the holding, whether directly or indirectly, of a specified percentage of capital or votes. Examples of those percentages vary from as little as 5 per cent to more than 80 per cent. Those laws specifying lower percentages generally consider additional factors such as the ones discussed below as indicators of control. In some examples, the percentages

establish a rebuttable presumption as to ownership, while higher percentages establish a conclusive presumption.

32. Other examples of what constitutes an enterprise group adopt a more functional approach and focus on aspects of control, or controlling or decisive influence (referred to in this note as control), where “control” is often a defined term. The key elements of control include actual control or capacity to control, either directly or indirectly, financial and operating policy and decision-making. Where the definition includes capacity to control, it generally envisages a passive potential for control, rather than focusing upon control that is actively exercised. Control may be obtained by ownership of assets, or through rights or contracts that give the controlling party the capacity to control. What is important is not so much the strict legal form of the relationship, such as parent-subsidiary, between the entities, but rather the substance of that relationship.

33. Factors that might indicate the existence of control of one entity by another could include: the ability to dominate the composition of the board of directors or governing body of the second entity; the ability to appoint or remove all or a majority of the directors or governing members of the second entity; the ability to control the majority of the votes cast at a meeting of the board or governing body of the second entity; and the ability to cast or regulate the casting of, a majority of the votes that are likely to be cast at a general meeting of the second entity, irrespective of whether that capacity arises through shares or options. Information that may be relevant to consideration of these factors might include: the group member’s incorporation documents; details about the member’s shareholding; information relating to substantive strategic decisions of the member; internal and external management agreements; details of bank accounts and their administration and authorized signatories; and information relating to employees.

E. Regulation of enterprise groups

34. Regulation of enterprise groups is generally based on one of two approaches or in some cases on a combination of the two: the separate entity approach (which is the traditional approach and by far the most prevalent) and the single enterprise approach.

35. The separate entity approach relies on several basic principles, foremost of which is the separate legal personality of each group company. It is also based upon the limited liability of shareholders of each group company and the duties of directors of each separate group entity to that entity.

36. The separate legal personality of a corporation generally means that it has its own rights and duties, irrespective of who controls it or owns it (i.e., whether it is wholly or partly owned by another company) and its participation in the activities of the enterprise group. The debts it incurs are its debts and the assets of the group generally cannot be pooled¹⁶ to pay for these debts. Contracts entered into with external persons do not automatically involve the parent company or other group members. A parent company cannot take into account the undistributed profits of other group companies in determining its own profits. Limited liability of a

¹⁶ See below, paras. 143-172 for a discussion of substantive consolidation.

corporation means that unlike in a partnership or sole proprietorship, enterprise group members have no liability for the group's debts and obligations, with the result that potential losses cannot exceed the amount contributed to the group member by purchasing shares.

37. The single enterprise approach, in comparison, relies upon the economic integration of enterprise group members, treating the group as a single economic unit that operates to further the interests of the group as a whole, or of the dominant corporate body, rather than of individual members. Borrowing may be conducted on a group basis, with group treasury arrangements being used to offset the credit and debit balances of each group member; group members may be permitted to operate at a loss, or be undercapitalized, as part of the overall group financial structure and strategy; assets and liabilities may be moved between group members in various ways; and intra-group loans, guarantees or other financial arrangements may be entered into on essentially preferential terms.

38. While many countries follow the separate entity approach, there are some countries that recognize exceptions to strict application of that approach and others that have introduced, either by legislation or through the courts, a single enterprise approach that applies to certain situations.

39. Some of the circumstances in which strict application of the separate entity approach has been overridden may include: consolidation of enterprise group accounts for a company and any controlled entity; related person transactions (where a public company is otherwise prohibited from giving any financial benefit, including intra-group loans, guarantees, indemnities, releases of debt or asset transfers, to a related company unless that transaction is approved by shareholders or is otherwise exempt); cross-shareholding (where group members are generally prohibited from acquiring, or taking a security over, the shares of any controlling member or issuing or transferring their shares to any controlled member); and insolvent trading (where a parent company which ought to suspect the insolvency of a subsidiary can be made liable for the debts of that subsidiary incurred when it was insolvent).

40. A few countries have established various categories of enterprise groups that can operate as a single enterprise, in exchange for enhanced protection of creditors and minority shareholders. In one,¹⁷ enterprise group structures involving public companies are divided into three categories: (a) integrated groups; (b) contract groups; and (c) de facto groups, to which a set of harmonized single enterprise principles dealing with corporate governance and liability applies:

(a) Integrated groups are based upon a vote, by a specified proportion of shareholders of the parent company, which in turn owns a specified proportion of the shares of the subsidiary, to approve the complete integration of the subsidiary. The parent company will have unlimited power to direct the subsidiary, in return for the parent company being jointly and severally liable for the debts and obligations of the subsidiary;

(b) Contract groups can be formed by a specified proportion of shareholders of each of two companies entering into a contract that grants one company (the parent) the right to direct the other company, provided the directions are consistent

¹⁷ Germany.

with the interest of the parent company or the group as a whole. In return for giving the parent company the right of control, minority shareholders and creditors are given enhanced protection; and

(c) De facto groups are those where one company exercises, either directly or indirectly, a dominant influence over another company. Although not created by any formal arrangement, there must nevertheless be systematic involvement by the parent in the affairs of the controlled company.

41. In one country¹⁸ where single enterprise principles have been introduced into corporate legislation, directors of wholly or partly owned subsidiaries may act in the interests of the parent company rather than their subsidiary company; there are provisions for streamlined group mergers; and legislation also permits contribution and pooling orders.

42. In another country,¹⁹ commercial regulatory laws affecting enterprise groups increasingly use single enterprise principles to ensure that the policy underlying specific commercial legislation cannot be undermined or avoided by the use of enterprise groups. The courts have assisted in this development, selectively introducing the single enterprise concept to achieve the underlying policies of the legislation. The concept has been applied to insolvency law to avoid specified intra-group transactions, to support intra-group guarantees and in limited cases, to achieve substantive consolidation. The courts also have the power to alter the priority of claims in the liquidation of a group entity, either by treating some intra-group loans to that entity as equity rather than debt, or by subordinating intra-group loans to that entity to the claims of its external creditors.

II. Addressing the insolvency of groups: domestic issues

A. Introduction

43. Enterprise groups may be structured in ways that minimize the threat of insolvency to one or more group members, by entering into cross-guarantees, indemnities and similar types of arrangements. Where problems do arise, a parent or controlling group member may seek to avoid the insolvency of other group members in order to preserve its reputation and maintain its credit in commercial and financial spheres by providing additional finance and agreeing to subordinate intra-group claims to external liabilities.

44. However, if the complexity of an enterprise group's structure is disturbed by the onset of financial difficulty affecting one or more, or even all of the group members that leads to insolvency, problems arise simply because the group is constituted by members that are each recognized as having a separate legal personality and existence. Since, as noted above, the great majority of domestic insolvency and corporate laws do not address the insolvency of enterprise groups, even though group issues might be addressed outside the insolvency area in relation to accounting treatment, regulatory issues and taxation, the absence of legislative authority to the contrary or judicial discretion to intervene in insolvency means that

¹⁸ New Zealand.

¹⁹ USA.

each entity has to be separately considered and, if necessary, separately administered in insolvency. In certain situations, such as where the business activity of group members is closely integrated, that approach may not always achieve the best result for the individual debtor or for the business of the group as a whole, unless the multiple, parallel proceedings can be closely coordinated.

45. Much of what already exists in domestic law regarding the insolvency of enterprise groups concentrates on the circumstances in which it might be appropriate to consolidate insolvency estates. What is lacking is more guidance on how the insolvency of enterprise groups should be addressed more comprehensively and, in particular, whether and in what circumstances enterprise groups should be treated differently from a single corporate entity.

46. A second key issue in the treatment of enterprise groups in insolvency is the degree to which the group is economically and organizationally integrated and how that level of integration might affect treatment of the group in insolvency and in particular, the extent to which a highly integrated group should be treated differently to a group where individual members retain a high degree of independence. In some cases, where for example the structure of a group is diverse, involving unrelated businesses and assets, the insolvency of one or more group members may not affect other members or the group as a whole and the insolvent members can be administered separately. In other cases, however, the insolvency of one group member may cause financial distress in other members or in the group as a whole, because of the group's integrated structure, with a high degree of interdependence and linked assets and debts between its different parts. In those circumstances, it might often be the case that the insolvency of several or many group members would lead inevitably to the insolvency of all members (the "domino effect") and there may be some advantage in judging the imminence of the insolvency by reference to the group situation as a whole or coordinating that consideration with respect to multiple members.

B. Application and commencement

47. General considerations with respect to application for and commencement of insolvency proceedings are discussed above in part two, chapters I and II. Since those chapters apply equally to individual enterprise group members, they should be considered in conjunction with the additional issues specific to enterprise groups discussed below.

1. Joint application for commencement

(a) Background

48. As a general rule, insolvency laws respect the separate legal status of each enterprise group member and a separate application for commencement of insolvency proceedings is required to be made for each of those members that satisfy the standard for commencement of insolvency proceedings and are covered by the insolvency law (see recommendation 10). There are some limited exceptions that allow a single application to be extended to other group members where, for example, all interested parties consent to the inclusion of more than one group member; the insolvency of one group member has the potential to affect other group

members; the parties to the application are closely economically integrated, such as by intermingling of assets or a specified degree of control or ownership; or consideration of the group as a single entity has special legal relevance, especially in the context of reorganization plans.

49. The recommendations of the *Legislative Guide* concerning application for and commencement of insolvency proceedings would apply to debtors that are enterprise group members in the same manner as they apply to debtors that are individual commercial enterprises. Recommendations 15 and 16 establish the standards for debtor and creditor applications for commencement of insolvency proceedings and form the basis upon which an application could be made for each group member that satisfied those standards, including imminent insolvency in the case of an application by a debtor. In the enterprise group context, the insolvency of a parent or controlling group member may affect the financial stability of a subsidiary or controlled member or the insolvency of a number of such members might affect the solvency of others, so that insolvency is imminent more widely across the group. That situation is likely to be covered by the terms of recommendation 15 if, at the time of the application with respect to the insolvent group members, it could be said of the other group members that they would be unable to pay their debts as they mature.

(b) Purpose of a joint application

50. Permitting those group members that satisfy the commencement standard to make a joint application for commencement of insolvency proceedings would facilitate the coordinated consideration of those applications by the court, without affecting the separate identity of the applicants or removing the need for each one to individually satisfy the applicable commencement standard. It would also alert the court to the existence of a group, particularly if the application were to be accompanied by information substantiating the existence of the group and the relationship between the debtors and, where proceedings subsequently commenced on the basis of that joint application, would have the advantage of establishing a common commencement date for relevant group members.

51. Such a joint application might include, where permitted under the law and feasible in the circumstances, a single application covering all group members that satisfy the commencement standard or parallel applications made at the same time in respect of each of those members. The latter approach may be appropriate where the group members are not located in the same domestic jurisdiction and different courts have competence (as discussed below) or where other circumstances of the case, such as that there is a significant number of proceedings to be coordinated, suggest that a single application would not be practical. In both cases, the insolvency law should facilitate the court undertaking a coordinated consideration of whether the commencement standards with respect to the individual group members are satisfied, taking into account the group context where relevant.

(c) Joint application and procedural coordination distinguished

52. The making of a joint application for commencement of insolvency proceedings should be distinguished from what is referred to below as procedural coordination. The purpose of permitting a joint application is to facilitate coordination of commencement considerations and potentially reduce costs.

Commencement of multiple proceedings on the basis of a joint application should also facilitate coordination of those proceedings; the commencement date, and any other dates calculated by reference to that date, such as those relating to the suspect period, would be the same for each member. Permitting a joint application is not intended to predetermine how, if the proceedings commence, they will be administered and, in particular, whether they will be subject to procedural coordination. Nevertheless, a joint application for commencement might include an application for procedural coordination, as noted below, and might facilitate the court taking a decision on procedural coordination.

(d) Including a solvent group member in a joint application

53. A question that is often discussed in the group context is whether a solvent group member can be included in an application for commencement of insolvency proceedings with respect to other group members and if so, in what circumstances. Where a group member appears to be solvent, but further investigation shows insolvency to be imminent, inclusion of that member in the application would be covered by recommendation 15 of the *Legislative Guide*, as noted above.

54. Where the question is not one of imminent insolvency and the group member is clearly solvent, different approaches may be taken. Where a group is closely integrated, an insolvency law may permit an application for commencement to include group members that do not satisfy the commencement standard, on the basis that it is desirable in the interests of the group as a whole that those members be included in the proceedings. Factors relevant to determining whether the necessary degree of integration exists might include: the relationship between the group members that is variously described, but involves, for example, a significant degree of interdependence or control; intermingling of assets; unity of identity, reliance on management and financial support or other similar factors that need not necessarily arise from the legal relationship (such as parent-subsidiary) between the group members. A further situation in which including a solvent group member in a joint application might be appropriate is where the existence of a “group” is fictitious.

55. Such an approach may facilitate development of an insolvency solution for the whole group, avoiding piecemeal commencement of proceedings over time, if and when additional group members became affected by the insolvency proceedings initiated against the originally insolvent members. It could also facilitate the preparation of a comprehensive reorganization plan, addressing the assets of both solvent and insolvent group members.

56. One of the problems with including a solvent group member, however, is that the insolvency law will generally only cover those entities properly regarded as satisfying the standard for commencement of insolvency proceedings. A solvent group member may, however, be voluntarily included in a reorganization plan, where a commercial decision is taken by that member that it should participate in the plan (see below, para. 184).

57. A joint application for commencement might also be permitted where all interested group members consent to the inclusion of one or more other members, whether they are insolvent or not, or all parties in interest, including creditors, so consent. An insolvency law might also consider whether a group member not involved at the time of commencement of insolvency proceedings against other

group members might later be joined in those proceedings if it is subsequently affected by those proceedings or it is determined that its joinder would be in the interests of the group as a whole.

(e) Persons permitted to make a joint application

58. Consistent with the approach of recommendation 14 of the *Legislative Guide*, an insolvency law may permit a joint application to be made by two or more enterprise group members that satisfy the commencement standard of the insolvency law. It might also be made by any creditor with respect to the group members of which it is a creditor. Permitting a creditor to make an application with respect to group members of which it is not a creditor would be inconsistent with the commencement standard of recommendation 14.

(f) Competent courts

59. A joint application for commencement with respect to two or more enterprise group members may raise issues of jurisdiction, even in the domestic context, if those group members are located in different places with different courts potentially being competent to consider the application. This may occur, for example, in respect of a group operating nationally in States where jurisdiction for insolvency matters lies with courts in different places or applications for commencement may be made in different courts. Some laws may allow a joint application for commencement to be handled by a single court. Although that approach is desirable, it will ultimately be a question of whether domestic law permits joint applications involving different debtors (albeit members of the same group) in different jurisdictions or courts to be treated in such a way. Various criteria might be relevant to determining the appropriate court for handling such an application. It might, for example, be the court with competence to administer insolvency proceedings with respect to the parent or controlling member of a group, where that member is included in the application. Other criteria, such as the size of indebtedness of the various group members or the centre of control of the group might also be chosen to establish the prevailing competence of one court in the domestic setting. Creditors of different group members might also be located in different places, raising issues of representation and the location in which creditor committees would meet or be constituted.

60. The fees payable and other associated procedural issues arising out of a joint application for commencement may need to be addressed.

61. Although the issue of which court is competent to consider a joint application for commencement where the subject group members are located in different domestic jurisdictions might be addressed by law other than the insolvency law, it is desirable that the approach of recommendation 13 of the *Legislative Guide* be followed. This would require the insolvency law to clearly indicate or include a reference to the relevant law that establishes the court with jurisdiction over such an application. Adoption of that approach should make it clear to all relevant parties where and how such an application can be pursued.

(g) Notice of application

62. The recommendations of the *Legislative Guide* with respect to notification of an application for commencement of insolvency proceedings would apply to a joint application. A joint application by a creditor should be notified to the group members that are the subject of the application in accordance with recommendation 19 (a). Where group members make a joint application, notice would not be required until proceedings commenced on the basis of that application, in accordance with recommendation 22.

Recommendations 199-201**Purpose of legislative provisions**

The purpose of provisions on joint application²⁰ for commencement of insolvency proceedings with respect to two or more enterprise group members is:

(a) To facilitate coordinated consideration of an application for commencement of insolvency proceedings with respect to those enterprise group members;

(b) To enable the court to obtain information concerning the enterprise group that would facilitate determination of whether commencement of insolvency proceedings with respect to those group members should be ordered;

(c) To facilitate efficiency and reduce the costs associated with commencement of those insolvency proceedings; and

(d) To provide a mechanism²¹ for the court to assess whether procedural coordination of those insolvency proceedings would be appropriate.

Contents of legislative provisions***Joint application for commencement of insolvency proceedings***

199. The insolvency law may specify that a joint application for commencement of insolvency proceedings may be made with respect to two or more enterprise group members, each of which satisfies the applicable commencement standard.²²

Persons permitted to apply

200. The insolvency law should specify that a joint application may be made by:

(a) Two or more enterprise group members, each of which satisfies the applicable commencement standard in recommendation 15; or

(b) A creditor, provided it is a creditor of each group member that is to be included in the joint application.

²⁰ A joint application for commencement does not affect the legal identity of each group member included in the application; each member remains separate and distinct.

²¹ A joint application is not a pre-requisite for procedural coordination, but may facilitate the court's consideration of whether an order for procedural coordination should be made.

²² See above, recommendation 15, which addresses debtor applications and recommendation 16, which addresses creditor applications for commencement.

Competent courts

201. For the purposes of recommendation 13, the words “commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings” include a joint application for commencement of insolvency proceedings with respect to two or more enterprise group members.²³

2. Procedural coordination**(a) Purpose of procedural coordination**

63. Procedural coordination is intended to promote procedural convenience and cost-efficiency and may facilitate comprehensive information being obtained on the business operations of the group members subject to the insolvency proceedings; assist the valuation of assets and the identification of creditors and others with legally recognized interests; and avoid duplication of effort. Procedural coordination refers to what may in practice be varying degrees of coordination with respect to the administration of multiple insolvency proceedings commenced with respect to two or more enterprise group members involving, possibly, one or more courts. Although administered in a coordinated manner, 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. The scope of an order for procedural coordination would generally be determined by the court in each case.

64. Multiple proceedings may be streamlined in various ways through an order for procedural coordination, facilitating sharing of information to obtain a more comprehensive picture of the situation of the various debtors; combining of hearings and meetings, including joint meetings of creditors; preparation of a single list of creditors and other parties in interest for the provision of notice and coordination of the provision of notice; establishment of joint deadlines; agreement on a joint claims procedure and coordinated sale of assets; coordination of avoidance proceedings; and the holding of single creditor meetings or coordination among creditor committees. Streamlining may also be facilitated by the appointment of a single or the same insolvency representative to administer the insolvency proceedings or by ensuring coordination between insolvency representatives where two or more are appointed (see below, paras. 173-177). It may also involve cooperation between two or more courts or, when permitted by domestic law, administration of the multiple proceedings concerning group members in a single court.

65. Where two or more courts are involved, cooperation between them might include, for example, coordinating the holding of hearings, including joint hearings, and sharing and disclosure of information. As noted below with respect to cross-border cooperation (see part three, chap. III, paras. ...), joint or coordinated hearings

²³ Recommendation 13 provides: The insolvency law should clearly indicate (or include a reference to the relevant law that establishes) the court that has jurisdiction over the commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings. The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, para. 59.

may significantly promote the efficiency of parallel insolvency proceedings involving members of an enterprise group by bringing relevant stakeholders together at the same time to discuss and resolve outstanding issues or potential conflicts, thus avoiding protracted negotiations and resulting time delays. Such hearings would generally involve two or more courts holding hearings at the same time with provision for simultaneous communication so that parties can at least hear and preferably see the proceedings in each court. These hearings may be relatively more convenient to organize in a domestic setting, as they would not generally involve the challenges posed by different languages, time zones, laws, procedures and judicial traditions that may occur in the cross-border context. However, as in the international context, the conduct of such hearings might require the use of common procedures and agreement, for example, as to how filing of documents and submission of information is to be handled between different courts.

66. Various factors might be relevant to considering whether procedural coordination is appropriate in a particular case. These may relate, for example, to information substantiating the existence of the group and identifying the linkages between group members, including the position in the group of each member covered by the application, particularly where one of them was the controlling group member or parent. Although the provision of such detail might be onerous in cases where creditors are permitted to apply for procedural coordination, the essence of the application is that the debtors are group members and the court would generally need to be satisfied as to that relationship when determining whether proceedings should commence and procedural coordination be ordered.

(b) Creditor participation

67. With respect to creditor participation, the interests of creditors of the different group members have the potential to diverge and it is unlikely that those interests could be represented in a single committee. It may be, however, that in cases of procedural coordination involving many group members, establishing a separate committee for the creditors of each member might prove to be extremely costly and inefficient for administration of the proceedings. For that reason, the courts in some States have the discretion not to establish a creditor committee for each separate entity in appropriate circumstances. Accordingly, the general principle may be that it is desirable that the insolvency law permit a single creditor committee to be established in suitable cases.

(c) Timing of application

68. Since 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, it is desirable that an insolvency law adopt a flexible approach to the timing of an application for procedural coordination. An application might therefore be made at the same time as an application for commencement of proceedings or at any subsequent time. However, since the goal of procedural coordination is to coordinate the administration of multiple proceedings, the feasibility of making an order at a late stage of the proceedings would be limited, in practice, by the usefulness of so doing. In other words, there may be little advantage in seeking to coordinate proceedings that are almost completed. The same approach

might apply to adding group members to an existing order for procedural coordination where those additional members became insolvent at a later time.

69. An insolvency law might adopt the approach of stipulating a time limit for applying for procedural coordination to provide a degree of certainty. However, as is generally the case with any consideration of the need for a time limit, the advantages of establishing such a limit must be weighed against the potential disadvantages of inflexibility and the need to ensure that the time limit is properly observed.

(d) Persons permitted to apply

70. It is desirable that procedural coordination be as widely available as possible and that the court be given the discretion to consider whether coordination of the various proceedings would advantage their administration. The court may consider whether to order procedural coordination on its own initiative, particularly to address situations it is determined that procedurally coordinating the proceedings would be in the best interests of the enterprise group and facilitate administration, but no application for procedural coordination is forthcoming from a party authorized to do so. The court might also order procedural coordination in response to an application from authorized parties, such as any group member subject to insolvency proceedings, the insolvency representative of a member, who would generally possess the information most relevant for making such an application, or a creditor.

71. In the case of creditors, the eligibility limitation that applies with respect to an application for commencement of insolvency proceedings should not necessarily apply. Where the application for procedural coordination is made at the time of the application for commencement, the issue of commencement might be treated separately from that of procedural coordination. Similarly, once proceedings have commenced, there is no reason to limit the ability to apply for procedural coordination to those creditors who are creditors of the members to be coordinated — the decision to order procedural coordination should not be conditioned upon the status of the creditor applying.

(e) Competent courts

72. Procedural coordination may also raise the issues of jurisdiction noted above with respect to joint applications for commencement (see above, paras. 59-61), where different domestic courts have competence over the various group members subject to insolvency proceedings. In jurisdictions where those issues arise, they would generally be determined by reference to domestic procedural law. In some States, different proceedings may be consolidated or transferred to a single court, for example, the court with competence to administer insolvency proceedings with respect to the parent of a group. A range of other criteria, such as priority of filing, size of indebtedness or centre of control, might also be chosen to establish the prevailing competence of one court in the domestic setting. A key element of consolidating or transferring proceedings to a single court would be establishing communication between the courts involved prior to that transfer. Creditors of different group members might also be located in different places, raising issues of representation and the location in which creditor committees would meet or be constituted.

73. Although these issues might be addressed by law other than the insolvency law, it is desirable, as noted above with respect to joint applications (see para. 61), that the approach of recommendation 13 be followed. That would require the insolvency law to clearly indicate or include a reference to the relevant law that establishes the court with jurisdiction over an application for procedural coordination.

(f) Notice with respect to procedural coordination

74. An application for procedural coordination may be subject to the same requirements for giving of notice as an application for commencement of proceedings under the *Legislative Guide* (see recommendations 19, 22-24). When made at the same time as the application for commencement of proceedings, only an application for procedural coordination by creditors would require notice to be given to the relevant debtors, consistent with recommendation 19.

75. An application made at that time by group members should not require creditors to be notified, consistent with recommendations 23-24, but relevant information, such as the content or implications of the order, could be included with the notice of commencement of proceedings.

76. When an application for procedural coordination is made subsequent to commencement of proceedings, it may be appropriate to provide notice to creditors, notwithstanding that procedural coordination does not affect the substantive rights of creditors. The provision of notice may be particularly important where the law makes provision, as noted above, for cases commenced in different jurisdictions to be transferred to, or administered by, a single court and that transfer may affect procedural aspects of the proceedings of interest to creditors, such as the location of meetings of a creditor committee or the place for submission of claims.

77. Provision of notice to all creditors may be satisfied with collective notification, such as by notice in a particular legal publication, when domestic legislation so permits and when appropriate, for instance, in the case of a large number of creditors with very small claims. In addition to the information required by the recommendations above addressing provision of notice on commencement of proceedings (recommendation 25), notice of an order for procedural coordination might include the terms of the order and information relevant to, for example, coordination of hearings and meetings, and arrangements to be made with respect to lending.

(g) Modifying or terminating an order for procedural coordination

78. Given that the purpose of procedural coordination is to promote administrative convenience and cost-efficiency, an insolvency law may include provisions relating to modification or reversal of an order to accommodate changed circumstances. That approach might be appropriate when, for example, a coordinated reorganization is not successful and the individual members should be liquidated separately. Reversal of an order, although rarely required, should be possible as the initial order is not intended to affect substantive rights. As a safeguard, the insolvency law could provide that reversal or modification would be possible, provided it was without prejudice to actions already taken or rights affected by the initial order.

Recommendations 202-210**Purpose of legislative provisions**

The purpose of provisions on procedural coordination of insolvency proceedings with respect to two or more enterprise group members is:

- (a) To facilitate coordination of the administration of those insolvency proceedings, while respecting the separate legal identity of each group member; and
- (b) To promote cost-efficiency and a better return to creditors.

Contents of legislative provisions*Procedural coordination of two or more insolvency proceedings*

202. The insolvency law should specify that the administration of insolvency proceedings with respect to two or more enterprise group members may be coordinated for procedural purposes.

203. The insolvency law should specify that, at the request of a person permitted to make an application under recommendation 206 or on its own initiative, the court²⁴ may order procedural coordination.

204. Procedural coordination may involve, for example, joint provision of notice; coordination of procedures for submission and verification of claims; appointment of a single or the same insolvency representative; coordination of avoidance proceedings; cooperation between the courts, including coordination of hearings; and cooperation between insolvency representatives, including information sharing and coordination of negotiations. The scope and extent of the procedural coordination [in each case] should be specified by the court.

*Application for procedural coordination**- Timing of application*

205. 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 or at any subsequent time.²⁵

Persons permitted to apply

206. The insolvency law should specify that an application for procedural coordination may be made by:

- (a) An enterprise group member that is subject to an application for commencement of insolvency proceedings or subject to insolvency proceedings;
- (b) The insolvency representative of an enterprise group member; or

²⁴ Coordination might involve different courts competent with respect to different group members or a single court that is competent with respect to a number of different insolvency proceedings concerning members of the same group. Accordingly, an order for procedural coordination may require action by more than one court.

²⁵ The impracticability of ordering procedural coordination at an advanced stage of the insolvency proceedings is discussed in the commentary; see above, paras.68-69.

(c) A creditor²⁶ of an enterprise group member that is subject to an application for commencement of insolvency proceedings or subject to insolvency proceedings.

Coordinating consideration of an application

207. The insolvency law should specify that the court²⁷ may take appropriate steps to coordinate with any other competent court consideration of an application for procedural coordination of insolvency proceedings concerning two or more enterprise group members. Those steps might involve, for example, coordinated proceedings; joint hearings; sharing and disclosure of information.

Modification or termination of an order for procedural coordination

208. The insolvency law should specify that an order for procedural coordination may be modified or terminated, provided that any actions or decisions already taken pursuant to the order should not be affected by the modification or termination. Where more than one court is involved in ordering procedural coordination, those courts may take appropriate steps to coordinate modification or termination of the procedural coordination.

Competent courts

209. For the purposes of recommendation 13, the words “commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings” include applications and orders for procedural coordination of insolvency proceedings with respect to two or more enterprise group members.²⁸

Notice of procedural coordination

210. The insolvency law should establish requirements for giving notice with respect to applications and orders for procedural coordination and modification or termination of procedural coordination, including the scope and extent of the order; to whom notice should be given; the party responsible for giving notice; and the content of the notice.

C. Treatment of assets on commencement of insolvency proceedings

79. The manner in which the commencement of insolvency proceedings affects the debtor and its assets is discussed in detail above (see part two, chap. II). In general, those effects would apply equally to commencement of insolvency proceedings against two or more enterprise group members. Some of the effects that might differ in the group context are discussed below, with respect to protection and preservation of the insolvency estate; post-commencement finance; avoidance; subordination; and remedies, including substantive consolidation orders.

²⁶ To be eligible to make an application for procedural coordination, a creditor does not have to be a creditor of all the group members in respect of which it is seeking procedural coordination.

²⁷ See note 23 above.

²⁸ The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, para.59 and note 23.

1. Protection and preservation of the insolvency estate

(a) Application of the stay to a solvent group member

80. As noted above (see part two, chap. II, para. 26), many insolvency laws include a mechanism to protect the value of the insolvency estate that not only prevents creditors from commencing actions to enforce their rights through legal remedies during some or all of the period of insolvency proceedings, but also suspends actions already under way against the debtor. The recommendations relating to the application of that mechanism, referred to as a “stay”, would apply generally in the case of insolvency proceedings against two or more enterprise group members (see recommendations 39-51).

81. One issue that might arise in the context of the insolvency of enterprise groups, but not in the case of individual debtors, is the extension of the stay to an enterprise group member that is not subject to the insolvency proceedings (where the insolvency law permits a group member that is not insolvent to be included in the proceedings, this issue will not arise). The issue may be of particular relevance to enterprise groups because of the interrelatedness of the business of the group. For example, when finance 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 group members not subject to insolvency proceedings may also affect the assets and liabilities or the ability to continue their ordinary course of business of group members with respect to which applications for commencement have been made or insolvency proceedings have commenced.

82. Extension of the stay to include the solvent member might be sought in a number of situations, for example, to protect an intra-group guarantee that relies upon the assets of the solvent group member providing the guarantee; to restrain a lender from seeking to enforce an agreement against a solvent group member, where that enforcement might affect the liability of another member subject to an application for insolvency proceedings; and to restrain enforcement of a security interest against assets of a solvent member that are central to the business of the group, including the business of group members subject to an application for insolvency proceedings. Extension of the stay in these cases has the potential to affect the business of the solvent member and the interests of its creditors, depending upon the nature of the solvent member and its function within the group structure. The day-to-day activities of a trading group member, for example, may be more adversely affected than those of a group member established to hold certain assets or obligations.

83. In some States, ordering insolvency-related relief with respect to a solvent group member (not included in insolvency proceedings) might not be possible as it would conflict, for example, with the protection of property rights or raises issues of constitutional rights. Nevertheless, it might be possible to achieve the same effect if a court could order measures of protection in conjunction with the commencement of insolvency proceedings with respect to other enterprise group members in certain cases, such as where there is an intra-group guarantee. The measures may be available at the courts’ discretion, subject to such conditions as the court determines appropriate.

84. These measures might be covered by recommendation 48, which provides for the court to grant relief in addition to any relief that might be applicable automatically on commencement of insolvency proceedings (as addressed in recommendation 46). As the footnote to recommendation 48 points out, that additional relief would depend upon the types of measures available in a particular jurisdiction and the measures that might be appropriate in a particular insolvency proceeding.

85. Measures might also be available on a provisional basis. Recommendation 39 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”.

86. Protection for the interests of the creditors, both secured and unsecured, of the solvent group member, might also be found in the relevant recommendations above. Recommendation 51, for example, specifically addresses the issue of protection of secured creditors and grounds for relief from the stay applicable on commencement and might be extended to secured creditors of the solvent group member. Other grounds for relief from the stay might relate to the financial situation of the solvent member and the continuing effect of the stay on its day-to-day operations and, potentially, its solvency.

87. Where a secured creditor is a member of the same enterprise group as the debtor or debtors, a different approach to the question of protection might be required, especially where the insolvency law permits substantive consolidation or subordination of related person claims (see below, paras.121-126).

(b) Post-application finance

88. The discussion on post-commencement finance in part two, chapter II recognizes that the continued operation of the debtor’s business after the commencement of insolvency proceedings is critical to reorganization and, to a lesser extent, liquidation, where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services, including labour costs, insurance, rent, maintenance of contracts and other operating expenses, as well as costs associated with maintaining the value of assets.

89. The same need for finance also occurs in the period between the time an application for commencement of insolvency proceedings is made and commencement of those proceedings (referred to as post-application finance). When an enterprise group member becomes insolvent and makes an application for commencement of insolvency proceedings, that application often triggers an event of default under existing loan agreements, entitling the lender to discontinue advancing funds under those agreements. Where an insolvency law does not provide for automatic commencement of insolvency proceedings upon application, it can often take a period of several months between the making of an application and the commencement of the proceedings, during which time, the courts must make an independent evaluation as to whether the debtors subject to the application meet the statutory criteria to commence proceedings. However, if the group member is to

continue as a going concern while this determination is being made, it must be able to continue to conduct its business, pay its employees, pay its suppliers and generally continue its day-to-day activities. The availability or lack of financing during this interim period can determine or significantly influence whether reorganization will ultimately be a viable option or whether liquidation will be required.

90. As noted above (part two, chap. II, para. 96), in the absence of enabling or clarifying treatment in the insolvency law, the provision of finance in this period before commencement of the insolvency proceedings may raise difficult questions relating to the application of avoidance powers and the liability of both the lender and the debtor. Some insolvency laws provide, for example, that where a lender advances funds to an insolvent debtor in the period before commencement of proceedings, the lender may be responsible for any increase in the liabilities of other creditors or the advance may be subject to avoidance in any ensuing insolvency proceedings as a preferential transaction.

91. The existence of a provision under the insolvency law enabling finance to be obtained for the period of time between the making of an application and the commencement of the proceedings would provide the necessary authorization and give any existing or new lender the assurance and incentive necessary to provide additional financing to cover that period.

92. Recommendation 39 permits the court to order provisional measures to preserve the assets of the debtor prior to the commencement of insolvency proceedings, where those measures are needed to protect those assets and the interests of creditors. Since those measures could include authorizing post-application, the provision of that finance should therefore be regarded as being within the purview of recommendation 39.

2. Use and disposal of assets

93. It is noted above (see part two, chap. II, para. 74) that, although as a general principle it is desirable that an insolvency law not interfere unduly with the ownership rights of third parties or the interests of secured creditors, the conduct of insolvency proceedings will often require assets of the insolvency estate, and assets in the possession of the debtor being used in the debtor's business, to continue to be used or disposed of (including by way of encumbrance) in order to enable the goal of the particular proceedings to be realized.

94. Where insolvency proceedings concern two or more enterprise group members, issues may arise with regard to the use of assets belonging to a group member not subject to insolvency proceedings to support ongoing operations of those members subject to such proceedings, pending resolution of the proceedings. Where those assets are in the possession of one of the group members subject to insolvency proceedings, recommendation 54, which addresses the use of third-party owned assets in the possession of the debtor, may be sufficient.

95. Where those assets are not in the possession of any of the group members subject to insolvency proceedings, recommendation 54 generally will not apply. There may be circumstances, however, where the solvent group member in possession of those assets is included in the insolvency proceedings or the provisions of a group reorganization plan should cover the assets (see below,

para. 184, for a discussion of the inclusion of a solvent group member in a reorganization plan). Where the solvent group member is not included in the proceedings, the question will be whether those assets can be used to support group members subject to insolvency proceedings and if so, the conditions to which that use would be subject. The use of those assets might raise questions of avoidance, particularly where the supporting member subsequently became insolvent, and also raises concerns for creditors of that member.

3. Post-commencement finance

(a) The need for post-commencement finance

96. The discussion on post-commencement finance above in part two, chapter II (see paras. 94-95) recognizes that the continued operation of the debtor's business after the commencement of insolvency proceedings is critical to reorganization and, to a lesser extent, liquidation where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services, including labour costs, insurance, rent, maintenance of contracts and other operating expenses, as well as costs associated with maintaining the value of assets. It is also noted, however, that many jurisdictions restrict the provision of new money in insolvency or do not specifically address the issue of new finance or the priority for its repayment in insolvency. Of those laws that do address post-commencement finance, very few, if any, specifically address the issue in the context of enterprise groups.

97. Post-commencement finance may be even more important in the group context than it is in the context of individual insolvency proceedings. If there are no ongoing funds there is very little prospect of reorganizing an insolvent enterprise group or selling all or parts of it as a going concern. The economic impact of that failure is likely to be much greater, especially in large groups, than it would be in the case of an individual debtor. The reasons for promoting the availability of post-commencement finance in the group context are therefore similar to the case of the individual debtor, although a number of issues different to those relating to the individual debtor are likely to arise. These issues may include: balancing the interests of individual enterprise group members with what is required for the reorganization of the group as a whole; provision of post-commencement finance by solvent group members, especially in cases where issues of control might arise (such as where that solvent member is controlled by the insolvent parent of the group); treatment of transactions that are essentially between related parties (see glossary, para. (jj)); provision of finance by other group members subject to insolvency proceedings; the possibility of conflict of interest between the needs of the different debtors with respect to ongoing finance where a single insolvency representative is appointed to several group members; and the desirability of maintaining, in insolvency proceedings, the financing structure that the group had before the onset of insolvency, especially where that structure involved pledging all of the assets of the group for finance that was channelled through a centralized group entity with treasury functions.

98. Recommendations 63-68 aim to promote the availability of finance for continued operation or survival of the debtor's business and ensure appropriate protection for the providers of post-commencement finance, as well as for other parties whose rights may be affected by the provision of post-commencement

finance. In the enterprise group context, these recommendations would apply to post-commencement finance provided by both lenders external to the group and solvent members of the group.

(b) Sources of post-commencement finance in a group context

99. As noted above in part two, chapter II (see para. 99), post-commencement finance is likely to come from a limited number of sources. In the enterprise group context, that might include sources both external and internal to the group, where internal sources might include both solvent group members and group members already subject to insolvency proceedings. While some of the incentives for providing post-commencement finance might be the same for internal and external lenders, internal lenders may have the added inducement of their own survival where they are to be part of a reorganization.

(i) Provision of post-commencement finance by a solvent group member

100. As noted above, one of the questions with respect to post-commencement finance in the enterprise group context is whether the assets of a solvent group member can be used, such as by provision of a security interest or guarantee, to obtain financing for an insolvent member from an external source or to fund the insolvent member directly and, if so, the implications for the recommendations concerning priority and security. A solvent group member might have an interest in the financial stability of the parent, other group members or the group as a whole in order to ensure its own financial stability and the continuation of its business, particularly where it is closely integrated with or reliant upon insolvent members for ongoing business activity. Different types of solvent entities, such as special purpose entities with few liabilities and valuable assets, might be involved in different ways in the insolvency of other group members, such as granting a guarantee or security interest to insolvent group members to help obtain new finance.

101. However, use of the assets of a solvent group member in that way, especially where that solvent member is likely to become, or subsequently becomes, insolvent, raises a number of questions. While the solvent entity might provide that finance on its own authority under relevant company law in a commercial context and not under the insolvency law, the consequences of that provision of finance ultimately may be regulated by the insolvency law. Questions may arise, for example, as to: whether a solvent group member would be entitled to the priority provided by recommendation 64 if it provided funding to an insolvent group member; whether the claim arising from that transaction would be subject to special treatment because the transaction occurred between related parties pursuant to recommendation 184; or whether such a transaction might be considered a preferential transaction in any subsequent insolvency of the member providing the finance. Under some laws, providing such finance may be prohibited as constituting a transfer of the assets of a solvent entity to an insolvent entity to the detriment of the creditors and shareholders of the solvent entity.

102. Some of the difficulties associated with provision of finance by a solvent group member might be solved if addressed in the context of a reorganization plan, in which the solvent group member, as well as external finance providers, could participate on a contractual basis. While there might be situations in which that

approach would be appropriate, the requirement for post-commencement finance at any early stage of the insolvency proceedings — in reorganization proceedings, before a plan could be negotiated and, in cases such as liquidation on a going concern basis, where there would be no reorganization plan — suggests it is likely to be of limited application.

103. Recommendation 63 establishes the basis for obtaining post-commencement finance (that the insolvency representative determines it to be necessary for the continued operation or survival of the business of the debtor or the preservation or enhancement of the value of the estate) and its authorization (by the court or by creditors). Those requirements remain relevant in the context of enterprise groups and for the avoidance of doubt, recommendation 63 should be interpreted as applying to a group member subject to insolvency proceedings that obtains post-commencement finance from either an external lender or a solvent member of the same group. What recommendation 63 does not address is a group member subject to insolvency proceedings providing post-commencement finance directly to another group member or facilitating its provision by way of security interest or guarantee.

(ii) *Provision of post-commencement finance by an insolvent group member*

104. Provision of post-commencement finance by one group member subject to insolvency proceedings to another such member is not directly addressed elsewhere in the *Guide*. Some of the general prohibitions under existing laws associated with insolvent entities borrowing and lending funds may need to be further considered to facilitate provision of post-commencement finance in that situation (see above, para. 96). The policy rationale for these prohibitions is likely to be even more evident when both the lender and the borrower are not only insolvent and subject to insolvency proceedings, but also members of the same enterprise group. The group context may also raise concerns with respect to the duties and obligations of the insolvency representative, when the insolvency representative of one insolvent group member seeks to facilitate the provision of post-commencement finance to another insolvent group member.

105. While it may generally be expected that a group member subject to insolvency proceedings would not have the ability to provide post-commencement finance to another such member or to provide support for its provision, there may be circumstances, albeit potentially limited, where it would be both possible, and desirable, particularly when the interests of the enterprise group are considered as a whole. To the extent that the provision of such finance has an impact on the rights of existing creditors, both secured and unsecured, of both group members, it is desirable that it be balanced against the prospect that preservation of going concern value by the continued operation of the business will ultimately provide benefit to those creditors. A balance might also be desirable between sacrificing one group member for the benefit of other members and achieving a better overall result for all members. Although potentially difficult to achieve, the goal might be fair apportionment of any harm that arises from such post-commencement finance in the short term with a view to the long term gain, rather than the sacrifice of one member (and its creditors) for the benefit of others involved in the post-commencement finance.

Conflict of interest

106. The provision of finance in the group context raises issues concerning possible prejudice and conflict of interest that are not relevant in the case of a single debtor. A conflict of interest might arise, for example, in balancing the interests of the group as a whole against the potentially different interests of the lender and the receiver of post-commencement finance, particularly where a single insolvency representative is appointed to the insolvency proceedings of a number of group members. For example, the insolvency representative of the member providing the finance might also be the insolvency representative of the receiving member. That situation might be addressed in several ways in the insolvency law, such as by requiring court or creditor approval of the post-commencement finance or by appointing one or more additional insolvency representatives to ensure the interests of the creditors of the different group members are protected (see below, paras. 173-178). The appointment might be to address that specific conflict or on more general terms for the duration of the proceedings.

107. There is also the question of whether an insolvent group member might, as part of the financing arrangements of the enterprise group as a whole, be requested to guarantee finance provided to a solvent group member. Since the provision of that guarantee is likely to constitute a disposal of the assets of the insolvent group member, it would probably be covered by the recommendations addressing that issue (see recommendations 52-62).

(iii) Priority for post-commencement finance

108. Recommendation 64 specifies the need to establish the priority to be accorded to post-commencement finance and the level of that priority, i.e. ahead of ordinary unsecured creditors, including those with administrative priority. While priority generally provides an important incentive for the provision of such financing, the inducement required in the group context is perhaps slightly different than in the situation of the individual debtor. The particular interest of the group member providing finance may relate more to the insolvency outcome for the group as a whole (including that member), than to commercial considerations of profit or short-term gains. In those circumstances, it might be necessary to consider whether the level of priority accorded by recommendation 64 would be appropriate. One view might be that that level of priority provides appropriate incentive for the provision of finance and affords appropriate protection to the creditors of the provider. Another view might be that because of the related person nature of the transaction and the group context (including the finance provider's self-interest in the outcome of the insolvency proceedings for the group as a whole), suggest the desirability of according a lower priority to protect the interests of creditors more generally and achieve a balance between the interests of the finance provider's creditors and those of the group member receiving the finance. Whichever approach is adopted, it is desirable that the insolvency law accord priority to such lending and specify the appropriate level.

(iv) Security for post-commencement finance

109. Recommendations 65-67 address issues relating to the granting of security for post-commencement finance and generally would be applicable in the enterprise group context. A group member subject to insolvency proceedings may grant a

security interest of the type referred to in recommendation 65 to secure post-commencement finance it has obtained for its own use. That situation is covered by recommendations 65-67. A group member subject to insolvency proceedings may also grant a security interest of the type referred to in recommendation 65 to secure repayment of post-commencement finance provided to another group member subject to insolvency proceedings. In the latter situation, the group member is granting the security over its unencumbered assets, but is not directly receiving the benefit of the post-commencement finance and is potentially diminishing the pool of assets available to its creditors. It may, however, derive an indirect benefit when the provision of the finance facilitates a better solution for the insolvency of the group as a whole and, as noted above, any short-term detriment is offset by the long-term gain for creditors, including its own creditors. The member receiving the finance is deriving a direct benefit, but increasing its indebtedness to the potential detriment of its creditors, although they should also benefit in the longer term.

110. To parallel the requirements of recommendation 63 with respect to the receiving group member, it might be desirable to require the insolvency representative of the providing group member to determine that the provision of the post-commencement finance is necessary for the continued operation or survival of the business of that group member or the preservation or enhancement of the value of its estate. An additional requirement might be that any harm to creditors of the providing group member must be offset by the benefit to be derived from the granting of the security interest.

111. Consistent with recommendation 63, the insolvency law might also require the court to authorize or creditors of the providing group member to consent to the post-commencement finance. Given that new finance may be required on a fairly urgent basis to ensure the continuity of the business, it is desirable that the number of authorizations required be kept to a minimum. The advantages and disadvantages of the different considerations with respect to authorization that would also apply in the group context are discussed above (see part two, chap. II, paras. 105-106). It may be added that since the issues to be determined are likely to be more complex in that context, involving as they do a larger number of parties and complex interrelationships, it is most likely to be the insolvency representatives of the relevant group members that will be in the best position to assess the impact of the proposed financing arrangement, in much the same way as they are with respect to determining the need for new finance under recommendation 63. If the involvement of the courts or creditors is considered desirable, however, it should be borne in mind that issues of delay may be encountered where there are a large number of creditors to be consulted or where the court does not have the ability to make speedy decisions.

112. Where it is considered desirable to accord a security interest granted to secure new finance a priority ahead of an existing security interest over the same asset, as contemplated by recommendation 66, the safeguards applicable under that recommendation and recommendation 67 would apply in the group context.

(v) *Guarantee or other assurance of repayment for post-commencement finance*

113. The granting of a guarantee by one group member for payment of new finance to another is not a situation that arises in the case of an individual debtor and is

therefore not addressed elsewhere in the *Guide*. However, since the considerations that arise are similar to those discussed above with respect to the granting of a security interest, it may be appropriate to adopt the same approach with respect to the determinations to be made by the insolvency representative and the possible authorization by the court or consent of creditors.

Recommendations 211-216

Purpose of legislative provisions

The purpose of provisions on post-commencement finance for enterprise groups is:

- (a) To facilitate finance to be obtained by enterprise group members subject to insolvency proceedings for the continued operation or survival of their business or the preservation or enhancement of the value of their assets;
- (b) To facilitate the provision of finance by enterprise group members, including group members subject to insolvency proceedings;
- (c) To ensure appropriate protection for the providers and receivers of post-commencement finance and for those parties whose rights may be affected by the provision of that finance; and
- (d) To advance the objective of fair apportionment of the benefit and detriment associated with the provision of post-commencement finance among all group members involved.

Contents of legislative provisions²⁹

Provision of post-commencement finance by a group member subject to insolvency proceedings to another group member subject to insolvency proceedings

[211. The insolvency law should permit an enterprise group member subject to insolvency proceedings to:

- (a) Advance post-commencement finance to other enterprise group members subject to insolvency proceedings;
- (b) Grant a security interest over its assets for post-commencement finance provided to another enterprise group member subject to insolvency proceedings; and
- (c) Provide a guarantee or other assurance of repayment for post-commencement finance provided to another enterprise group member subject to insolvency proceedings.]

[212. The insolvency law should specify that post-commencement finance may be [provided] [advanced or facilitated] in accordance with recommendation 211, where the insolvency representative of the group member advancing finance, granting a security interest or providing a guarantee or other assurance:

- (a) Determines it to be necessary for the continued operation or survival of the business of that enterprise group member;

²⁹ Recommendations 211 to 216 were revised at the 36th session of the Working Group, but not considered for lack of time. Accordingly, they are included here in square brackets.

(b) Determines it to be necessary for the preservation or enhancement of the value of the estate of that enterprise group member; and

(c) Determines [in accordance with the insolvency law] that any harm to creditors is offset by the benefit to be derived from advancing finance, granting a security interest or providing a guarantee or other assurance.]

[213. The insolvency law may require the court to authorize or creditors to consent to the provision of post-commencement finance in accordance with recommendations 211 and 212.]

Post-commencement finance obtained by a group member subject to insolvency proceedings from another group member subject to insolvency proceedings

[214. The insolvency law should specify that in accordance with recommendation 63, post-commencement finance may be obtained from an enterprise group member subject to insolvency proceedings by another group member subject to insolvency proceedings where the insolvency representative of the receiving group member determines it to be necessary for the continued operation or survival of the business of that group member or the preservation or enhancement of the value of the estate. The insolvency law may require the court to authorize or creditors to consent to the obtaining of that post-commencement finance.]

Priority for post-commencement finance

[215. The insolvency law should specify the priority that applies to post-commencement finance provided by one enterprise group member subject to insolvency proceedings to another group member that is subject to insolvency proceedings.]

Security for post-commencement finance

[216. The insolvency law should specify that recommendations 65, 66 and 67 apply to the granting of a security interest in accordance with recommendation 211(b).]

4. Avoidance proceedings

(a) Nature of enterprise group transactions

114. Recommendations 87-99 relating to avoidance would generally apply to avoidance of transactions in the context of an enterprise group, although additional considerations may apply to transactions between group members because of the group structure and the different relationships that group members may have vis-à-vis each other. 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 an enterprise group, where the benefits and detriments of transactions might be more widely assigned. Those transactions, for

example, contracts entered into for purposes of transfer pricing³⁰ may involve terms and conditions that are different to those included in similar contracts entered into by unrelated commercial parties on usual commercial terms. Similarly, some legitimate transactions occurring within an enterprise group may not be commercially viable outside the group context if the benefits and detriments were to be analysed on normal commercial grounds.

115. Intra-group transactions may represent trading between group members; channelling of profits upwards from one group member to a controlling group member; loans from one member to another to support continued trading by the borrowing member; asset transfers and guarantees between group members; payments by one group member to a creditor of a related group member; a guarantee or mortgage given by one group member to support a loan by an outside party to another group member; or a range of other transactions. A group may have the practice of putting all available money and assets in the group to the best commercial use in the interests of the group as a whole, as opposed to the benefit of the group member to which they belong. This might include sweeping cash from some group members into the financing group member. Although this might not always be in the best interests of the individual group members, some laws permit directors of wholly owned group members, for example, to act in that manner, provided it is in the best interests of the controlling group member.

(b) Avoidance criteria in the enterprise group context

116. 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, on the basis that they are normal “ordinary course” business transactions or subject them to particular scrutiny and a greater likelihood of avoidance because of the relationship between transacting parties as group members and the provisions of the insolvency law applicable to related person transactions. “Related person” is defined to include enterprise group members such as a parent, subsidiary, partner or affiliate of the insolvent group member against which insolvency proceedings have commenced or a person, including a legal person, that is or has been in control of the debtor (glossary, para. (jj)). While in some cases, 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, the mere existence of the enterprise group may not always provide sufficient justification to treat all intra-group transactions as transactions between related persons that should be subject to avoidance, as noted above (part two, chap. V, para. 48).

117. 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. Other transactions may not be so clearly within the scope of that recommendation and may raise issues concerning the extent to which the group

³⁰ Transfer pricing refers to the pricing of goods and services within a multi-divisional organization. Goods from the production division may be sold to the marketing division, or goods from a parent company may be sold to a foreign subsidiary. The choice of the transfer prices affects the division of the total profit among the parts of the company. It can be advantageous to choose them so that, in terms of bookkeeping, most of the profit is made in a country with low taxes.

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 be transactions that are intra-group transactions because they cannot be conducted in other ways or because they result from the manner in which the group is structured. In some situations, for example, finance may only be available on an intra-group basis and there would be no justification to treat such a transaction more strictly than if it involved an external lender. Similarly, a group may involve centralized cash flow and transfers of cash, as noted above, that would not occur where there was no group.

118. 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. For these reasons, it is desirable that an insolvency law consider those issues in the group context and include group-related factors as matters to be taken into account in determining whether a particular transaction between group members would be subject to avoidance under recommendation 87.

119. Recommendation 97 addresses the elements to be proven to avoid a particular transaction and defences to avoidance. It may be appropriate to consider how those elements would apply in the group context and whether a different approach is required. One approach to the burden of proof in the case of transactions with related persons, for example, might be to provide that the requisite intent or bad faith is deemed or presumed to exist where certain types of transactions are undertaken within the suspect period and the counterparty to the transaction will have the burden of proving otherwise. Some laws, for example, have established a rebuttable presumption that certain transactions among group members and the shareholders of that group would be detrimental to creditors and therefore subject to avoidance. A different approach would be to acknowledge that, as noted above, transactions occurring within a group, although not always commercially viable if occurring outside the group context, are generally legitimate, especially when occurring within the limits of relevant applicable law and within the ordinary course of business of the group members concerned. Such a transaction might nevertheless be subjected to special scrutiny (in much the same way as is recommended for claims by related persons in recommendation 184, an approach followed by some laws that also permit the rights of related group members under intra-group debt arrangements to be deferred or subordinated to the rights of external creditors of the insolvent members.

120. Recommendation 93 makes limited provision for a creditor to commence an avoidance proceeding with the approval of the insolvency representative or leave of the court. In the group context, the level of integration of the group may have the potential to significantly affect the ability of creditors to identify the group member with which they dealt and thus provide the requisite information for commencing avoidance proceedings.

Recommendations 217-218**Purpose of legislative provisions**

The purpose of avoidance provisions as among enterprise group members is [to provide, in addition to the considerations set forth in recommendations 87-99, that the insolvency law may permit the court to take into account that the transaction took place in the context of an enterprise group and establish the specific circumstances that may be considered by the court.]

Contents of legislative provisions*Avoidable transactions*

217. The insolvency law should specify that, in considering whether a transaction of the kind referred to in recommendation 87 (a), (b) or (c) that took place between enterprise group members or an enterprise group member and other related persons should be avoided, the court may have regard to the circumstances in which the transaction took place. Those circumstances may include: the relationship between the parties to the transaction; the degree of integration between enterprise group members that are parties to the transaction; the purpose of the transaction; whether the transaction contributed to the operations of the group as a whole; and whether the transaction granted advantages to enterprise group members or other related persons that would not normally be granted between unrelated parties.

Elements of avoidance and defences

218. The insolvency law should specify the manner in which the elements referred to in recommendation 97 would apply to avoidance of transactions in the enterprise group context.³¹

5. Subordination

121. It is noted above (see part two, chap. V, para. 56) that subordination refers to a rearranging of creditor priorities in insolvency and does not relate to the validity or legality of the claim. Notwithstanding the validity of a claim, it might nevertheless be subordinated because of a voluntary agreement or a court order. Two types of claims that typically may be subordinated in insolvency are those of persons related to the debtor and of owners and equity holders of the debtor.

(a) Related person claims

122. In the enterprise group context, subordination of related person claims might mean, for example, that the rights of group members under intra-group arrangements could be deferred to the rights of external creditors of those group members subject to insolvency proceedings.

123. As explained, the term “related person” would include enterprise group members. However, the mere fact of a special relationship with the debtor, including, in the group context, membership of the same enterprise group, may not be sufficient in all cases to justify special treatment of a creditor’s claim. In some

³¹ 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.

cases, those claims will be entirely transparent and should be treated in the same manner as similar claims made by creditors who are not related persons; in other cases, they may give rise to suspicion and will deserve special attention. An insolvency law may need to include a mechanism to identify those types of conduct or situation in which claims will deserve additional attention. Similar considerations apply, as noted above, with respect to avoidance of transactions occurring between enterprise group members.

124. A number of situations in which special treatment of a related person's claim might be justified (e.g. where the debtor is severely undercapitalized and where there is evidence of self-dealing) are identified in part two, chapter V, para. 48. In the group context, additional considerations might include, as between a parent and a controlled group member: the parent's participation in the management of the group member; whether the parent has sought to manipulate intra-group transactions to its own advantage at the expense of external creditors; or whether the parent has otherwise behaved unfairly, to the detriment of creditors and shareholders of the controlled group member. Under some laws, the existence of those circumstances might result in the parent having its claims subordinated to those of unrelated unsecured creditors or even minority shareholders of the controlled group member.

125. Some laws include other approaches to intra-group transactions such as permitting debts owed by a group member that borrowed funds under an intra-group lending arrangement to be involuntarily subordinated to the rights of external creditors of that borrowing member; permitting the court to review intra-group financial arrangements to determine whether particular funds given to a group member should be treated as an equity contribution rather than as a loan, where the law subordinates equity contributions to creditor claims (on treatment of equity, see below); and allowing voluntary subordination of intra-group claims to those of external creditors.

126. The practical result of a subordination order in an enterprise group context might be to reduce or effectively extinguish any repayment to those group members whose claims have been subordinated if the claims of secured and unsecured external creditors are large in relation to the funds available for distribution. In some cases this might threaten the viability of the subordinated group member and be detrimental not only to its own creditors, but also its shareholders and, in the case of reorganization, to the group as a whole. The adoption of a policy of subordinating such claims may also have the effect of discouraging intra-group lending.

(b) Treatment of equity

127. Many insolvency laws distinguish between the claims of owners and equity holders that may arise from loans extended to the debtor or their ownership interest in the debtor (see above, part two, chap. V, para. 76). With respect to claims arising from equity interests, many insolvency laws adopt the general rule that the owners and equity holders of the business are not entitled to a distribution of the proceeds of assets until all other claims that are senior in priority have been fully repaid (including claims of interest accruing after commencement). As such, these parties will rarely receive any distribution in respect of their interest in the debtor. Where a distribution is made, it would generally be made in accordance with the ranking of

shares specified in the company law and the corporate charter. Debt claims, such as those relating to loans, however, are not always subordinated.

128. Few insolvency laws specifically address subordination of equity claims in the enterprise group context. One law that does allow the courts to review intra-group financial arrangements to determine whether particular funds given to a group member subject to insolvency proceedings should be treated as an equity contribution, rather than as an intra-group loan, enabling it to be postponed behind creditors' claims. Those funds are likely to be treated as equity where the original debt to equity ratio was high before the funds were contributed and the funds would reduce the ratio; if the paid-up share capital was inadequate; if it is unlikely that an external creditor would have made a loan in the same circumstances; and if the terms on which the advance was made were not reasonable and there was no reasonable expectation of repayment.

129. Subordination is discussed above in the context of treatment of claims and priorities, but the *Guide* does not recommend the subordination of any particular types of claims under the insolvency law, simply noting that subordinated claims would rank after claims of ordinary unsecured creditors (recommendation 189).³²

D. Remedies

130. Because of the nature of enterprise groups and the way in which they operate, there may be a complex web of financial transactions between group members, and creditors may have dealt with different members or even with the group as a single economic entity, rather than with members individually. Disentangling the ownership of assets and liabilities and identifying the creditors of each group member may involve a complex and costly legal inquiry. However, because adherence to the separate entity approach means that each group member is only liable to its own creditors, it may become necessary, when insolvency proceedings have commenced with respect to one or more of the group members, to disentangle the ownership of their assets and liabilities.

131. When this disentangling can be effected, adherence to the separate entity principle operates to limit creditor recovery to the assets of the specific group member of which they were a creditor. Where it cannot be affected or other specified reasons exist to treat the group as a single enterprise, some laws include remedies that allow the single entity approach to be set aside. Historically, these remedies have been developed to overcome the perceived inefficiency and unfairness of the traditional separate entity approach in specific group cases. In addition to setting aside intra-group transactions or subordinating intra-group lending, the remedies may include: the extension of liability for external debts to solvent group members, as well as to office holders and shareholders; contribution orders; and pooling or substantive consolidation orders. Some of these remedies require findings of fault to be made, while others rely upon the establishment of certain facts with respect to the operations of the enterprise group. In some cases, particularly where misfeasance of management is involved, other remedies might

³² See also the UNCITRAL Legislative Guide on Secured Transactions.

more appropriately be employed, such as removing the offending directors and limiting management participation in reorganization.

132. Because of the potential inequity that may result when one group member is forced to share assets and liabilities with other group members that may be less solvent, remedies setting aside the single entity approach are not universally available, generally not comprehensive and apply only in restricted circumstances. Those remedies involving extension of liability may involve “piercing” or “lifting the corporate veil”, which may result in shareholders, who are generally shielded from liability for the enterprise’s activities, being held liable for certain activities. The remedies discussed below do not involve lifting the corporate veil, although in some circumstances the effect may appear to be similar.

1. Extension of liability

133. Extending the liability for external debts and, in some cases, the actions of the group members subject to insolvency proceedings to solvent group members and relevant office holders is a remedy available under some laws to individual creditors on a case-by-case basis and depends upon the circumstances of that creditor’s relationship with the debtor.

134. Many laws recognize circumstances in which exceptions to the limited liability of corporate entities are available and one group member and relevant office holders could be found liable for the debts and actions of another group member. Some laws adopt a prescriptive approach and the circumstances are strictly limited; other laws adopt a more expansive approach, giving the courts broad discretion in evaluating the circumstances of a particular case on the basis of specific guidelines. In both cases, however, the basis for extending liability beyond the insolvent group member is the relationship between that group member and related group members in terms of both ownership and control. A further relevant factor may be the conduct of the related group member vis-à-vis the creditors of the member subject to insolvency proceedings.

135. Whilst there are different formulations of the circumstances in which liability might be extended, examples generally fall into the following categories, although it should be noted that not all laws reflect all of these categories and to some extent they may overlap:

(a) Exploitation or abuse by one group member (perhaps the parent) of its control over another group member, including operating that group member continually at a loss in the interests of the controlling group member;

(b) Fraudulent conduct by the dominant shareholder, which might include fraudulently siphoning off a group member’s assets or increasing its liabilities, or conducting the affairs of the group member with an intent to defraud creditors;

(c) Operating a group member as the parent or controlling group member’s agent, trustee or partner;

(d) Conducting the affairs of the group or of a group member in such a way that some classes of creditors might be prejudiced (for example, incurring liabilities to employees of one group member);

(e) Artificial fragmentation of a unitary enterprise into several entities for the purposes of insulating the single entity from potential liabilities; failure to follow the formalities of treating group members as separate legal entities, including disregarding the limited liability of group members or confusing personal and corporate assets; or where the enterprise group structure is a mere sham or facade, such as where the corporate form is used as a device to circumvent statutory or contractual obligations;

(f) Inadequate capitalization of an entity, so that it does not have an adequate capital basis for carrying out its operations. This may apply at the time of establishment, or be the result of depletion of the capital by way of refunds to shareholders or by shareholders drawing more than distributable profits;

(g) Misrepresentation of the real nature of the enterprise group, leading creditors to believe that they are dealing with a single enterprise, rather than with a member of a group;

(h) Misfeasance, where any person, including a group member, can be required to compensate for any loss or damage to another group member arising from fraud, breach of duty or other misfeasance, such as actions causing significant injury or environmental damage;

(i) Wrongful trading, where directors, including shadow directors of a group member have a duty to monitor, for example, whether that group member can properly continue carrying on business in the light of its financial condition and are required to apply for insolvency within a specified period once it has become insolvent. Permitting or directing a group member to incur debts when it is or is likely to become insolvent would fall into this category; and

(j) Failing to observe regulatory requirements, such as keeping regular accounting records of a subsidiary or controlled group member.

136. Generally, the mere incidence of control or domination of a group member by another group member, or other form of close economic integration within an enterprise group, is not regarded as sufficient reason to justify disregarding the separate legal personality of each group member and piercing the corporate veil.

137. In a number of the examples where liability might be extended to the controlling group member, that liability may include the personal liability of the members of the board of directors of the controlling group member (who may be described as *de facto* or shadow directors). While directors of an individual group member may generally owe certain duties to that group member, they may be faced with balancing those duties against the overall commercial and financial interests of the group. Achieving the general interests of the group, for example, may require that the interests of individual members be sacrificed in certain circumstances. Some of the factors that might be relevant to determining whether directors of a controlling group member will be personally liable for the debts or actions of a controlled group member subject to insolvency proceedings include: whether there was active involvement in the management of the controlled group member; whether there was grievous negligence or fraud in the management of the insolvent group member; whether the management of the controlling group member could be in breach of duties of care and diligence or there was abuse of managerial power; or whether there was a direct relationship between the management of the controlled

group member and its insolvency. In some jurisdictions, directors may also be found criminally liable. One of the principal difficulties with extending liability in such cases is proving the behaviour in question to show that the controlling group member was acting as a de facto or shadow director.

138. There are also laws that provide for controlling group member or parents to accept liability for debts of controlled group members or subsidiaries by contract, especially where the creditors involved are banks, or by entering into voluntary cross-guarantees. Under other laws, which provide for various forms of integration of enterprise groups, the principal group member can be jointly and severally liable to the creditors of the integrated group members, for liabilities arising both before and after the formalization of the integration.

2. Contribution orders

139. A contribution order is an order by which a court can require a solvent group member to contribute specific funds to cover all or some of the debts of other group members subject to insolvency proceedings. Although contribution orders are not widely available under insolvency laws, a few jurisdictions have adopted or are considering adopting these measures, generally only in liquidation proceedings.

140. A number of the issues noted below may not require specific provisions to be included in the insolvency law, as remedies may already exist under other laws, such as those addressing liability and wrongful trading.

141. Under those laws that do permit contribution orders, the problem, as noted above, of reconciling the interests of the two sets of unsecured creditors that have dealt with the two separate group members, has meant that the power to make a contribution order is not commonly exercised. Courts have also taken the view that a full contribution order may be inappropriate if the effect is to threaten the solvency of the group member not already in liquidation, although it might be possible to order a partial contribution that is limited to certain assets, such as the balance remaining after meeting bona fide obligations.

142. Under one law that does provide for contribution orders, the court must take into account certain specified circumstances in considering whether to make an order. These include: the extent to which a related group member took part in the management of the group member in liquidation; the conduct of the related group member towards the creditors of the member in liquidation, although creditor reliance on the existence of a relationship between the group members is not sufficient grounds for making an order; the extent to which the circumstances giving rise to liquidation are attributable to the actions of the related group member; the conduct of a solvent group member after commencement of liquidation proceedings with respect to another group member, particularly if that conduct indirectly or directly affects the creditors of the group member subject to insolvency proceedings, such as with respect to failure to perform a contract; and such other matters as the court thinks fit.³³ Such an order might also be possible, for example, in cases when the subsidiary or controlled group member had incurred significant liability for personal injury or the parent or controlling group member had permitted the subsidiary or controlled group member to continue trading whilst insolvent.

³³ New Zealand Companies Act 1993, Sections 271 (1) (a) and 272 (1).

3. Substantive consolidation

(a) Introduction

143. As noted above, when procedural coordination is ordered, the assets and liabilities of the debtors remain separate and distinct, with the substantive rights of claimants unaffected. Substantive consolidation, on the other hand, permits the court, in insolvency proceedings involving two or more enterprise group members, to disregard the separate identity of each group member in appropriate circumstances and consolidate their assets and liabilities, treating them as though held and incurred by a single entity. The assets are thus treated as if they were part of a single estate for the general benefit of all creditors of the consolidated group members. Few jurisdictions provide statutory authority for consolidation orders and in those where the remedy is available, it is not widely used. A principal concern is that consolidation overturns the principle of the separate legal identity of each group member, which is often used to structure an enterprise group to respond to various business considerations, serving different purposes and having important implications, in terms for example of taxation law, corporate law and corporate governance rules. If the courts routinely agreed to substantive consolidation, many of the benefits to be derived from the flexibility of enterprise structure could be undermined.

144. Notwithstanding the absence of direct statutory authority or a prescribed standard for the circumstances in which substantive consolidation 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, nevertheless, very limited and tend to be those where a high degree of integration of the group members, through control or ownership, would make it difficult, if not impossible, without expending significant time and resources, to disentangle the assets and liabilities of the different group members.

145. Consolidation is typically discussed in the context of liquidation and the legislation that authorizes it does so only in that context. There are, however, legislative proposals that would permit consolidation in the context of various types of reorganization. In jurisdictions without specific legislation, consolidation orders may be available in both liquidation and reorganization, where such an order would, for example, assist the reorganization of the group. While typically requiring a court order, consolidation may also be possible on the basis of consensus of the relevant interested parties. Some commentators suggest that consolidation by consensus frequently occurs in cases involving enterprise groups, and often in situations where the courts would generally uphold creditor objections to consolidation if a formal application were to be made. It may also be possible by way of a reorganization plan. Some laws permit a plan to include proposals for a debtor to be consolidated with other group members, whether insolvent or solvent, which could be implemented with creditor approval.

146. Consolidation might be appropriate where it leads to greater return of value for creditors, either because of the structural relationship between the group members and their conduct of business and financial relationships or because of the value of assets common to the whole group, such as intellectual property in both a process

conducted across numerous group members and the product of that process. A further ground might be where there is no real separation between the group members, and the group structure is being maintained solely for dishonest or fraudulent purposes.

147. The principal concerns with the availability of such orders, in addition to those associated with the fundamental issue of overturning the separate entity principle, include the potential unfairness caused to one creditor group when forced to share *pari passu* with creditors of a less solvent group member and whether the savings or benefits to the collective class of creditors outweighs incidental detriment to individual creditors. Some creditors might have relied on the separate assets or separate legal entity of a particular group member when trading with it, and should therefore not be denied a full payout because of their trading partner's relationship with another group member of which they were unaware. Other creditors might have relied upon the assets of the whole group and it would be unfair if they were limited to recovery against the assets of a single group member.

148. Because it involves pooling the assets of different group members, consolidation may not lead to increased recovery for each creditor, but rather operate to level the recoveries across all creditors, increasing the amount distributed to some at the expense of others. Additionally, the availability of consolidation may enable stronger, larger creditors to take advantage of assets that should not be available to them; encourage creditors who disagree with such an order to seek its review, thus prolonging the insolvency proceedings; and damage the certainty and enforceability of security interests (where intra-group claims disappear as a result of consolidation, creditors that have security interests in those claims would lose their rights).

149. Consolidation would generally involve the group members subject to insolvency proceedings, but in some cases and as permitted by some insolvency laws, might extend to an apparently solvent group member. This might occur when the affairs of that member were so closely intermingled with those of other group members that it would be beneficial to include it in the consolidation, when further investigation showed it to be actually insolvent because of the intermingling of assets or where the legal entity is a sham or involves a fraudulent scheme. Where the solvent group member is to be included, the creditors of that group member may have particular concerns and a limited approach might be taken so that the consolidation order extended only to the net equity of the solvent group member in order to protect the rights of those creditors, although this would be difficult in cases of intermingling or fraud.

(b) Circumstances supporting consolidation

150. A number of elements have been identified as relevant to determining whether or not substantive consolidation is warranted, both in the legislation that authorizes consolidation orders and in those cases where the courts have played a role in developing those orders. In each case, it is a question of balancing the various elements to reach a just and equitable decision; no single element is necessarily conclusive and all of the elements do not need to be present in any given case. Those elements have included: the presence of consolidated financial statements for the group; the use of a single bank account for all group members; the unity of interests and ownership between the group members; the degree of difficulty in

segregating individual assets and liabilities; sharing of overhead, management, accounting and other related expenses among different group members; the existence of intra-group loans and cross-guarantees on loans; the extent to which assets were transferred or funds moved 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.

151. While these many factors remain relevant, some courts have begun to focus on a limited number and in particular on whether the affairs of the group members are so intermingled that separating assets and liabilities can only be achieved at extraordinary cost and expenditure of time or group members are engaged in fraudulent schemes or business activity that has no legitimate business purpose. With respect to the first ground, the degree of intermingling required is hard to quantify and has been variously described by different courts as involving a degree of intermingling that was hopeless or a practical impossibility to disentangle; that would require such time and expense to disentangle the interrelationships between the group members and the ownership of assets that it would be disproportionate to the result, or was so substantial that it would threaten the realization of any net assets for the creditors; or that the allocation of assets and liabilities between the relevant members was essentially arbitrary and without economic reality. In reaching a decision that the degree of intermingling in a particular case justifies substantive consolidation, the courts have looked at various factors, including the manner in which the group members operated and related to each other, including with respect to management and financial matters; the sufficiency of record keeping of the individual group members; the observance of proper corporate formalities; the manner in which funds and assets were transferred between the various members; and other similar factors concerning group operations.

152. The type of fraud contemplated is not fraud occurring in the daily operations of a company, but rather the total absence of a legitimate business purpose, which may relate either to the reasons for which the company was formed or, once formed, the activities it undertakes (see above, para. 135(e)). Examples of such fraud may include transfers by a debtor of substantially all of its assets to a newly formed entity or to self-owned separate entities for the purpose of preserving and conserving those assets for its own benefit and to hinder, delay and defraud its creditors, simulation³⁴ or Ponzi³⁵ and other such fraudulent schemes.

³⁴ Simulation may involve contracts that either do not express the true intent of the parties and have no effect between the parties or produce different effects between the parties than those expressed in the contracts, i.e. sham contracts.

³⁵ A fraudulent investment operation that pays returns to separate investors from their own money or money paid by subsequent investors, rather than from any actual profit earned.

(c) **Applications for substantive consolidation**

(i) *Persons permitted to apply*

153. An insolvency law should address the question of who may apply for substantive consolidation and at what time. With respect to the parties permitted to apply, it would seem appropriate to follow the approach of recommendation 14 concerning the parties permitted to apply for commencement of insolvency proceedings. In the group context, that would include a group member and a creditor of any such group member. In addition, it would be appropriate to permit applications by the insolvency representative of any group member, since in many instances, it will be the insolvency representative or representatives appointed to administer group members that will have the most complete information on group members and are therefore in the best position to assess the appropriateness or desirability of substantive consolidation.

154. Although in some States it might be possible for the court to act on its own initiative to order substantive consolidation, the serious impact of such an order requires that a fair and equitable process be followed and that parties in interest have the opportunity to be heard and to object to such an order, in accordance with recommendations 137-138. For that reason, and since the *Legislative Guide* generally adopts the approach that courts do not act on their own initiative in insolvency matters, it may be appropriate to follow that approach in the case of substantive consolidation.

(ii) *Timing of an application*

155. Since the factors supporting substantive consolidation might not always be apparent or certain at the time insolvency proceedings commence, it is desirable that an insolvency law adopt a flexible approach to the issue of timing, allowing an application to be made at the same time as an application for commencement of proceedings or at any subsequent time. It should be noted, however, that the possibility of applying for substantive consolidation subsequent to commencement might be limited, in practice, by the state reached in administration of the proceedings, particularly for example, with respect to implementation of a reorganization plan. Certain key matters may already have been resolved, such as sale or disposal of assets or submission and admission of claims, or certain decisions taken and acted upon with respect to individual group members, creating practical difficulties with consolidating partly administered proceedings. In this situation, it is desirable that the order take account of the status of administration, consolidating the separate proceedings already in progress and preserving existing rights. Claims already admitted against a group member, for example, might therefore be treated as claims admitted against the consolidated estate.

156. The same approach might apply to adding group members to an existing substantive consolidation. As the administration of various enterprise group members proceeds, it may become apparent that additional group members should be included because the grounds for the initial order are also satisfied with respect to those members. If the consolidation order was made with the consent of the creditors, or if creditors were 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 that originally agreed or notified to

creditors. In that situation, it is desirable that creditors have a further opportunity to consent or object to the addition to the consolidation. Where substantive consolidation is ordered subsequent to a partial distribution to creditors, the introduction of a hotchpot rule might be desirable. This would help to ensure that a creditor who has received a partial distribution in respect of its claim against the single group member may not receive payment for the same claim in the consolidated proceedings, so long as the payment of the other creditors of the same class is proportionately less than the partial distribution the creditor has already received.

(d) Competing interests in consolidation

157. In addition to the competing interests of the creditors of the different group members, the interests of other stakeholders may warrant consideration in the context of consolidation, including those of creditors vis-à-vis shareholders; of the shareholders of the different group members, in particular those who are shareholders of some of the members but not of others; and of secured and priority creditors of different consolidated group members.

(i) Owners and equity holders

158. 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 (see part two, chap. V, para. 76 and recommendation 189). 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

159. The position of secured creditors in insolvency proceedings is discussed throughout the *Legislative Guide* (see Annex I for relevant references) and the approach adopted that, as a general principle, the effectiveness and priority of a valid security interest should be recognized and the economic value of the encumbered assets should be preserved in insolvency proceedings. That approach will also apply to the treatment of secured creditors in the enterprise group context. It is also recognized that an insolvency law may nevertheless affect the rights of secured creditors in order to implement business and economic policies, subject to appropriate safeguards (see part two, chap. II, para. 59).

160. Questions arising with respect to consolidation might include: whether a security interest over some or all of the assets of one group member could extend to include assets of another group member where a consolidation order was made or whether that security interest should be limited to the defined pool of assets upon which the secured creditor had originally relied; whether secured creditors with insufficient security could make a claim against the pooled assets as unsecured creditors; and whether internal secured creditors (i.e. creditors that are at the same

time group members) should be treated differently to external secured creditors. Security interests over the whole of a debtor's estate would generally crystallize on the commencement of insolvency proceedings and the issue of that interest expanding to cover the pooled assets should not arise. To allow any secured creditor's security interest to be extended or expanded as the result of an order for substantive consolidation would improve that creditor's position at the expense of other creditors and amount to an unjust benefit or windfall, which is generally undesirable. The same point could be made with respect to employee claims.

161. One solution with respect to the treatment of external secured creditors might be to exclude them from the process of consolidation, thus achieving what might be termed a partial or limited consolidation. Individual secured creditors that relied upon the separate identity of group members, such as where they relied upon an intra-group guarantee, might require special consideration. Where encumbered assets are required for reorganization, a different solution might be possible, such as allowing the court to adjust the consolidation order to make specific provision for such assets or requiring the consent of the affected secured creditor. A secured creditor could surrender its security interest following consolidation, and the debt would become payable by all of the consolidated entities.

162. The interests of internal secured creditors might also need to be considered. Under some laws, those internal security interests might be extinguished, leaving the creditors with an unsecured claim, or those claims might be modified or subordinated.

(iii) *Priority creditors*

163. 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, the treatment of those priorities across the group may need to be considered, 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 they may have as a result of their priority position with respect to the assets of a single entity. Where there is intermingling of assets so that it is not possible to determine who owns what assets, it may be very difficult to determine how much might be available to settle the claims of priority creditors. Accordingly, although it is desirable that the priorities established under the insolvency law with respect to each individual debtor be recognized where that debtor is subject to substantive consolidation, it might not always be possible to give them full effect.

(e) *Notification of creditors*

164. An application for substantive consolidation may be subject to the same requirements for giving notice as an application for commencement of

proceedings.³⁶ When made at the same time as the application for commencement of proceedings, only an application for substantive consolidation by creditors would require notice to be given to the relevant debtors, consistent with recommendation 19. An application by group members made at the same time as the application for commencement would not require creditors to be notified under recommendations 22 and 23, which do not mandate notification of an application for commencement of insolvency proceedings to the creditors of the concerned entity.

165. The potential impact of substantive consolidation on creditor rights suggests that affected creditors should have the right to be notified of any order for consolidation made at the time of commencement and have the right to appeal, consistent with recommendation 138. One issue to be considered is whether a single objection would be sufficient to prevent consolidation from occurring. It may be possible, for example, to provide objecting creditors who will be significantly disadvantaged by the consolidation relative to other creditors with a greater level of return than other unsecured creditors, thus departing from the strict policy of equal distribution. It may also be possible to exclude specific groups of creditors with certain types of contracts, for example, limited recourse project financing arrangements entered into with clearly identified group members at arm's length commercial terms.

166. Where the application is made by creditors after proceedings have commenced, it might be desirable for notice of the application to be given to insolvency representatives of the entities to be consolidated. Notice should be given in an effective and timely manner in the form determined by domestic law.

(f) Effect of an order for substantive consolidation

167. The insolvency law should establish the effects of an order for substantive consolidation. These might include: the treatment of assets and liabilities of the consolidated group members as if they were part of a single insolvency estate; the extinguishment of intra-group claims; treatment of claims against the individual group members to be consolidated as claims against the consolidated estate; recognition of priorities established against the individual group members as priorities against the consolidated estate (to the extent possible, given the difficulty noted above); and the convening of a single meeting for creditors of all consolidated group members. Concerning liquidation value for the purposes of recommendation 152 (b), that value in substantive consolidation would be the liquidation value of the consolidated estate, and not the liquidation value of the individual members before substantive consolidation. An order for substantive consolidation might also combine the creditors for the purposes of voting on any reorganization plan for the consolidated group members. Intra-group claims would generally disappear on consolidation on the basis that since the claim and the obligation to pay belong or are owed by the same insolvency estate, they effectively cancel each other out.

168. Where substantive consolidation is ordered after the commencement of proceedings or where group members are added to a substantive consolidation at different times, the choice of the date from which the suspect period for the

³⁶ See above, part two, chap. I, para. 64-71 and recommendations 19 (a), 22-25.

purposes of avoidance (see recommendation 89) would be calculated may need to be considered to provide certainty for lenders and other third parties. The issue may become more important as the period of time between an application for or commencement of individual insolvency proceedings and the order for substantive consolidation increases. Choosing the date of the order for substantive consolidation for calculation of the suspect period for avoidance purposes may create problems with respect to transactions entered into between the date of application for or commencement of insolvency proceedings for individual group members and the date of the substantive consolidation. One approach might be to calculate that date in accordance with recommendation 89. Another approach may be to establish a common date by reference to the earliest date on which there was an application for commencement or commencement of insolvency proceedings with respect to those group members to be consolidated. In either case, it is desirable that the date be specified in the insolvency law to ensure transparency and predictability.

(g) Modification of an order

169. Although modification of an order for substantive consolidation might not always be possible or desirable, given the substantive effect of that order, there may be cases where circumstantial changes or the availability of new information indicate the desirability of modifying the original order. Any such modification should be subject to the condition that any actions or decision taken pursuant to the initial order should be unaffected by the order for modification. Those actions or decisions, whether taken by the court or the insolvency representative, may include sales of assets and provision of finance to group members, provided they were taken in good faith.

(h) Exclusions from an order for substantive consolidation

170. Some laws make provision for what may be termed an order for partial or limited substantive consolidation, that is, an order for substantive consolidation that excludes certain assets or claims.

171. These exclusions will be rare, given the assumption in favour of substantive consolidation where the requirement for intermingling is met. Consolidation might be limited, for example, to unsecured creditors, thereby excluding external secured creditors, who might be free to enforce their security interests (unless those security interests depend upon the separate identity of the group members to be consolidated), or to only those assets and liabilities that are intermingled, thus exempting those assets whose ownership might be clear. Claims associated with any such excluded assets would go with the asset. Another approach excludes certain assets from substantive consolidation if otherwise creditors would be unfairly prejudiced, although this ground is unlikely to be relevant in cases of intermingling or fraud.

(i) Competent court

172. The issues discussed above with respect to both joint applications and procedural coordination would apply also with respect to the court competent to order substantive consolidation (see above, paras. 59-61 and recommendation 209).

Recommendations 219-232**Purpose of legislative provisions**

The purpose of provisions on substantive consolidation is:

- (a) To provide legislative authority for substantive consolidation, while respecting the basic principle of the separate legal identity of each enterprise group member;
- (b) To specify the very limited circumstances in which the remedy of substantive consolidation may be available in order to ensure transparency and predictability; and
- (c) To specify the effect of an order for substantive consolidation, including the treatment of security interests.

Contents of legislative provisions*Exceptions to the principle of separate legal identity*

219. The insolvency law should respect the separate legal identity of each enterprise group member. Exceptions to that general principle should be limited to the grounds set forth in recommendation 220.

Circumstances in which substantive consolidation may be available

220. The insolvency law may specify that, at the request of persons permitted to make an application under recommendation 223, the court may order substantive consolidation with respect to two or more enterprise group members [in the following limited circumstances]:

- (a) Where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or
- (b) Where the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and the court is satisfied that substantive consolidation is essential to rectify that scheme or activity.

Exclusions from substantive consolidation

221. The insolvency law may permit the court to exclude specified assets and claims from an order for substantive consolidation.

*Application for substantive consolidation**- Timing of application*

222. The insolvency law should specify that an application for substantive consolidation may be made at the time of an application for commencement of

insolvency proceedings with respect to enterprise group members or at any subsequent time,³⁷ provided the conditions of recommendation 220 are satisfied.

- *Persons permitted to apply*

223. The insolvency law should specify the persons permitted to make an application for substantive consolidation, which may include an enterprise group member, the insolvency representative of an enterprise group member or a creditor of any such group member.

Effect of an order for substantive consolidation

224. The insolvency law should specify that an order for substantive consolidation has the following effects:³⁸

(a) The assets and liabilities of the consolidated group members are treated as if they were part of a single insolvency estate;

(b) Claims and debts between group members included in the order are extinguished; and

(c) Claims against group members included in the order are treated as claims against the [single] [consolidated] insolvency estate.

225. [The insolvency law should specify that a creditor holding a security interest over an asset of an enterprise group member or a labour claim against that enterprise group member cannot [improve][enhance] the value, ranking or priority of their security interest or claim as a result of an order for substantive consolidation affecting that enterprise group member.]

Treatment of security interests in substantive consolidation

226. The insolvency law should specify that the rights and priorities of a creditor holding a security interest over an asset of an enterprise group member subject to an order for substantive consolidation should, as far as possible, be respected in substantive consolidation, unless:

(a) The secured indebtedness is owed solely between enterprise group members and is extinguished by an order for substantive consolidation;

(b) It is determined that the security interest was obtained by fraud in which the creditor participated; or

(c) The transaction granting the security interest is subject to avoidance in accordance with recommendations 87, 88 and 217.

Recognition of priorities in substantive consolidation

227. The insolvency law should specify that the priorities established under insolvency law and applicable to individual enterprise group members prior to an

³⁷ The impracticability of ordering substantive consolidation at an advanced stage of the insolvency proceedings is discussed in the commentary, see above, paras. 155-156.

³⁸ The effect on security interests is addressed in recommendation 226.

order for substantive consolidation should, as far as possible, be recognized in substantive consolidation.

Meetings of creditors

228. The insolvency law should specify that, to the extent a meeting of creditors is required by the law to be held subsequent to an order for substantive consolidation, creditors of all consolidated group members are eligible to attend.

Calculation of suspect period in substantive consolidation

229. (1) 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 should be calculated when substantive consolidation is ordered.

(2) When substantive consolidation is ordered at the same time as commencement of insolvency proceedings, the specified date from which the suspect period is calculated retrospectively should be determined in accordance with recommendation 89.

(3) When substantive consolidation is ordered subsequent to commencement of insolvency proceedings, the specified date from which the suspect period is calculated retrospectively may be:

(a) A different date for each enterprise group member included in the substantive consolidation, being either the date of application for or commencement of insolvency proceedings with respect to each such group member, in accordance with recommendation 89; or

(b) A common date for all enterprise group members included in the substantive consolidation, being the earliest of the dates of application for, or commencement of, insolvency proceedings with respect to those group members.

Modification of an order for substantive consolidation

230. The insolvency law should specify that an order for substantive consolidation may be modified, provided that any actions or decisions already taken pursuant to the order are not affected by the modification.³⁹

Competent court

231. For the purposes of recommendation 13, the words “commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings” include an application or order for substantive consolidation, including modification of that order.⁴⁰

³⁹ It is not intended that use of the term “modification” would include termination of an order for substantive consolidation.

⁴⁰ The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, paras. 59-61 and note 23.

Notice

232. The insolvency law should establish requirements for giving notice with respect to applications and orders for substantive consolidation and modification of substantive consolidation, including the parties to whom notice should be given; the party responsible for giving notice; and the content of the notice.

E. Participants**1. Appointment of an insolvency representative****(a) Coordination of proceedings**

173. When multiple proceedings commence with respect to group members, an order for procedural coordination may or may not be made, but in either case, coordination of those proceedings may be facilitated if the insolvency law was to include specific provisions promoting coordination and indicating how it might be achieved, along the lines of article 27 of the Model Law. That approach could be adopted with respect to coordination between the different courts involved in administering proceedings for different group members and between the different insolvency representatives appointed in those proceedings. The appointment and role of the insolvency representative are discussed above (see part two, chap. III, paras. 36-74). The issues discussed, together with recommendations 115-125 would generally apply in the group context. The obligations of an insolvency representative under the *Legislative Guide* (specifically, recommendations 111, 116-117, and 120) might be extended in the group context to include various aspects of coordination, including: sharing and disclosure of information; approval or implementation of agreements with respect to division of the exercise of powers and allocation of responsibilities between insolvency representatives; cooperation on use and disposal of assets; proposal and negotiation of coordinated reorganization plans (unless preparation of a single group plan is possible as discussed below); coordination of the use of avoidance powers; obtaining of post-commencement finance; coordination of the submission and admission of claims; and distributions to creditors. The insolvency law could also address timely resolution of disputes between the different insolvency representatives appointed.

174. Where a number of insolvency representatives are appointed to the different proceedings concerning group members, the insolvency law may permit one of them to take a leading role in coordinating those proceedings. That representative could be, for example, the representative of the parent or controlling group member if it is subject to proceedings. While such a leading role might reflect the economic reality or structure of the enterprise group, equality under the law of all insolvency representatives should be preserved. Coordination under the leadership of one insolvency representative may also be achieved on a voluntary basis, to the extent possible under applicable law.

175. In certain jurisdictions, courts, rather than insolvency representatives, may have the principal authority to coordinate insolvency proceedings. When the insolvency law so provides, and different courts are involved in administering proceedings for different group members, it is desirable that the provisions

concerning coordination of proceedings apply also to the courts and that they have powers along the lines of article 27 of the Model Law.

(b) Appointment of a single or the same insolvency representative

176. Coordination of multiple proceedings might also be facilitated by the appointment of a single or the same insolvency representative to administer the different group members subject to insolvency. In practice, it might be possible to appoint one insolvency representative to administer multiple proceedings or it might be necessary to appoint the same insolvency representative to each of the proceedings to be coordinated, depending upon procedural requirements and the number of courts involved. Although the administration of each of the group members would remain separate (as in the case of procedural coordination), such an appointment could help to ensure coordination of the administration of the various group members, reduce related costs and delays and facilitate the gathering of information on the group as a whole. With respect to the latter point, care might need to be exercised in how that information is treated, ensuring in particular that confidentiality requirements with respect to separate group members are observed. While many insolvency laws do not address the question of appointing a single insolvency representative, there are some jurisdictions where such an appointment in the group context has become a practice. This has also been achieved to a limited extent in some cross-border insolvency cases, where insolvency representatives from the same international firm have been appointed in the different jurisdictions.

177. Where a single or the same insolvency representative is appointed to administer several members of a group with complex financial and business relationships and different groups of creditors, there is the potential for loss of neutrality and independence. Conflicts of interest may arise, for example, with respect to cross guarantees, intra-group claims and debts, post-commencement finance, lodging and verification of claims; or the wrongdoing by one group member with respect to another group member. The obligation to disclose potential or existing conflicts of interest contained in recommendations 116 and 117 would be relevant to the group context. As a safeguard against possible conflicts, the insolvency representative could be required to provide an undertaking or be subject to a practice rule or statutory obligation to seek direction from the court. Additionally, the insolvency law could provide for the appointment of one or more further insolvency representatives to administer the entities in conflict. That appointment might relate to the specific area of conflict, with the appointment being limited to its resolution, or be more general and for the duration of the proceedings.

(c) Debtor in possession

178. When the insolvency law permits the debtor to remain in possession of the business, and no insolvency representative is appointed, special consideration may be required to determine how multiple proceedings should be coordinated and the extent to which the obligations applicable to the insolvency representative, including any additional obligations referred to above, will apply to the debtor in possession (see above, part two, chap. III, paras. 16-18). To the extent that the debtor in possession performs the functions of an insolvency representative, consideration might also be given to how provisions of an insolvency law permitting the appointment of a single or the same insolvency representative or one of several

insolvency representatives to take a lead role in coordinating proceedings might apply to the debtor in possession context.

Recommendations 233-237

Purpose of legislative provisions

The purpose of provisions on appointment of insolvency representatives in an enterprise group context is:

(a) To permit appointment of a single or the same insolvency representative to facilitate coordination of insolvency proceedings commenced with respect to two or more enterprise group members; and

(b) To encourage cooperation where two or more insolvency representatives are appointed, with a view to avoiding duplication of effort; facilitating gathering of information on the financial and business affairs of the enterprise group as a whole; and reducing costs.

Contents of legislative provisions

Appointment of a single or the same insolvency representative

233. The insolvency law should specify that, where it is determined to be in the best interests of the administration of the insolvency proceedings with respect to two or more enterprise group members, a single or the same insolvency representative may be appointed to administer those proceedings.⁴¹

Conflict of interest

234. The insolvency law should specify measures to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members. Such measures may include the appointment of one or more additional insolvency representatives.

Cooperation between two or more insolvency representatives in a group context

235. The insolvency law may specify that when different insolvency representatives are appointed to administer insolvency proceedings with respect to two or more enterprise group members, those insolvency representatives should cooperate with each other to the maximum extent possible.⁴²

⁴¹ Although recommendation 118 addresses selection and appointment of the insolvency representative, it does not recommend appointment by any particular authority, but leaves it up to the insolvency law. Whichever mechanism is used with respect to domestic appointment would apply to recommendation 233.

⁴² In addition to the provisions of the insolvency law with respect to cooperation and coordination, the court generally may indicate measures to be taken to that end in the course of administration of the proceedings.

Cooperation between two or more insolvency representatives in procedural coordination

236. The insolvency law should specify that, when more than one insolvency representative is appointed to administer insolvency proceedings that are subject to procedural coordination, those insolvency representatives should cooperate with each other to the maximum extent possible.

Forms of cooperation [Cooperation to the maximum extent possible]

237. The insolvency law should specify that the cooperation to the maximum extent possible between insolvency representatives referred to in recommendations 235 and 236, should be implemented by any appropriate means, including:

- (a) Sharing and disclosure of information;
- (b) Approval or implementation of agreements with respect to division of the exercise of powers and allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating or leading role;
- (c) Coordination with respect to administration and supervision of the affairs of the group members subject to insolvency proceedings, including day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; use of avoidance powers; submission and admission of claims; and distributions to creditors; and
- (d) Coordination with respect to proposal and negotiation of reorganization plans, communication with creditors and meetings of creditors.

F. Reorganization of two or more enterprise group members

179. Recommendations 139-159 address issues specific to the preparation, proposal, content, approval and implementation of a reorganization plan. In general, those recommendations will be applicable in the context of an enterprise group.

1. Coordinated reorganization plans

180. When reorganization proceedings commence with respect to two or more enterprise group members, irrespective of whether or not those proceedings are to be procedurally coordinated, one issue not addressed elsewhere in the *Legislative Guide* is whether it will be possible to reorganize the debtors through a single reorganization plan covering several members or through coordinated, substantially similar plans or each member. Such plans have the potential to deliver savings across the group's insolvency proceedings, ensure a coordinated approach to the resolution of the group's financial difficulties, and maximize value for creditors. Although several insolvency laws permit the negotiation of a single reorganization plan, under some laws this approach is only possible where the proceedings are procedurally coordinated or substantively consolidated, while under other laws it would generally only be possible where the proceedings could be coordinated on a voluntary basis.

181. In practice, the concept of a single reorganization plan or coordinated plans would require the same or a similar reorganization plan to be prepared and approved

in each of the proceedings concerning group members covered by the plan. Approval of such a plan would be considered on a member-by-member basis with the creditors of each group member voting in accordance with the voting requirements applicable to a plan for a single debtor; it would not be desirable to consider approval on a group basis and allow the majority of creditors of the majority of members to compel approval of a plan for all members. The process for preparation of the plan and solicitation of approval should take into account the need for all group members to approve the plan and it would accordingly need to address the benefits to be derived from such approval and the information required to obtain that approval. Those issues would be covered by recommendations 143 and 144 concerning content of the plan and the accompanying disclosure statement. Additional details that could relevantly be disclosed in the group context might include details with respect to group operations, the linkages between group members, the position in the group of each member covered by the plan and functioning of the group as such.

182. Such a reorganization plan or plans 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. Classification of claims and classes of creditors also needs to be considered, as does voting of creditors and approval of a plan, particularly when group members are creditors of each other and therefore “related persons”. Calculation of applicable majorities in the group context may require consideration of how creditors with the same claim against different group members should be counted for voting purposes, particularly where the claims may have different priorities. Some consideration may also need to be given to whether rejection by the creditors of one of several group members might prevent approval of the plan across the group and the consequences of that rejection. One approach might be based upon provisions applicable to the approval of a reorganization plan for a single debtor. Another approach might be to devise different majority requirements that are specifically designed to facilitate approval in the group context. Safeguards analogous to those in recommendation 152 could also be included, with an additional requirement that the plans should be fair as between the creditors of different group members.

183. In the group context, a related person includes a person who is or has been in a position of control of the debtor or a parent, subsidiary or affiliate of the debtor (see glossary, (jj)). Voting by related persons on approval of the plan is discussed above (see part two, chap. IV, para. 46) and it is noted that although some insolvency laws restrict the ability of related persons to vote in various ways, most insolvency laws do not specifically address the issue. It should be noted that where the insolvency law includes such restrictions, they might cause difficulty in some groups when a particular member has only creditors classified as related persons or a very limited number of creditors who are not related persons.

184. 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 group members. Where solvent members participated in the plan by consent, special provisions may be required to prevent undue advantages arising from that liquidation.

2. Inclusion of a solvent group member in a reorganization plan

185. Paragraphs 53-57 above discuss the possibility of including a solvent group member in an application for commencement of proceedings. It is noted that an apparently solvent member may, on further investigation, satisfy the commencement standard of imminent insolvency and thus be covered, for commencement purposes, by recommendation 15. That situation may not be uncommon in an enterprise group where the insolvency of some members leads almost inevitably to the insolvency of others. Where imminent insolvency is not an issue, however, a solvent group member generally could not participate in a reorganization plan for other members of the same group in insolvency proceedings under the insolvency law. There may, however, be circumstances in which different levels of participation by a solvent member in a reorganization plan might be both appropriate and feasible, on a voluntary basis. Such participation by solvent group members is, in fact, not unusual in practice. The solvent group member could thus aid the reorganization of other enterprise group members and would be contractually bound by the plan once it were approved and, where required, confirmed. The decision of a solvent group member to participate in a reorganization plan would be an ordinary business decision of that member, and the consent of creditors would not be necessary unless required by applicable company law. With respect to any disclosure statement accompanying a plan that included a solvent group member, caution would need to be exercised in disclosing information relating to that solvent group.

Recommendations 238-239

Purpose of legislative provisions

The purpose of provisions relating to reorganization plans in an enterprise group context is:

- (a) To facilitate the coordinated rescue of the businesses of enterprise group members subject to the insolvency law, thereby preserving employment and, in appropriate cases, protecting investment; and
- (b) To facilitate the negotiation and proposal of coordinated reorganization plans in insolvency proceedings with respect to two or more enterprise group members.

Contents of legislative provisions

Reorganization plan

238. The insolvency law should permit coordinated reorganization plans to be proposed in insolvency proceedings with respect to two or more enterprise group members.

239. The insolvency law should specify that an enterprise group member that is not subject to insolvency proceedings may voluntarily participate in a reorganization plan proposed for two or more enterprise group members subject to insolvency proceedings.

A/CN.9/WG.V/WP.90/Add.1 (Original: English)**Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-seventh session****ADDENDUM****CONTENTS**

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III. Addressing the insolvency of groups: international issues**A. Introduction**

1. The introduction to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation [the Practice Guide]¹ notes that although the number of cross-border insolvency cases has increased significantly since the 1990s, the adoption of legal regimes, either domestic or international, equipped to address cases of a cross-border nature has not kept pace. The lack of such regimes has often resulted in inadequate and uncoordinated approaches that have not only hampered the rescue of financially troubled businesses and the fair and efficient administration of cross-border insolvencies, but also impeded the protection and maximization of the value of the assets of the insolvent debtor and are unpredictable in their application. Moreover, the disparities in and, in some cases, conflicts between national laws have created unnecessary obstacles to the achievement of the basic economic and social goals of insolvency proceedings. There has often been a lack of transparency, with no clear rules on recognition of the rights and priorities of existing creditors, the treatment of foreign creditors and the law that will be applicable to cross-border issues. While many of these inadequacies are also apparent in domestic insolvency regimes, their impact is potentially much greater in cross-border cases, particularly where reorganization is the goal.

2. In addition to the inadequacy of existing laws, the absence of predictability as to their application in practice and associated cost and delay has added a further layer of uncertainty that can impact upon capital flows and cross-border investment. Acceptance of different types of proceedings, understanding of key concepts and the treatment accorded to parties with an interest in insolvency proceedings differs. Reorganization or rescue procedures, for example, are more prevalent in some countries than others. The involvement of, and treatment accorded to, secured creditors in insolvency proceedings varies widely. Different countries also recognize

¹ Adopted by the Commission on 1 July 2009.

different types of proceedings with different effects. An example in the context of reorganization proceedings is the cases in which the law of one State envisages a debtor in possession continuing to exercise management functions, while under the law of another State in which contemporaneous insolvency proceedings are being conducted with respect to the same debtor, existing management will be displaced or the debtor's business liquidated. Many national insolvency laws have claimed, for their own insolvency proceedings, application of the principle of universality, with the objective of a unified proceeding where court orders would be effective with respect to assets located abroad. At the same time, those laws do not accord recognition to universality claimed by foreign insolvency proceedings. In addition to differences between key concepts and treatment of participants, some of the effects of insolvency proceedings, such as the application of a stay or suspension of actions against the debtor or its assets, regarded as a key element of many laws, cannot be applied effectively across borders.

3. In the international context, the models that have been created to address cross-border insolvency issues have always stopped short of dealing satisfactorily with enterprise groups. When the United Kingdom's House of Lords sitting under the chairmanship of Lord Hoffmann considered whether the United Kingdom should subscribe to the European Convention on Insolvency Proceedings, the committee commented on the failure of the convention to deal with groups of companies — the most common form of business model. When the convention became the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation), it still did not address the issue. When the text of what became the UNCITRAL Model Law on Cross-Border Insolvency was debated, groups were regarded as "a stage too far".

4. A well-reported case that illustrates one of the key problems with respect to groups in the international context was the KPNQwest group, which failed the day the EC Regulation came into force, 31 May 2002. KPNQwest was a telecoms group that owned and operated a fibre-optic cable network around Europe and to the United States. The main cables were in rings: for the ring around Europe, the French part of the ring was owned by a French subsidiary; the German part by a German subsidiary, and so on. When the Dutch parent failed, many of the subsidiaries were obliged to file for the protection of the court in the jurisdictions in which they were incorporated. No one was able to coordinate the proceedings and it was effectively broken up. A discussion of other international cross-border cases would confirm the shortcomings of the existing system; there is often a clear tension between the traditional separate legal entity approach to corporate regulation and its implications for insolvency and the facilitation of insolvency proceedings against a group or part of a group in a cross border situation in a manner that would enable the goal of maximizing value for the benefit of all creditors to be achieved. The history of cross-border insolvency since the Maxwell case in 1991² underscores the problems encountered in managing numbers of parallel proceedings, and the need for the creative solutions that have been developed and adopted. Some of these solutions are discussed in the Practice Guide, but the development of a legislative regime to

² This case involved the United States and the United Kingdom. United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of Justice, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991).

address the cross-border insolvency of enterprise groups remains a challenge to be met.

5. There has been considerable discussion in recent times as to what might form the basis of a legal regime to address the cross-border insolvency of enterprise groups. Some suggestions have included adapting the concept of “centre of main interests” as it applies to an individual debtor and to an enterprise group to enable all proceedings with respect to group members to be commenced in, and administered from, a single centre through one court and subject to a single governing law. Another suggestion has been to identify a coordination centre for the group, which might be determined by reference to the location of the controlling member of the group or to permit group members to apply for insolvency in the State in which proceedings have commenced with respect to the insolvent parent of the group.³

6. These proposals raise significant and difficult issues. Some relate to the very nature of multinational enterprise groups and how they operate — how to define what constitutes an enterprise group for insolvency purposes and identify the factors that might appropriate to determine where the group centre is located, assuming that there is only one centre for each group — as well as to questions of jurisdiction over the constituent members of the group, eligibility to commence insolvency proceedings and applicable law. Others relate to the challenge of reaching broad international agreement on these issues in order to achieve a consistently, widely applied and, possibly, binding solution that will deliver certainty and predictability to the cross-border insolvency of enterprise groups.

B. Promoting cross-border cooperation and coordination of enterprise group insolvencies

1. Introduction

7. The first step in finding a solution to the problem of how to facilitate the global treatment of enterprise groups in insolvency might be to ensure existing principles for cross-border cooperation apply to enterprise group insolvencies. Cooperation between courts and insolvency representatives in insolvency proceedings involving multinational enterprise groups may help to facilitate commercial predictability and increase certainty for trade and commerce, as well as fair and efficient administration of proceedings that protects the interests of the parties, maximizes the value of the assets of group members to preserve employment and minimizes costs. Although there are enterprise groups where separate insolvency proceedings may be a feasible option because there is a low degree of integration in the group and group members are relatively independent of each other, for many groups, cooperation may be the only way to reduce the risk of piecemeal insolvency proceedings that have the potential to destroy going concern value and lead to asset ring-fencing, as well as asset shifting or forum shopping by debtors.

³ These issues are discussed in some detail in the working papers of UNCITRAL Working Group V (Insolvency law) — see A/CN.9/WG.V/WP.85/Add.1, paras. 3-12; A/CN.9/WG.V/WP.82/Add.4, paras. 3-15; A/CN.9/WG.V/WP.76/Add.2, paras. 2-17; A/CN.9/WG.V/WP.74/Add.2, paras. 6-12.

8. A widespread limitation on cooperation and coordination between courts and insolvency representatives from different jurisdictions in cases of cross-border insolvencies derives from a lack of a legislative framework, or from uncertainty regarding the scope of the existing legislative authorization, for pursuing cooperation with foreign courts and insolvency representatives. The Model Law provides that legislative framework authorizing cross-border cooperation and communication between courts, between courts and insolvency representatives and between insolvency representatives.

9. However, since the provisions of the Model Law focus on individual debtors, they have limited application to enterprise groups. A key difference in coordinating enterprise group insolvencies is that the court in one jurisdiction is not necessarily dealing with the same debtor as the courts in other jurisdictions (although there may be a common debtor in the case of individual group members with assets in different States, a situation within the scope of the Model Law). The link between parallel proceedings is not a common debtor, but rather that the debtors are all members of the same enterprise group. Unless the existence (and possibly the extent) of that group is or can be recognized under national law, each proceeding will appear to be unconnected to each other proceeding and cooperation will appear to be unwarranted on the basis that it might interfere with the independence of local courts or be deemed unnecessary because each proceeding is, essentially, a national proceeding. While it may be possible in some instances to treat each group member entirely separately, for many enterprise groups the best result for each of the different members may be achieved through a more widely-based and potentially global solution that reflects the manner in which the group conducted its business and addresses either distinct business sections or the enterprise group as a whole, particularly where the business is closely integrated.

10. For these reasons, it is desirable that an insolvency law recognize the existence of enterprise groups and the need, with respect to cross-border cooperation, for courts to cooperate with other courts and with insolvency representatives, not just with respect to insolvency proceedings concerning the same debtor, but also with respect to different members of an enterprise group.

2. Forms of cooperation involving courts

11. Cooperation in cross-border insolvencies may take different forms and may include, as suggested in article 27 of the Model Law, communication between the courts, between the courts and insolvency representatives and between the insolvency representatives, as well as the use of cross-border insolvency agreements, coordination of hearings, and coordination of the supervision and administration of the debtor's affairs. In the context of a single debtor, authorization for cooperation is provided by articles 25 and 26 of the Model Law. Article 25 authorizes the court to cooperate to the maximum extent possible with foreign courts, while Article 26 authorizes an insolvency representative, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign courts and representatives. The issue of cooperation is also addressed, within the European Union, by the EC Insolvency Regulation. Recital 20 notes that in the context of main and secondary proceedings the liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. The liquidator in the main proceedings should have the

ability to intervene in the secondary proceedings and to propose a restructuring plan or apply for suspension of the realization of assets in those proceedings. Article 31 of the EC Regulation establishes a duty of liquidators in main and secondary proceedings to communicate information, particularly information that may be relevant to the other proceedings and relates to progress made with respect to the submission and verification of claims and measures aimed at terminating the proceedings. Neither the Model Law nor the EC Regulation addresses the need for cooperation with respect to enterprise groups, where those obligations need to be more broadly applicable and the distinction between main and non-main or secondary proceedings is not relevant, except as it applies to multiple proceedings concerning an individual group member.

(a) Communication between courts

(i) General considerations

12. The Guide to Enactment of the Model Law⁴ points to the desirability of enabling courts in cross-border insolvency proceedings to communicate directly with foreign courts and insolvency representatives in order to avoid the use of the traditional, time-consuming procedures, such as letters rogatory or other diplomatic or consular channels and communications via higher courts. This ability is critical when the courts consider they should act with urgency to avoid potential conflicts or preserve value or the issues to be considered are time-sensitive. That ability to communicate should include the ability to initiate communication, by requesting information or assistance from foreign courts and insolvency representatives, as well as the ability to receive and process such requests from abroad.

13. The different approaches taken to communication between the courts and parties serve to illustrate some of the problems that might be encountered when seeking to promote cross-border cooperation. In addition to the question of whether there is specific authorization for communication between courts, there is very often hesitation or reluctance on the part of courts of different jurisdictions to communicate directly with each other. That hesitation or reluctance may be based upon ethical considerations; legal culture; language; or lack of familiarity with foreign laws and their implementation. They may also relate to concerns about the implications of communication for judicial independence and impartial decision-making. Some States have a relatively liberal approach to communication between judges, while in other States judges may not communicate directly with parties or insolvency representatives or indeed with other judges, as such communication may give rise to constitutional issues. In some States, ex parte communications with the judge are considered normal and necessary, while in other States such communications would not be acceptable. Within States, judges and lawyers may have quite different views about the propriety of contacts between judges without the knowledge or participation of the attorneys for the parties. Some judges, for example, accept that there is no difficulty with private contact amongst themselves, while some lawyers would strongly disagree with that practice. Courts typically focus on the matters before them and, as noted above, may be reluctant to provide assistance to related proceedings in other States, particularly when the

⁴ Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, para. 179.

proceedings for which they are responsible do not appear to involve an international element in the form of a foreign debtor, foreign creditors or foreign operations.

14. A further issue of relevance to facilitating cooperation between insolvency proceedings affecting group members might be the ability or willingness of courts to take a global view of the business of the debtor and note what is occurring in insolvency proceedings in other jurisdictions concerning the same debtor or other members of the same group. This may be of particular importance where what occurs in other jurisdictions is likely to have a domestic impact (e.g. with respect to local employees and other social policy issues). Whilst it would not change the powers the courts would have under domestic law, knowledge of or about the foreign proceedings might nevertheless affect the court's approach to local proceedings and its willingness to coordinate them with the foreign proceedings. The challenge, however, is for the court to obtain the necessary information about a debtor's global operations and concurrent insolvency proceedings. One approach might be to permit appropriate documentary evidence to be provided or a foreign practitioner or insolvency representative of related group members to appear in the local court. Notwithstanding the practical difficulties, it is desirable that a court be able to take note of foreign proceedings that might affect local proceedings, particularly where a global solution for a multinational enterprise group is being sought.

15. Establishing communication in cross-border cases involving enterprise groups may facilitate cross-border proceedings in many ways. For instance, it may assist parties to better understand the implications or application of foreign law, particularly the differences or overlaps that may otherwise lead to litigation; advance resolution of issues through a negotiated result acceptable to all; and provoke more reliable responses from parties, avoiding inherent bias and adversarial distortion that may be apparent where parties represent their own particular concerns in their own jurisdictions. It may also serve international interests by creating better understanding that will encourage international business and preserving value that would otherwise be lost through fragmented judicial action. Some of the potential benefits may be hard to identify at the outset, but may become apparent once the parties have communicated. Cross-border communication may reveal, for example, some fact or procedure that will substantially inform the best resolution of the case and may, in the longer term, serve as an impetus to law reform.

16. Communication between judges or other interested parties should follow proper procedures in order to ensure the communication is transparent, effective and credible. At a general level, it might be appropriate to consider whether communication should be treated as a matter of course or as a last resort; whether a judge may advocate that a particular course of action be taken; and, with respect to the conditions that might apply to communication, such as those mentioned below, whether they should apply in all cases or whether there might be exceptions. While courts should be given broad discretion in carrying out their communications with foreign bodies, they should not be required to engage in communications they consider inappropriate in the circumstances of a particular case. A further issue relates to the subject matter of the communication, and in particular whether communication could address only matters of procedure or also matters of substance. Some judges take the view that they could discuss case management

issues, issues of timing, use of cross-border agreements and which court might resolve which issue, but not substantive issues that touched upon the merits of the case.

(ii) *Means of communication*

17. Information may be communicated in several ways, such as by exchange of documents (e.g. copies of formal orders, judgements, opinions, reasons for decisions, transcripts of proceedings, affidavits and other evidence) or orally. The means of communication may be post, fax or e-mail or other electronic means, or telephone or videoconference, depending upon what is available and affordable in the States involved in the communication and what is appropriate or required in each case. Copies of written communications may also be provided to the parties in accordance with applicable notice provisions. Communication may be affected directly between judges or between or through court officials (or a court appointed intermediary) or insolvency representatives, subject to local rules. The development of new communication technologies supports various aspects of cooperation and coordination, with the potential to reduce delays and, as appropriate, facilitate face-to-face contact. As global litigation multiplies, these methods of direct communication are increasingly being used. Videoconferences, for example, have been used in preference to telephone conferences, as they provide reasonable control of the process and facilitate disciplined organization of the communication as the participants can hear and see each other, an aspect that is central to court proceedings generally. However, since these technologies are not available to all courts, it is desirable that the focus be upon how the communication might be facilitated to suit the needs of the particular case, rather than upon the use of any particular technology.

(iii) *Establishing rules or procedures for court-to-court communication*

18. In any particular case it will be desirable to determine, as appropriate to the relevant jurisdictions and in accordance with applicable law, procedures to govern court-to-court communication to balance the interests of the different stakeholders and ensure that no one is prejudiced in any material way. The procedures might address: the parties to be notified of the proposed communication (e.g. all affected parties and their representatives or counsel); the persons permitted to participate in the communication and any limitations that will apply; the questions to be considered; whether the parties share the same intentions or understanding with respect to communication; organization and timing of the communication; recording of the communication; any safeguards that will apply to protect the substantive and procedural rights of the parties; the language of the communication and any consequent need for translation of written documents or interpretation of oral communications (and who should bear the administrative costs); acceptable methods of communication; handling of objections to the proposed communication; and questions of confidentiality.

19. Courts may adopt guidelines, such as the Court-to-Court Guidelines,⁵ to address some of these issues. These guidelines typically are intended to promote transparent communication between courts, permitting courts of different jurisdictions to communicate with one another, without changing the applicable domestic rules or procedures or to affecting or curtailing the substantive rights of any party in proceedings before the courts.

- Time, place and manner of communication

20. Generally, it is desirable that communications proceed at a time and place and in a manner mutually determined between the courts, the insolvency representatives and other stakeholders, as applicable. These arrangements need not necessarily involve the judges directly, but might be made through relevant court officials.

- Notice of proposed communication

21. In insolvency proceedings involving multinational enterprise groups, a balance needs to be struck between facilitating the communication in a practical and convenient manner and protecting the integrity of the communication by ensuring an open and transparent process. Various parties may be affected by communications between courts, and it may often be difficult, if not impractical, to ascertain the identity of all of those parties, including, for example, the creditors. Moreover, the jurisdictions involved may operate under different rules regarding the provision of notice, affecting issues of timing and the identity of recipients (i.e., not all stakeholders may be entitled to notice of certain issues). A key question will therefore concern the parties to be notified of any proposed communication. The absence of clear rules on how this issue should be approached has the potential to cause delay and erosion of value, especially where the communication is required to resolve or avoid conflicts or to address the coordination of particular issues, such as sale of assets or submission and verification of claims.

22. Provision of notice generally might be assisted by cooperation between the various courts to develop a list of parties required to be notified, which may include parties that are entitled to notice of any court business related to the insolvency proceedings, including communication.⁶ Coordination of the provision of notice may be managed through an electronic system or a website, which could facilitate tracking of the changing identity of stakeholders entitled to notice in many insolvency proceedings, resulting from, for example, assignment or trading of claims; minimizing the costs associated with provision of notice; and the differences in the laws applicable to the provision of notice being taken into account. It would also, however, have to be taken into consideration possible language, access, and confidentiality issues.

- Right to participate

23. To ensure the credibility of the communication and the parties directly involved in it, as well as fairness and transparency, it is desirable that

⁵ Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, published by the American Law Institute (16 May 2000) and adopted by the International Insolvency Institute (10 June 2001), available online at www.ali.org/doc/Guidelines.pdf.

⁶ See Court-to-Court Communication Guideline 12.

communications proceed in a manner that is open to participation by relevant parties, rather than *ex parte*.

24. As noted above, however, there is a need to balance those requirements against the practicalities of organizing and conducting the communication. This may require participants to be limited to “affected parties”. Although different standards may govern the issue of who constitutes an “affected party” in the jurisdictions involved, it might generally be assumed that key stakeholders would include the debtor, the insolvency representative and relevant legal counsel. While the general principle should be that affected parties are entitled to participate, it may be desirable for the courts to have the right to agree, as required, to limit the number of participants in order to ensure the process is manageable.

- Recording of the communication as part of the record

25. To further ensure the transparency of court-to-court communication, the insolvency law may permit any communication to be recorded and a transcript prepared. The transcript may be made part of the record of the proceedings and, as such, be available at least to those participating in the communication or, more generally, in accordance with the rules applicable to the availability of such court records.

- Confidentiality

26. In general, communications between courts involved in parallel insolvency proceedings related to members of a multinational group should be as transparent as possible to ensure fairness to the parties involved and avoid creating incentives for the parties to hedge against the possibility of an adverse outcome. It is desirable that information not be treated as confidential simply because the communication occurs in a cross-border context.

27. However, much of the information relating to the debtors and their affairs that needs to be considered and shared in insolvency proceedings involving multinational enterprise groups may be commercially sensitive, confidential, or subject to obligations owed to third persons (such as trade secrets, research and development information, and customer information). Such information may be especially sensitive in the case of a debtor in reorganization proceedings where its continued ability to operate in the market and the protection of value may require confidentiality. Accordingly, the use of such information may need to be carefully considered and disclosure appropriately restricted to prevent third parties from taking unfair advantage of it.

28. The jurisdictions involved in insolvency proceedings relating to multinational enterprise group members may have different substantive rules regarding confidentiality and the release of information to parties. Those differences may need to be taken into account when considering cross-border communication and how they will be conducted and recorded, permitting the courts to reach agreement on the protections necessary to comply with applicable law.

29. Confidentiality of information may also be addressed in a cross-border insolvency agreement,⁷ which can establish requirements for access to that information, including the use of confidentiality agreements.

- Costs of communication

30. The issue of costs of the communication may be a consideration, especially where many parties are affected and a means of communication is used that entails, in some States, relatively high costs, such as videoconferencing. Moreover, the use of multiple languages may complicate communication, with cost implications where translation of documents and interpretation of oral communication is required. It will be important to determine how the costs are to be borne by, or apportioned between, the relevant insolvency proceedings. If reimbursement of the costs of certain parties is involved, it should be clear how, and the currency in which, that will occur.

- Effect of communication

31. Where a court communicates with a foreign court in the context of cross-border insolvency proceedings, the insolvency law should make it clear that the communication would not have a substantive effect on the authority or powers of the court, the matters before it, its orders, or the rights and claims of parties participating in the communication. Such a proviso reassures the parties that the communication between the authorities involved in the insolvency proceedings will not jeopardize their rights nor affect the authority and independence of the court before which they are appearing. It is likely to reduce the likelihood of objections to planned communication and furnish the courts and their representatives with greater flexibility in their cooperation with each other. Such a proviso may also ensure that courts and their representatives do not operate beyond the limits of their authority in engaging in communication with their counterparties in different jurisdictions.

(b) Coordination of the debtor's assets and affairs

32. The conduct of cross-border insolvency proceedings concerning enterprise groups will often require assets of the different insolvency estates to continue to be used, realized or disposed of in the course of the proceedings. Coordination of such use, realization and disposal will help to avoid disputes and ensure that the benefit of all parties in interest is the key focus, particularly in reorganization. For example, one member of an enterprise group may serve as the exclusive supplier of another group member or have exclusive control over a key resource used by another member, so that insolvency proceedings with respect to one of those members might have profound consequences on the continuing operation of the entire group. Coordinating the debtor's assets and affairs may involve both the courts and the insolvency representatives. Some matters may require specific approval by the courts, while others may be addressed by agreement between the insolvency representatives.

33. Some of the issues to be considered in facilitating this coordination may include: the location of the various assets and the identification of the jurisdiction to

⁷ See UNCITRAL Practice Guide, III.B, paras. 168-171; Legislative Guide, part two, chap. III, paras. 28, 52, 115 and recommendation 111.

which they are subject; determination of the law governing the assets and the parties responsible for determining how they can be used or disposed of (e.g., the insolvency representative, the courts or in some cases the debtor), including the approvals required; the extent to which responsibility for those assets can be shared among or allocated to those different parties in different States; how information can be shared to ensure coordination and cooperation; and the sequence in which proceedings should evolve. Coordination may be relevant to investigating the debtor's assets, considering possible avoidance proceedings, and restricting the debtor's ability to move assets to locations beyond the reach of the court or insolvency representative. It may also require the courts to identify the optimal forum for addressing a particular issue, such as sale or disposal of a certain asset, and defer to that forum to the extent permitted by law.⁸

(c) Appointment of a court representative

34. Such a person may be appointed by a court to facilitate coordination of insolvency proceedings concerning enterprise group members taking place in different jurisdictions. The person may have a variety of possible functions including: acting as a go-between for the courts involved, especially where issues of language are raised; developing an agreement in consultation with the relevant parties; promoting consensual resolution of issues between the parties; and ensuring that notice with respect to certain business before the courts is given to all parties in interest (other members of the enterprise group, creditors, and foreign courts or insolvency representatives). The appointing court will typically outline the terms under which the appointee is authorized to act and the extent of its powers. The person may be required to report to the court or courts involved in the proceedings on a regular basis, as well as to the parties.

(d) Use of cross-border agreements (see 4. below)

(e) Coordination of hearings

35. Hearings that might variously be described as joint, simultaneous or coordinated⁹ ("coordinated hearings") can significantly promote the efficiency of parallel insolvency proceedings involving members of a multinational enterprise group by bringing relevant stakeholders together at the same time to discuss and resolve outstanding issues or potential conflicts, thus avoiding protracted negotiations and resulting time delays. What needs to be emphasized with respect to such hearings, however, is that each court should reach its own decision independently and without influence from the other courts. While such hearings may be relatively convenient to organize in a domestic setting to ensure coordination of proceedings with respect to different group members, they can be logistically very complicated to organize in an international setting, involving as they may different languages, time zones, laws, procedures and judicial traditions. They may result in a deadlock if, for example, the competencies of the authorities engaged in the hearing are not precisely agreed or established.

⁸ Allocation of responsibility for certain actions between the different courts is discussed in the UNCITRAL Practice Guide, Section II.B, paras. 18-20; section III.B, paras. 55-60, 71-74.

⁹ These types of hearings are discussed in the UNCITRAL Practice Guide, III.B, paras. 145-150.

36. Although they are potentially difficult to organize, such hearings have been used between some States that share a common language, legal tradition and similar time zones and have led to the successful resolution of difficult issues to the benefit of all parties concerned.¹⁰ Such hearings might, however, be more widely used in the future, with the assistance of appropriate procedures and safeguards to assist careful planning and avoid complications. Those rules of procedure might address, for example, use of pre-hearing conferences; conduct of the hearings, including the language to be used and need for interpretation; requirements for the provision of notice; methods of communication to be used so that the courts can simultaneously hear each other; conditions applicable to the right to appear and be heard; documents that may be submitted; the courts to which participants may make submissions; the manner of submission of documents to the court and their availability to other courts; question of confidentiality; limitations on the jurisdiction of each court to the parties appearing before it; and rendering of decisions.¹¹

37. Some guidelines and agreements dealing with these types of hearings provide that in order to best plan for orderly administration, the courts, their appointees, or the insolvency representatives should communicate with their foreign counterparties in advance of the hearing to establish guidelines related to all procedural, administrative, and preliminary matters. Once a hearing has been concluded, the relevant authorities may further communicate to assess the contents of the hearing, discuss next steps (including additional hearings), develop or modify guidelines for future hearings, consider whether issuing joint orders would be feasible or warranted and how certain procedural issues that were raised in the hearing should be resolved.¹²

Recommendations 240-247

Purpose of legislative provisions

The purpose of legislative provisions on cooperation in the context of multinational enterprise groups is:

- (a) To authorize cooperation between the courts seized of insolvency proceedings relating to different members of an enterprise group in different States;
- (b) To authorize cooperation between those courts and insolvency representatives appointed to those different proceedings; and
- (c) To facilitate and promote the use of various forms of cooperation to coordinate insolvency proceedings with respect to different enterprise groups members in different States and establish the conditions and protections that should

¹⁰ See for example, the cases of *Quebecor World Inc.*, Montreal Superior Court, Commercial Division, (Canada) No. 500-11-032338-085 and the United States Bankruptcy Court for the Southern District of New York, No. 08-10152 (JMP) (2008) and *Solv-Ex Canada Limited and Solv-Ex Corporation*, Alberta Court of Queen's Bench, Case No. 9701-10022 (28 January 1998), and the United States Bankruptcy Court for the District of New Mexico, Case No. 11-97-14362-MA (28 January 1998).

¹¹ Cf. UNCITRAL Model Law, article 10.

¹² See also UNCITRAL Practice Guide, III.B, paras. 145-150; Court-to-Court Communication Guideline 9 (e).

apply to those forms of cooperation to protect the substantive and procedural rights of parties and the authority and independence of the courts.

Contents of legislative provisions

Cooperation between the court and foreign courts or foreign representatives

240. The insolvency law should permit the court that is competent with respect to insolvency proceedings concerning an enterprise group member to cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through the insolvency representative or other person appointed [for that purpose by the court], to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.

Cooperation between the insolvency representative and foreign courts

241. The insolvency law should permit the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign courts to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.

Cooperation to the maximum extent possible involving courts

242. The insolvency law should specify that the cooperation to the maximum extent possible between the courts and between the courts and foreign representatives, [referred to in recommendations 240 and 241], may be implemented by any appropriate means, including:

- (a) Communication of information by any means considered appropriate by the court;
- (b) Participation in communications with the foreign court or foreign representative by telephone, videoconference or other electronic means;
- (c) Provision to the foreign court or the foreign representative of copies of documents issued by the court concerning the enterprise group members subject to insolvency proceedings, including formal orders, judgements, and transcripts of proceedings;
- (d) Provision of copies of documents that have been or are to be filed with the court concerning the enterprise group members subject to insolvency proceedings to the foreign court or foreign representative;
- [(e) Coordination of the administration and supervision of the assets and affairs of the enterprise group members subject to insolvency proceedings];
- [(f) Appointment of a person or body to act at the direction of the court]; and
- [(g) Approval or implementation of agreements concerning coordination of insolvency proceedings in accordance with recommendation 254.]

Direct communication between the court and foreign courts or foreign representatives

243. The insolvency law should permit the court that is competent with respect to insolvency proceedings concerning an enterprise group member to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives concerning those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.

244. The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts concerning those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.

Conditions applicable to cross-border communication involving courts

245. The insolvency law should specify that communication between the courts and between courts and foreign representatives should be subject to the following conditions:

(a) The time, place and manner of communication should be determined [by] between the courts or [by] between the courts and foreign representatives;

(b) Notice of any proposed communication should be provided to affected parties [or their representatives] in all relevant States in accordance with applicable law and in the manner considered appropriate by the courts, unless otherwise agreed by the courts;

(c) Affected parties or their representatives, as appropriate, should be entitled to participate in person during the communication, unless otherwise agreed by the courts;

(d) The communication may be recorded and a written transcript prepared as directed by the courts. That transcript may be treated as an official transcript of the communication, filed as part of the record of the proceedings and made available to the courts and to [affected parties or their] representatives involved in the communication;

(e) Communications should only be treated as confidential in exceptional cases to the extent considered appropriate by the courts and in accordance with applicable law; and

(f) Communication should respect the mandatory rules of the jurisdictions involved in the communication as well as the substantive and procedural rights of affected parties, in particular the confidentiality of information.

246. The insolvency law should specify that:

(a) No compromise or waiver by the court of any powers, responsibilities or authority;

(b) No substantive determination of any matter in controversy before the court [or the foreign court];

(c) No waiver by any of the parties of any of their substantive rights and claims; and

(d) No diminution of the effect of any of the orders made by the court [or the foreign court], shall be implied as the result of [any] communication made in accordance with these recommendations.

Coordination of hearings

247. The insolvency law may permit the court to conduct a [joint] hearing in coordination with a foreign court. Where hearings are coordinated, they may be subject to certain conditions to safeguard the substantive and procedural rights of parties and the jurisdiction [and independence] of each court. Those conditions might address the rules applicable to the conduct of the hearing; the requirements for the provision of notice; the method of communication to be used; the conditions applicable to the right to appear and be heard; the manner of submission of documents to the court and their availability to other courts; and limitations of the jurisdiction of each court to the parties appearing before it.¹³ [Notwithstanding the conduct of a joint or coordinated hearing, each court remains responsible for reaching its own decision on the matters before it.]

3. The insolvency representative

(a) Cooperation between insolvency representatives

38. As noted in the Legislative Guide, the insolvency representative plays a central role in the effective and efficient implementation of the insolvency law, with day-to-day responsibility for administration of the insolvency estate of the debtor. As such, the insolvency representatives will play a key role in ensuring the successful coordination of multiple proceedings concerning enterprise group members through working with other insolvency representatives and the courts concerned. In order to fulfil that role, the insolvency representative, like the court, will need to have appropriate authorization to undertake the necessary tasks of, for example, sharing information, coordinating day to day administration and supervision of the debtors' affairs, negotiating cross-border insolvency agreements and so forth.

Recommendations 248-250

Purpose of legislative provisions

The purpose of legislative provisions on cooperation between insolvency representatives in the context of multinational enterprise groups is:

(a) To authorize cooperation between insolvency representatives appointed to administer insolvency proceedings relating to different members of an enterprise group in different States; and

(b) To facilitate and promote the use of various forms of cooperation between those insolvency representatives and establish the conditions and protections that should apply to those forms of cooperation to protect the substantive and procedural rights of parties.

¹³ See also UNCITRAL Model Law, article 10.

Contents of legislative provisions

Cooperation between insolvency representatives

248. [The insolvency law should permit the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign representatives to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.]

Communication between insolvency representatives

249. [The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign representatives concerning those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.] The insolvency law should permit insolvency representatives to communicate with each other as soon as they are appointed.

Cooperation to the maximum extent possible between insolvency representatives

250. The insolvency law should specify that the cooperation to the maximum extent possible between insolvency representatives, referred to in recommendation 248, should be implemented by any appropriate means, including:

- (a) Sharing and disclosure of information concerning the enterprise group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information;
- (b) Use of cross-border insolvency agreements in accordance with recommendation 253;¹⁴
- (c) Division of the exercise of powers and allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating or leading role;
- (d) Coordination with respect to administration and supervision of the affairs of the group members subject to insolvency proceedings; and
- (e) Coordination with respect to proposal and negotiation of coordinated reorganization plans, communication with creditors and meetings of creditors.

(b) Appointment of a single or the same insolvency representative

39. The issue of promoting coordination may also be approached via the appointment of the insolvency representative, by considering, for example, the appointment of the same insolvency representative in multiple proceedings affecting members of the same group in different States, where that person (whether natural or legal) met applicable local requirements (see above, paras. 173-178 with respect to domestic proceedings). Where such a person could be appointed, they would be

¹⁴ See the UNCITRAL Practice Guide, which compiles practice with respect to the use and negotiation of these agreements, including a discussion of the issues typically addressed.

subject to the local law of the States in which they were appointed, in particular as regards qualification, licensing (where applicable), powers and duties and supervision by the court. Accordingly, the insolvency representative would be subject to the same local requirements as any insolvency representative appointed in one of those States would be.

40. The appointment could be of a natural person qualified to act in different States or legal person, where that legal person employed or had as its members appropriately qualified persons who could serve as insolvency representatives in a number of different States. Although the availability of those qualified persons might generally be limited, there may be regions where it is more common or the globalization of trade and services makes it increasingly feasible.

41. Where such an approach is adopted, provisions to avoid potential conflicts of interest along the lines of draft recommendation 231 may need to be considered. Such a conflict of interest might arise when the group members represented by a single insolvency representative had different interests in a particular issue, for example, post-commencement finance or verification and admission of claims or when the obligations of the insolvency representative under different insolvency laws were directly in conflict. Those cases might be addressed in the same manner as indicated above with respect to appointment of a single or the same insolvency representative in the domestic context (see recommendation 234).

Recommendations 251-252

Purpose of legislative provisions

[The purpose of legislative provisions on appointment of the insolvency representative is, in the interests of promoting efficient and effective administration of insolvency proceedings members of the same enterprise group in different States, to authorize the appointment of a single or the same insolvency representative to those multiple proceedings.]

Contents of legislative provisions

Appointment of the same insolvency representative

251. The insolvency law should permit the court, [in appropriate cases,][where the court determines it to be in the best interests of the relevant insolvency proceedings] to coordinate with foreign courts with respect to the appointment of the same insolvency representative to administer insolvency proceedings concerning members of the same enterprise group in different States, provided that the insolvency representative is qualified to be appointed in each of the relevant States. To the extent required by the [insolvency] law, the insolvency representative would be subject to the supervision of each of the appointing courts.

Conflict of interest

[252. The insolvency law should specify measures to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members in different States. Such measures may include the appointment of one or more additional insolvency representatives.]

4. Use of cross-border insolvency agreements¹⁵

42. The insolvency community, faced with the daily necessity of dealing with insolvency cases and attempting to coordinate administration of cross-border insolvencies in the absence of widespread adoption of facilitating national or international laws, has developed cross-border insolvency agreements. These agreements are discussed in detail in the UNCITRAL Practice Guide. They are designed to address issues arising in cross-border cases, facilitating their resolution through cooperation between the courts, the debtor, and other stakeholders across jurisdictional lines to work efficiently, and increase realizations for stakeholders in potentially competing jurisdictions. Their use can effectively reduce the cost of litigation and enable parties to focus on the conduct of the insolvency proceedings, rather than upon resolving conflict of laws and other such disputes. Moreover, in addition to clarifying parties' expectations, these agreements can assist with preservation of the debtor's assets and maximization of value.

43. Cross-border insolvency agreements are generally entered into for the purpose of facilitating international cooperation and coordination of multiple insolvency proceedings in different States. Typically, they are designed to assist in the management of those proceedings and are intended to reflect the harmonization of procedural rather than substantive issues between the jurisdictions involved (although in limited circumstances, substantive issues may also be addressed). They vary in form (written versus oral) and scope (generic to specific) and may be entered into by different parties. Simple generic agreements may emphasize the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements establish a framework of principles to govern multiple insolvency proceedings and may be approved by the courts involved.

44. They can be regarded as contracts between the signatories or, in case of approval by the court, may obtain the legal status of a court order. Agreements may cover one or more matters and nothing prevents parties from concluding several agreements as proceedings progress to address different issues arise. It is not uncommon, for example, to have agreements addressing general communication and cooperation at the start of insolvency proceedings, followed by specific agreements on claims procedures at a later point. The conclusion of a cross-border insolvency agreement is thus not limited to a certain time period, such as before the commencement of proceedings. While it is certainly preferable at an early stage of the proceedings in order to address expectations and provide clarity, an agreement may be concluded at a later stage, when particular issues arise that indicate a need for cooperation. Existing agreements may also be modified, subject to any requirements of the agreement for modification.

45. As noted above, cross-border insolvency agreements may include only general principles on how cooperation and coordination should be handled, or also address specific issues depending upon the needs of the particular case and the issues to be resolved. Issues typically addressed include some of all of the following: (a) allocation of responsibility for various aspects of the conduct and administration of the proceedings between the different courts involved and between insolvency

¹⁵ For a detailed discussion of cross-border insolvency agreements, see the UNCITRAL Practice Guide.

representatives, including limitations on authority to act without the approval of the other courts or insolvency representatives; (b) availability and coordination of relief; (c) coordination of recovery of assets for the benefit of creditors generally, in case claims for assets of a group member subject to bankruptcy proceedings in a different state are raised; (d) submission and treatment of claims; (e) use and disposal of assets; (f) methods of communication, including language, frequency, and means; (g) provision of notice; (h) coordination and harmonization of reorganization plans; (i) issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution; (j) administration of proceedings, in particular with respect to stays of proceedings or agreement between the parties not to take certain legal actions; (k) choice of applicable law with respect to overlapping issues; (l) the allocation of responsibilities between the parties to the agreement; (m) costs and fees; and (n) safeguards. The latter typically relate to ensuring that there are no derogations from court independence and authority, public policy and applicable law, particularly with respect to any obligations undertaken by the insolvency representative or parties, including the debtor, in the agreement.

46. These agreements are increasingly common, especially in certain States, and have been successfully employed in different situations, such as concurrent reorganization and liquidation proceedings in different states; main and non-main proceedings as defined by the Model Law; and concurrent insolvency and non-insolvency proceedings in different States. It should be noted, however, that while the insolvency law of certain States may permit courts to approve cross-border agreements regarding the same debtor (for example, through provisions analogous to article 27 of the Model Law), that authorisation may not necessarily extend to the use of such agreements in the group context. What might be required to facilitate global resolution of a group's financial difficulties (be it global reorganization or a combination of different procedures) is an agreement to coordinate multiple proceedings with respect to different debtors in different States, albeit members of the same group. Many laws may lack the provisions necessary to enable a court to approve or recognize an agreement relating not only debtors subject to its jurisdiction, but also to debtors that are not, albeit that they are members of the same enterprise group.

47. It is desirable, therefore, that in order to enhance cross-border cooperation an insolvency law should authorize the relevant parties — insolvency representatives and other parties in interest — to conclude cross-border insolvency agreements concerning different group members in different States and permit the courts to approve or implement them, taking into consideration the group context. It should be noted that different States may have different form requirements that will have to be observed in order for these agreement to be effective in the relevant jurisdictions.

Recommendations 253-254

Purpose of legislative provisions

[The purpose of legislative provisions with respect to cross-border insolvency agreements is to ensure that the insolvency law permits the use of such agreements to facilitate cooperation with respect to insolvency proceedings concerning enterprise group members in different States and authorizes their approval by the court, as appropriate.]

Contents of legislative provisions*Authority to enter into cross-border insolvency agreements*

253. The insolvency law should permit the insolvency representative and other parties in interest to enter into, [to the extent permitted or in the manner required by applicable law,] a cross-border insolvency agreement [involving two or more members of an enterprise group in different States] to facilitate coordination of insolvency proceedings with respect to those group members.

Approval or implementation of cross-border insolvency agreements

254. The insolvency law should permit the court to approve or implement a cross-border insolvency agreement [involving two or more members of an enterprise group in different States] to facilitate coordination of the insolvency proceedings with respect to those enterprise group members.

A/CN.9/WG.V/WP.90/Add.2 (Original: English)**Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-seventh session****ADDENDUM****I. Introduction**

1. This document sets forth explanatory notes with respect to the revisions of the recommendations contained in A/CN.9/WG.V/WP.90 and Add.1 and raises a number of questions for consideration by the Working Group concerning those recommendations and possible additional recommendations.

II. Domestic treatment of enterprise groups in insolvency**A. General issues**

2. The draft recommendations on the domestic treatment of enterprise groups are based upon a fundamental principle that the insolvency law should recognize the existence of enterprise groups, as defined in the glossary, and accord them special treatment as outlined in recommendations 199-239 in order to achieve a more efficient and effective outcome for the group as a whole and for individual members because of their group connection. The existence of such a principle in national law becomes especially important when looking to facilitate cooperation and coordination of enterprise group insolvencies in the international context. However, there is no general recommendation to that effect, along the lines of the general principles contained in part one of the Legislative Guide, recommendations 1-5. The Working Group may wish to consider whether a statement of that fundamental principle should be included as a recommendation.

3. The fundamental principle might also be reflected in relevant purpose clauses. For example, the purpose clause on procedural coordination might include, in paragraph (a), words to the effect of “with a view to achieving a better, more effective result for the enterprise group”.

B. Post-commencement finance

4. Draft recommendations 211-216 were revised during the thirty-sixth session of the Working Group, but not further considered for lack of time.

5. Draft recommendation 213 refers to the consent of creditors to the provision of post-commencement finance in accordance with recommendations 211 and 212. It is perhaps implied that they are the creditors of the insolvent group member providing the finance, but given the group context and the interest of creditors of both receiving and providing members, it might be clearer to stipulate which creditors are intended. The same approach might be helpful in draft recommendation 214

which deals with the obtaining of post-commencement finance in accordance with recommendation 63.

C. Avoidance proceedings

6. In accordance with the discussion by the Working Group at its thirty-sixth session (A/CN.9/671, paragraph 97), a new purpose clause reflecting more clearly the group context is proposed for consideration.

D. Substantive consolidation

7. Draft recommendation 221 has been revised, to improve the drafting, from “The insolvency law may specify that the court may exclude specified assets and claims from an order for substantive consolidation” to “The insolvency may permit the court to exclude specified assets and claims from an order for substantive consolidation.”

8. While draft recommendation 221 addresses exclusions from an order for substantive consolidation, it does not indicate how those exclusions would be treated in practice. Limited explanation is given in paragraph 171 of the commentary. The Working Group may wish to consider whether the draft recommendation or the commentary should provide more detail, and if so, the explanation to be included.

9. At its thirty-sixth session, the Working Group discussed the need to address the issue of a secured creditor or employee enhancing their position when an order for substantive consolidation was made. The issue is addressed in paragraph 160 of the commentary and draft recommendation 225 has been included for consideration by the Working Group.

10. Draft recommendation 226 addresses the recognition of security interests in substantive consolidation, requiring that they should “as far as possible” be recognized in substantive consolidation. Issues associated with secured creditors are discussed in paragraphs 159-162 of the commentary. The Working Group might wish to consider whether that discussion provides sufficient guidance as to what recognition to the extent possible might mean in practice.

11. Draft recommendation 227 addresses the recognition of priorities in substantive consolidation, also requiring that they should be recognized “as far as possible”. The commentary, paragraph 163, includes a limited explanation. The Working Group may wish to consider whether further material should be provided to explain what recognition to the extent possible might mean in practice, in order to provide guidance to readers unfamiliar with substantive consolidation and its effects.

E. Insolvency representative

12. Draft recommendation 237 included a reference which limited the substance of the article to what was permitted under applicable law. That reference has been deleted on the basis that the purpose of the Guide is to influence the substance of

applicable law and, as far as possible, change it to reflect the recommendations. The purpose of draft recommendation 237 is to foster coordination and cooperation. To the extent applicable law defeated the types of cooperation referred to, the recommendation would be devoid of meaning. Limiting a recommendation to what is permitted by applicable law is not an approach used elsewhere in the Guide. The Working Group may wish to consider whether the deletion of that phrase is appropriate.

F. Reorganization plans

13. Draft recommendation 238 addresses the proposal of coordinated reorganization plans, but goes no further. The Working Group may wish to consider whether the draft recommendation should also address approval and other aspects of those plans, perhaps by reference to the other recommendations of the Guide and the issues addressed in the commentary.

III. International treatment of enterprise groups in insolvency

A. General issues

14. To build upon the issue noted above with respect to recognition of the enterprise groups in domestic law, the Working Group might wish to consider whether it might be desirable to include a statement to the effect that, as a general principle, these recommendations on international treatment are intended to facilitate global solutions to the insolvency of enterprise groups.

B. Coordination involving the courts

15. A new purpose clause has been added to draft recommendations 240-247 to address the general issue of coordination.

16. The draft recommendations have been rearranged to include in the first group (recommendations 240-247), those that relate to the court. Cooperation and communication strictly between insolvency representatives is now set forth in section 3, recommendations 248-250.

17. Draft recommendations 242 and 250, with respect to cooperation to the maximum extent possible, have been revised (taking into account the slightly different context of each recommendation) in accordance with the decision of the Working Group in order to align them with the domestic provision, draft recommendation 237, concerning cooperation between insolvency representatives.

18. Draft recommendation 246 is based upon a version approved by the Working Group at its thirty-sixth session (A/CN.9/671, paragraph 38). The Working Group may wish to consider whether, given that the draft recommendation refers to the content of domestic law, it is appropriate to retain the references to the foreign court in paragraphs (b) and (d).

19. Draft recommendation 247 has been revised to include a second sentence based upon what was previously contained in a footnote, as requested by the Working Group at its thirty-sixth session (A/CN.9/671, paragraph 41). It also includes a third sentence to address, in the context of coordinated hearings, the need to ensure that each court reaches its own decision free of influence of any other court.

20. The Working Group might wish to consider whether a further recommendation along the lines of article 16(2) of the Model Law, providing a presumption as to authenticity of documents, might be useful in the context, in particular, of coordinated hearings, where documents might be shared between the different courts. It might also have some bearing on sharing of documents between courts under the draft recommendations on coordination.

C. Cooperation involving insolvency representatives

21. New purpose clauses have been added to draft recommendations 248-250, addressing cooperation between insolvency representatives and to draft recommendations 251-252, addressing appointment of a single or the same insolvency representative.

22. Draft recommendation 252 has been added at the request of Working Group (A/CN.9/671, paragraph 51) to reflect the approach taken to conflicts in the domestic context under draft recommendation 234.

D. Cross-border insolvency agreements

23. A new purpose clause has been added to the recommendations on cross-border insolvency agreements.

24. Draft recommendation 253 includes certain words in square bracket following a suggestion at the thirty-sixth session (A/CN.9/671, paragraph 48). For the reasons noted above with respect to draft recommendation 237, the inclusion of the words “to the extent permitted by applicable law” have the potential to render the recommendation devoid of meaning, as they would defeat what the recommendation is seeking to promote. The second set of words “or in the manner required by applicable law” might usefully be retained to reflect form requirements included in applicable law. The other words in square brackets (“involving two or more members of an enterprise group in different States”) are included in draft recommendations 253 and 254 to align them with the formulation used in other draft recommendations.

**C. Report of the Working Group on Insolvency Law
on the work of its thirty-eighth session
(New York, 19-23 April 2010) (A/CN.9/691)**

[Original: English]

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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 (the "Guide" or "Legislative Guide") and the UNCITRAL Model Law on Cross-Border Insolvency provided a sound basis for the unification of insolvency law, and that the current work was intended to complement those texts, not to replace them (see A/CN.9/618, para. 69). A possible method of work would entail the consideration of those provisions contained in existing texts that might be relevant in the context of corporate groups and the identification of those issues that required additional discussion and the preparation of additional recommendations. Other issues, although relevant to corporate groups, could be treated in the same manner as in the Legislative Guide and Model Law. It was also suggested that the possible outcome of that work

might be in the form of legislative recommendations supported by a discussion of the underlying policy consideration (see A/CN.9/618, para. 70).

3. The Working Group continued its consideration of the treatment of corporate groups in insolvency at its thirty-second session in May 2007, on the basis of notes by the Secretariat covering both domestic and international treatment of corporate groups (A/CN.9/WG.V/WP.76 and Add.1). For lack of time, the Working Group did not discuss the international treatment of corporate groups contained in document A/CN.9/WG.V/WP.76/Add.2.

4. At its thirty-third session in November 2007, its thirty-fourth session in March 2008, its thirty-fifth session in November 2008, its thirty-sixth session in May 2009 and its thirty-seventh session in November 2009, 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 (A/CN.9/WG.V/WP.78 and Add.1, A/CN.9/WG.V/WP.80 and Add.1, A/CN.9/WG.V/WP.82 and Add.1-4, A/CN.9/WG.V/WP.85 and Add.1 and A/CN.9/WG.V/WP.90 and Add.1-2). At its thirty-sixth session, the Working Group decided that the draft recommendations on the international treatment of enterprise groups in insolvency should be included in part three of the Legislative Guide and adopt the same format as the preceding parts of the Legislative Guide (see A/CN.9/671, para. 55).

5. At its thirty-seventh session in November 2009, the Working Group commenced a preliminary discussion on possible future work (see Report of Working Group V (Insolvency Law) on the work of its thirty-seventh session, document A/CN.9/686, paras. 126-131). Topics suggested for future work included an international insolvency convention, liability of directors and officers of enterprises in insolvency or in proximity to insolvency, insolvency of large and complex financial institutions, the concept of centre of main interests (COMI) of an enterprise and the factors relevant to its determination, as well as issues of jurisdiction and recognition.

II. Organization of the session

6. Working Group V (Insolvency Law), which was composed of all States members of the Commission, held its thirty-eighth session in New York from 19 to 23 April 2010. The session was attended by representatives of the following States members of the Working Group: Belarus, Benin, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Egypt, El Salvador, Germany, Greece, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Madagascar, Malaysia, Mexico, Morocco, Pakistan, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Spain, Sri Lanka, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Angola, Bangladesh, Croatia, Cuba, Denmark, Indonesia, Iraq, Kuwait, Lithuania, Panama, Philippines, Slovenia and Turkey.

8. Non-Member States and entities: Holy See and Palestine.

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

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF) and the World Bank;

(b) *Invited intergovernmental organizations*: European Commission (EC);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), American Bar Foundation (ABF), Center For International Legal Studies (CILS), INSOL International (INSOL), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (III), International Law Institute (ILI), International Women's Insolvency and Restructuring Confederation (IWIRC), Inter-Pacific Bar Association (IPBA) and Union Internationale des Avocats (UIA).

10. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Mr. Maged Sobhy Siweha (Egypt)

11. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.91);

(b) A note by the Secretariat on the treatment of enterprise groups in insolvency (A/CN.9/WG.V/WP.92 and Add.1-2);

(c) A note by the Secretariat on future work (A/CN.9/WG.V/WP.93);

(d) A proposal for future work by the delegation of the United States of America (A/CN.9/WG.V/WP.93/Add.1-2);

(e) A proposal by INSOL International: Directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases (A/CN.9/WP.93/Add.3);

(f) A proposal by the delegation of the United Kingdom for the development of guidelines on directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases (A/CN.9/WP.93/Add.4);

(g) A proposal by the delegation of Switzerland for preparation of a study on the feasibility of an instrument regarding the cross-border resolution of large and complex financial institutions (A/CN.9/WP.93/Add.5); and

(h) Comments by the International Bar Association respecting proposals to consider an international convention and/or Model Law on Cross-border Enterprise Group Insolvency (A/CN.9/WP.93/Add.6).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of the treatment of enterprise groups in insolvency and future work.

5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

13. 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.92 and Add.1-2 and other documents referred to therein. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Treatment of enterprise groups in insolvency

14. The Working Group commenced its work with the domestic treatment of enterprise groups in insolvency as set forth in A/CN.9/WG.V/WP.92.

A. Introduction to part three

1. General purpose clause

15. The Working Group recalled its decision at its thirty-seventh session to include a statement of general purpose for the recommendations applicable to enterprise groups in part three of the Legislative Guide. It approved the substance of the draft purpose clause, subject to the addition of text clarifying what was intended by the words “a better, more effective result” for the enterprise group. It was also suggested that the wording of the first sentence might be clearer if it referred to the “treatment of the insolvency proceedings concerning one or more members of an enterprise group”.

2. Glossary

16. The Working Group approved the substance of the draft glossary.

B. General features of enterprise groups

1. Introduction, paragraphs 1-5

17. The Working Group approved the substance of paragraphs 1-5, subject to substituting the words “legal persona” in paragraph 1 with the words “legal personality”.

2. Nature of enterprise groups, paragraphs 6-16

18. A proposal to move footnote 9 to the glossary was not supported. A further proposal to broaden the language of paragraph 9 so as to include examples of parent or holding entities that were not incorporated, such as foundations, received support. Another suggestion was to align the language of the footnote with the language used in the glossary with respect to control and ownership.

3. Reasons for conducting business through enterprise groups, paragraphs 17-25; Defining the enterprise group, paragraphs 26-30; and Regulation of enterprise groups, paragraphs 31-39

19. The Working Group approved the substance of paragraphs 17 to 39.

C. Addressing the insolvency of enterprise groups: domestic issues

1. Introduction, paragraphs 1-4

20. The Working Group approved the substance of paragraphs 1 to 4.

2. Application and commencement

(a) Introduction and joint application for commencement

Commentary, paragraphs 5-21

21. A proposal to delete the third sentence of paragraph 6 because it might prove confusing, was not supported on the basis that it provided background to the issue and examples of the approach adopted by some insolvency laws, consistent with the approach generally taken by the Legislative Guide.

Purpose clause

22. In response to a suggestion that footnotes 22 and 23 conveyed new explanations or repeated information set forth in other recommendations or in the commentary, and might not be required, it was noted that such explanations and reminders were found elsewhere in the footnotes included in the Guide and served to emphasize several key points. The Working Group approved the substance of the purpose clause as drafted.

Draft recommendation 199

23. The Working Group approved the substance of draft recommendation 199.

Draft recommendation 200

24. The Working Group supported the proposal in paragraph 2 of document A/CN.9/WG.V/WP.92/Add.2, retaining the text proposed in square brackets in the chapeau and removing the brackets. With respect to paragraph (b), the Working Group agreed with a proposal to redraft it to ensure greater clarity, as follows:

“(b) A creditor, provided that:

- (i) It is a creditor of each group member to be included in the application; and
- (ii) Each of those group members satisfies the commencement standard of recommendation 16.”

Draft recommendation 201

25. The Working Group approved the substance of draft recommendation 201.

(b) Procedural coordination*Commentary, paragraphs 22-37*

26. A proposal to substitute the words “others with legally recognized interests” in paragraph 22 with the words “parties in interest” was supported. A further proposal to replace the word “reversal” in paragraph 37 with the word “termination” to align it with draft recommendation 208 was also supported.

Purpose clause

27. The Working Group approved the substance of the draft purpose clause.

Draft recommendation 202

28. The Working Group approved the substance of draft recommendation 202.

Draft recommendation 203

29. To improve the drafting of footnote 26, a proposal to revise the second sentence was approved as follows: “Accordingly, an order for procedural coordination may require action by one or more than one court.”

Draft recommendation 204

30. A proposal that draft recommendation 204 should include a reference to creditor committees and the possibility of establishing a single committee in appropriate cases, as noted in paragraph 26 of the commentary, or of the need for coordination if there was more than one creditor committee, was supported. The Working Group approved the substance of draft recommendation 204 as follows:

“Procedural coordination may involve, for example, appointment of a single or the same insolvency representative; establishment of a single creditor committee, as appropriate; cooperation between courts, including coordination of hearings; cooperation between insolvency representatives, including information sharing and coordination of negotiations; joint provision of notice; coordination between creditor committees; coordination of procedures for submission and verification of claims; and coordination of avoidance proceedings. The scope and extent of the procedural coordination should be specified by the court.”

31. The Working Group noted that paragraph 26 would require some revision and in particular, deletion of the final sentence, as well as addition of references to the discussion of creditor committees in part two of the Guide and more discussion of the need to protect the interests of creditors and the circumstances in which a single creditor committee might be appropriate.

Draft recommendation 205

32. It was noted that while draft recommendation 203 made reference to the possibility of a court ordering procedural coordination on its own initiative, draft recommendation 205 only addressed the timing issue with respect to an application under draft recommendation 206 and not with respect to the time when the court might initiate procedural coordination. A proposal to consider an additional recommendation addressing that issue was not supported.

Draft recommendations 206-209

33. The Working Group approved the substance of the draft recommendations.

Draft recommendation 210

34. A suggestion that the draft recommendation should also refer to the modalities of giving notice and the time frame within which it should be given did not receive support. The Working Group approved the substance of the draft recommendation.

3. Treatment of assets on commencement of insolvency proceedings

(a) Introduction and protection and preservation of the insolvency estate, paragraphs 38-51

35. The Working Group approved the substance of paragraphs 38-51.

(b) Use and disposal of assets, paragraphs 52-54

36. The Working Group approved the substance of paragraphs 52-54.

(c) Post-commencement finance

Commentary, paragraphs 55-74

37. It was noted that the reference to the glossary in paragraph 56 should refer to the glossary at the commencement of the Legislative Guide, rather than to the glossary to part three. It was also noted that the reference to “related parties” should be replaced with the term “related persons”. The Working Group approved the substance of paragraphs 55-74.

Purpose clause

38. The Working Group approved the substance of the draft purpose clause.

Draft recommendation 211

39. The Working Group approved the substance of draft recommendation 211.

Draft recommendation 212

40. The Working Group supported the proposal in paragraph 6 of document A/CN.9/WG.V/WP.92/Add.2 to replace the word “is” in paragraph (b) with either “will be” or “is likely to be”. After discussion, the prevailing view was that “will be” was preferred. The Working Group approved the substance of the draft recommendation with that revision.

Draft recommendations 213-216

41. The Working Group approved the substance of the draft recommendations.

(d) Avoidance proceedings

Commentary, paragraphs 75-82

42. The Working Group approved the substance of paragraphs 75-82.

Purpose clause and draft recommendations 217-218

43. The Working Group approved the substance of the purpose clause and the draft recommendations.

(e) **Subordination, paragraphs 83-91**

44. The Working Group approved the substance of paragraphs 83-91.

4. Remedies

(a) **Introduction, extension of liability and contribution orders, paragraphs 92-104**

45. The Working Group approved the substance of paragraphs 92-104.

(b) **Substantive consolidation**

Commentary, paragraphs 105-137

46. A proposal to delete the final sentence of paragraph 136 was not supported. A proposal to ensure that references to “consolidation”, particularly in paragraphs 106-107, be revised to “substantive consolidation” was supported. The Working Group approved the substance of paragraphs 105-137 with that revision.

Purpose clause

47. The Working Group approved the substance of the purpose clause.

Draft recommendations 219-220

48. The Working Group approved the substance of the draft recommendations.

Draft recommendation 221

49. The Working Group supported the proposal in paragraph 8 of document A/CN.9/WG.V/WP.92/Add.2, with the final word “ordered” being replaced with the word “appropriate”. As a matter of drafting, it was agreed that dividing the draft recommendation into two subparagraphs providing that the insolvency law should (a) permit the court to exclude specified assets, and (b) specify the circumstances in which those exclusions might be appropriate, would assist with clarity and understanding. It was also agreed that the commentary should be expanded to include additional examples of situations in which exclusions might be appropriate, including where there were burdensome assets, such as assets carrying an environmental liability or assets that would be difficult or costly to administer, or where the consequences of fraud might be exacerbated if certain assets were to be included in the order for substantive consolidation.

Draft recommendations 222-223

50. The Working Group approved the substance of the draft recommendations.

Draft recommendation 224

51. The Working Group supported the proposal in paragraph 11 of document A/CN.9/WG.V/WP.92/Add.2 to treat claims “as if they were claims against the single insolvency estate” in paragraph (c) of the draft recommendation.

Draft recommendations 225-227

52. The Working Group approved the substance of the draft recommendations.

Draft recommendation 228

53. The Working Group supported the proposal in paragraphs 12-15 of document A/CN.9/WG.V/WP.92/Add.2 to revise the draft recommendation. As a matter of drafting, it was noted that the recommendation should refer to the calculation of the suspect period “retroactively”. The draft recommendation was adopted as follows:

“228. (1) 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 should be calculated when substantive consolidation is ordered with respect to two or more enterprise group members.

(2) The specified date from which the suspect period is calculated retroactively in accordance with recommendation 89 may be:

(a) A different date for each enterprise group member included in the substantive consolidation, being either the date of application for or commencement of insolvency proceedings with respect to each such group member; or

(b) A common date for all enterprise group members included in the substantive consolidation, being either (i) the earliest of the dates of application for, or commencement of, insolvency proceedings with respect to those group members; or (ii) the date on which all applications for commencement were made or all proceedings commenced.”

Draft recommendations 229-230

54. The Working Group approved the substance of the draft recommendations.

Draft recommendation 231

55. The Working Group supported the proposal in paragraph 16 of document A/CN.9/WG.V/WP.92/Add.2 to align the draft recommendation with draft recommendation 210 and approved the substance of the draft recommendation on that basis. A proposal to add a reference to the right to be heard and to appeal was not supported on the basis that those matters were already addressed in recommendations 137 and 138.

5. Participants

Commentary, paragraphs 138-145

56. The Working Group approved the substance of paragraphs 138-145.

Purpose clause

57. The Working Group approved the substance of the purpose clause.

Draft recommendations 232-235

58. The Working Group approved the substance of the draft recommendations. In response to a question concerning the party responsible for making the determinations under draft recommendation 232, it was recalled that that issue should be considered in the context of recommendation 118 and the mechanism adopted by insolvency law for appointment of the insolvency representative.

Draft recommendation 236

59. The Working Group noted the proposal in paragraph 18 of document A/CN.9/WG.V/WP.92/Add.2 to align the draft recommendation with draft recommendations 235, 241 and 250. With respect to the use of “should” or “may”, the Working Group agreed, after discussion, that both words could be deleted, as the remaining draft “The insolvency law should specify that cooperation ... be implemented” would be sufficient. It was noted that that change should also be made to draft recommendation 250.

60. The Working Group also agreed with the proposal to relocate the reference to communication with creditors to paragraph (c). With respect to the proposal concerning paragraph (d), the prevailing view was to retain the text “Coordination with respect to the proposal and negotiation of reorganization plans”, with the brackets removed. The Working Group adopted the substance of the draft recommendation with those modifications.

6. Reorganization of two or more enterprise group members*Commentary, paragraphs 146-152*

61. The Working Group approved the substance of paragraphs 146-152.

Draft recommendations 237-238

62. The Working Group agreed that the reference to “two or more enterprise group members” in draft recommendation 238 should be revised to “one or more” on the basis that a solvent group member could participate in a reorganization plan concerning only one group member, as well as in a plan concerning multiple group members. The Working Group approved the substance of draft recommendations 237-238 with that modification.

D. Addressing the insolvency of enterprise groups: international issues

63. The Working Group continued its deliberations on enterprise groups in insolvency in the international context as set forth in A/CN.9/WG.V/WP.92/Add.1.

1. Introduction, paragraphs 1-6

64. The Working Group approved the substance of paragraphs 1-6.

2. Promoting cross-border cooperation in enterprise group insolvencies

(a) Introduction, paragraphs 7-10

65. The Working Group approved the substance of paragraphs 7-10.

(b) Access to courts and recognition of foreign proceedings

Commentary, paragraphs 11-13

66. The Working Group approved the substance of paragraphs 11-13.

Purpose clause

67. The Working Group agreed that the words “two or more” and “where access to the courts and recognition of those foreign proceedings are prerequisites to cooperation between the courts, insolvency representatives and creditors” should be deleted and the square brackets removed. With those deletions, the Working Group approved the substance of the purpose clause.

Draft recommendation 239

68. The Working Group noted that the comma after the word “necessary” in paragraph (b) was not included in the original draft of the text approved at its thirty-seventh session (A/CN.9/686, para. 20) and should therefore be deleted. With that modification, the Working Group approved the substance of draft recommendation 239.

3. Forms of cooperation involving courts

(a) Communication by courts

Commentary, paragraphs 14-34

69. The Working Group approved the substance of paragraphs 14-34, noting that additional footnotes referring to specific paragraphs of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation should be added throughout those paragraphs to draw the reader’s attention to the Practice Guide and to underline its importance as a reference tool on cross-border insolvency.

(b) Coordination of the debtor’s assets and affairs

Commentary, paragraph 35-36

70. The Working Group approved the substance of paragraphs 35-36.

(c) Appointment of a court representative

Commentary, paragraph 37

71. Some concerns were raised with respect to the qualifications and integrity required of a person to be appointed by the court and issues of conflict of interest. It was emphasized that such a person was not generally an insolvency representative and that recommendations 115-125 therefore were not intended to apply. A proposal to address those issues in detail was not supported, a preference being expressed in favour of leaving those issues to the domestic law and the appointing court.

However, the Working Group agreed to revise the fourth sentence of paragraph 37 along the following lines: “The appointing court may consider the qualifications required to perform the functions to be undertaken, as well as issues of conflict of interest and will typically outline the terms under which the appointee is authorized to act and the extent of its powers.” Subject to that addition, the Working Group approved the substance of paragraph 37.

(d) Coordination of hearings

Commentary, paragraphs 38-40

72. The Working Group approved the substance of paragraphs 38-40.

Purpose clause

73. The Working Group agreed to add the words “and facilitate” after the word “authorize” in paragraphs (a) and (b). With those additions, the Working Group approved the substance of the purpose clause.

Draft recommendation 240

74. The Working Group agreed to replace the reference to “that enterprise group” at the end of the draft recommendation with the words “the same enterprise group” to align it with draft recommendations 242 and 246-249 and approved the substance of draft recommendation 240 with that modification.

Draft recommendation 241

75. The Working Group agreed to retain the text in square brackets in paragraph (a) and remove the brackets. To address concerns that the use of the word “including” in the chapeau might operate to limit the provision in some legal systems, it was agreed that words such as “for example” might be added. The Working Group approved the substance of draft recommendation 241 with those modifications.

Draft recommendation 242

76. The Working Group agreed to replace the reference to “that enterprise group” at the end of the draft recommendation with the words “the same enterprise group” to align it with draft recommendations 240 and 246-249 and approved the substance of draft recommendation 242 with that modification.

Draft recommendation 243

77. The Working Group agreed to delete the words in square brackets in the chapeau. A proposal to replace the word “may” in both sentences of paragraph (d) with “should” was not supported. The Working Group approved the substance of draft recommendation 243 with the modification of the chapeau.

Draft recommendation 244

78. The Working Group considered the proposals contained in paragraphs 25 and 26 of document A/CN.9/WG.V/WP.92/Add.2 to revise draft recommendation 244. The Working Group agreed to delete the words in square brackets in the chapeau and

to align the chapeau with that of draft recommendation 243 as follows: “The insolvency law should specify that communication between courts and between courts and foreign representatives shall not imply:”. A proposal to revise paragraph (c) to refer to “substantive or procedural rights” and thus align it with the usage in draft recommendation 243, paragraph (f) was supported.

79. The Working Group approved the substance of draft recommendation 244 with those revisions.

Draft recommendation 245

80. A proposal to require coordinated hearings to be subject to the conditions set forth in the second sentence of the draft recommendation by replacing “may” with “should” was supported. A further proposal to revise the final sentence was supported as follows: “Notwithstanding the coordination of hearings, each court should maintain its independence in reaching its own decision on the matters before it.” The Working Group adopted the substance of the draft recommendation with those revisions.

4. Forms of cooperation involving insolvency representatives

(a) Cooperation by the insolvency representatives

Commentary, paragraphs 41-42

81. The Working Group approved the substance of paragraphs 41-42.

Purpose clause

82. The Working Group approved the substance of the purpose clause with the following revisions: (a) addition of the words “and between insolvency representatives and foreign courts” after the word “representatives” in the chapeau, in order to align it with the substance of the following recommendations; and (b) addition of the words “and facilitate” after the word “authorize” in paragraph (a), to align it with the modifications agreed for the purpose clause to recommendations 240-245.

Draft recommendations 246-249

83. The Working Group supported the proposal contained in paragraph 30 of document A/CN.9/WG.V/WP.92/Add.2 to adopt the words “the same” and remove the square brackets. With that modification, it approved the substance of the draft recommendations.

Draft recommendation 250

84. The Working Group supported the proposal contained in paragraph 33 of document A/CN.9/WG.V/WP.92/Add.2 to retain the wording in square brackets in paragraph (d) and remove the brackets, in order to align the draft recommendation with draft recommendation 236. For the same reason, the word “may” was deleted from the chapeau. With those modifications, the Working Group approved the substance of draft recommendation 250.

(b) Appointment of a single or the same insolvency representative*Commentary, paragraphs 43-47*

85. The Working Group approved the substance of paragraphs 43-47, with the addition in paragraph 46 of a reference to the paragraphs of part II, chapter III, dealing with appointment of the insolvency representative, and to the explanation of the term “insolvency representative” in the glossary.

Purpose clause

86. The Working Group approved the substance of the purpose clause.

Draft recommendation 251

87. The Working Group noted the proposal contained in paragraph 35 of document A/CN.9/WG.V/WP.92/Add.2 to revise the draft recommendation and agreed to retain the reference to “applicable law” and remove the square brackets. With that modification, the Working Group approved the substance of draft recommendation 251.

Draft recommendation 252

88. A proposal to delete the second sentence of the draft recommendation was not supported. Noting that the draft recommendation was the same as draft recommendation 233, which had been approved as drafted, the Working Group approved the substance of draft recommendation 252.

5. Use of cross-border insolvency agreements*Commentary, paragraphs 48-54*

89. The Working Group approved the substance of paragraphs 48-54.

Purpose clause

90. The Working Group approved the substance of the purpose clause.

Draft recommendations 253-254

91. The Working Group approved the substance of draft recommendations 253-254.

6. Possible additional recommendations

92. The Working Group considered the proposals contained in paragraphs 38-39 of document A/CN.9/WG.V/WP.92/Add.2 to include an additional recommendation to permit an insolvency representative to act in a foreign State on behalf of the proceedings in which the insolvency representative was appointed (along the lines of article 5 of the Model Law) or to seek information or assistance directly from the foreign court (in accordance with article 25 of the Model Law). After discussion, the Working Group agreed to revise draft recommendation 248 as follows:

“The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group

member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with, or to request information or assistance directly from, foreign courts concerning those proceedings and insolvency proceedings commenced in other States with respect to members of the same enterprise group.”

93. The Working Group requested the Secretariat to make the necessary adjustments to the draft of part three of the Legislative Guide as agreed upon at the current session. The Working Group proceeded to adopt the draft of part three of the Legislative Guide on the treatment of enterprise groups as contained in documents A/CN.9/WG.V/WP.92 and Add.1 and recommended it to the Commission for possible finalization and adoption at its forty-third session in 2010.

V. The impact of insolvency of a licensor or licensee on a security right in that party’s rights under a licence agreement: discussion in the draft supplement to the Legislative Guide on Secured Transactions dealing with security rights in intellectual property

94. The Working Group was informed that, in the course of its work on a supplement to the Legislative Guide on Secured Transactions dealing with security rights in intellectual property, Working Group VI (Security interests) had agreed to include text on automatic termination and acceleration clauses in intellectual property licence agreements. Working Group VI (Security interests) further agreed to refer that text to Working Group V for its consideration and approval (see document A/CN.9/685, para. 95), as that text contains references to and seeks to summarize portions of the UNCITRAL Legislative Guide on Insolvency Law.

95. The Working Group considered the text referred to it by Working Group VI (Security interests) and contained in document A/CN.9/WG.VI/WP.42/Add.6, paras. 50-52:

“50. The Insolvency Guide recommends that any contractual clauses that automatically terminate and accelerate a contract upon an application for commencement, or commencement, of insolvency proceedings or upon the appointment of an insolvency representative should be unenforceable as against the insolvency representative and the debtor (see recommendation 70 of the Insolvency Guide). The Insolvency Guide also recommends that the insolvency law should specify the contracts that are exempt from the operation of this recommendation, such as financial contracts, or are subject to special rules, such as labour contracts (see recommendation 71 of the Insolvency Guide).

“51. The commentary of the Insolvency Guide states that some laws uphold these clauses in some circumstances and explains the reasons for this approach. These reasons include ‘the need for creators of intellectual property to be able to control the use of that property and the effect on a counterparty’s business of termination of a contract, especially one with respect to an intangible’ (see part two, chapter II, para. 115 of the Insolvency Guide). For example, automatic termination and acceleration clauses contained in

intellectual property licence agreements may be upheld as the insolvency of the licensee may have a negative impact not only on the licensor's rights but also on the intellectual property right itself. This is the case, for example, where the insolvency of a licensee of a trademark used on products may affect the market value of the trademark and the trademarked products. In any case, clauses included in intellectual property licence agreements that provide, for example, that a licence terminates after X years or upon material breach such as failure of the licensee to upgrade or market the licensed products on time (that is, where the event that triggers the automatic termination is not insolvency) are not affected (see footnote 39, recommendation 72 of the Insolvency Guide).

"52. The commentary of the Insolvency Guide also states that other laws override these clauses and explains the relevant reasons (see part two, chapter II, paras. 116 and 117 of the Insolvency Guide). The commentary further explains that, although some insolvency laws do permit these types of clause to be overridden if insolvency proceedings are commenced, this approach has not yet become a general feature of insolvency laws. In this regard, the commentary speaks of an inherent tension between promoting the debtor's survival, which may require the preservation of contracts, and affecting commercial dealings by creating a variety of exceptions to general contract rules. The commentary concludes by expressing the desirability that an insolvency law permit such clauses to be overridden (see part two, chapter II, and para. 118 of the Insolvency Guide)."

96. Some concerns were expressed that while not an inaccurate summary of the material in the Insolvency Guide, the paragraphs presented did not reflect the nuanced treatment of those issues in the Insolvency Guide. After discussion, there was support for a proposal to address those concerns by adding the following sentence to refer to the Insolvency Guide. That sentence could be inserted in the appropriate place, possibly following paragraph 50:

"The commentary to the Insolvency Guide explains the perceived advantages and disadvantages of such clauses, the types of contracts that may be appropriate to be exempted and the inherent tension between promoting the debtor's survival, which may require the preservation of contracts, and introducing provisions which override contractual clauses. The possible application of such provisions to intellectual property is addressed in the commentary at part two, chapter II, paragraph 115 of the Insolvency Guide."

97. It was suggested that in referring to the recommendations of the Insolvency Guide it might be noted that those recommendations are directed at the content of the insolvency law.

98. The Working Group approved the text of paragraphs 50-52 as presented by Working Group VI with the modifications noted above.

VI. Future work

99. The Working Group recalled its preliminary exchange of views on possible topics for future work at its last session (see document A/CN.9/686, paras. 126-131) and continued its discussion on future work, hearing presentations on a series of proposals by the delegations of the United States, the United Kingdom, Switzerland, INSOL International, the International Bar Association (IBA), the International Insolvency Institute (III) and the Union Internationale des Avocats (UIA) contained in documents A/CN.9/WG.V/WP.93 and Add.1-6 and other documents referred to therein.

100. With respect to the United States proposal concerning, *inter alia*, the centre of main interests (COMI and related issues, it was observed that although some common threads could be distinguished in the cases being considered, there was an increasing divergence in the manner in which COMI and other related issues were interpreted and determined in different States and thus growing unpredictability with respect to what might constitute, for example, the COMI of a debtor or foreign proceedings within the meaning of the Model Law. That lack of predictability had economic implications arising from the location in which insolvency proceedings might commence, which would in turn affect the priorities applicable in insolvency proceedings and could affect lending decisions at the outset. It was observed that because COMI and the related issues were the subject of much study and discussion, considerable work had already been done that could assist the Working Group in its deliberations on such a topic.

101. It was noted that the United States proposal included different phases, the latter of which, for the development of a model law on jurisdiction, access and recognition, was closely related to the proposal by the UIA and the IBA to develop a convention addressing, *inter alia*, those issues. There was considerable support for the view that, in line with the approach adopted in previous work of the Working Group, the topics could be approached in a manner that would not preclude the development of a convention. At the outset, the particular type of instrument to be developed could be left open and, if a considerable degree of consensus could be reached, it might be possible to conclude some form of binding instrument. The hope was expressed that the work could be taken to a level of consensus beyond that reached in the Legislative Guide. A different view was that the work should focus only upon providing non-prescriptive guidance and should be developed as additions to existing texts, such as the Legislative Guide and the Practice Guide.

102. With respect to the proposals relating to the liability and responsibility of directors and officers, it was observed that the topic was increasingly important, particularly in the context of enterprise groups. It was noted that provisions on duties and responsibilities might operate as an incentive to management of the debtor to reorganize at an early stage rather than wait until that possibility had passed and liquidation was inevitable. Moreover, the topic had been recognized in the work of regional and international organizations as one to be addressed in the future and particularly in the international context as there was an absence of international standards addressing those duties and responsibilities in the shadow of, or in, insolvency and a real divergence in the approaches adopted under national law. It was observed that the financial crisis had demonstrated not only the global effect of insolvencies, but also that national responses were often insufficient to resolve issues such as those raised with respect to the responsibility of directors and officers. Some concern was expressed as to whether such

duties and responsibilities fell within the purview of insolvency law or more commonly within that of company law or criminal law. It was observed, in response, that the proposal was not intended to cover areas of criminal liability or to deal with core areas of company law.

103. It was noted with respect to the proposal on large and complex financial institutions that those institutions had not been covered by UNCITRAL's work to date for various reasons, such as the prevalence of special regulatory regimes which focus on the need to prevent systemic risk, ensure the safety of payment systems and protect depositors. It was suggested however, that the work undertaken by UNCITRAL was of direct relevance to the possible treatment of those institutions in the international context and that UNCITRAL was well placed to address the topic, particularly since it could involve in its deliberations parties with the relevant expertise and experience. A different view, however, was that UNCITRAL may not be the appropriate organization to undertake such work given the need to involve central banks and supervisory agencies and because work was already being undertaken by other regional and international organizations, including the IMF, the World Bank, the European Commission and the Basel Committee on Banking Supervision, as noted in A/CN.9/WG.V/WP.93, paragraphs 9-15. It was noted that the work of UNCITRAL had been cited in the work of some of those organizations and, on that basis, it was suggested that the Secretariat might be requested to monitor the development of that work with a view to reporting to the Working Group and the Commission, pursuant to its coordination function.

104. After discussion, the Working Group recommended that activity be initiated on two insolvency topics, both of which were of current importance and where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability. Those topics were:

(a) The United States proposal as described in paragraph 8 of A/CN.9/WG.V/WP.93/Add.1 to provide guidance on the interpretation and application of selected concepts of the Model Law relating to COMI and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention; and

(b) The proposals of the United Kingdom (set forth in document A/CN.9/WG.V/WP.93/Add.4), INSOL International (as set forth in document A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (as set forth in document A/CN.9/582/Add.6) concerning the responsibility and liability of directors and officers in insolvency and pre-insolvency cases.

105. The Working Group was of the view that work should begin in 2010 because of the current circumstances facing many States as a result of the global financial crisis and the divergent approaches taken by national laws to those issues. The Working Group was also of the view that the proposal documents, together with existing comparative studies and publications would provide a sufficient basis for initiating this activity in 2010.

106. The Working Group recommended that it be given the flexibility to make recommendations to the Commission regarding the scope of its future work and the

form it should take and to determine the manner in which the work might be organized and proceed.

107. The Working Group agreed that other proposals that had received support should be referred for the consideration of the Commission.

**D. Note by the Secretariat on the treatment of enterprise groups
in insolvency, submitted to the Working Group on Insolvency
Law at its thirty-eighth session
(A/CN.9/WG.V/WP.92 and Add.1-2)**

[Original: English]

I. General features of enterprise groups

**II. Addressing the insolvency of enterprise groups: domestic
issues**

1. This note sets forth the draft commentary and recommendations of part three of the UNCITRAL Legislative Guide on Insolvency Law. The commentary and recommendations are revised versions of the text previously included in documents A/CN.9/WG.V/WP.90 and Addenda 1, revised on the basis of the Report of Working Group V on the work of its thirty-seventh session in November 2009 (A/CN.9/686).

2. A/CN.9/WG.V/WP.92 addresses the treatment of enterprise groups in the domestic context, while A/CN.9/WG.V/WP.92/Add.1 addresses the international context. A/CN.9/WG.V/WP.92/Add.2 is provided for the information and consideration of the Working Group. It includes some explanatory notes that are intended to explain revisions made to the draft recommendations, to facilitate discussion and to raise questions for consideration by the Working Group; it is not intended that the content of A/CN.9/WG.V/WP.92/Add.2 would form part of the text of part three of the Legislative Guide.

UNCITRAL Legislative Guide on Insolvency Law

Part three: Treatment of enterprise groups in insolvency

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Part three

Treatment of enterprise groups in insolvency

Introduction to part three

1. Part three focuses on the treatment of enterprise groups in insolvency. Where an approach different to that taken in part two might be required with respect to a particular issue as it affects an enterprise group or where the treatment of enterprise groups in insolvency raises issues additional to those discussed in part two, they are addressed in this part. Where the treatment of an issue in the context of an enterprise group is the same as discussed above, it is not repeated in this part. The substance of part two is therefore applicable to enterprise groups unless indicated otherwise in this part.

2. Chapter I addresses general features of enterprise groups. Chapter II deals with the insolvency of group members in a domestic context and proposes a number of recommendations to supplement the recommendations of part two, in so far as

additional issues arise by virtue of the group context. Chapter III addresses the cross-border insolvency of enterprise groups, building upon the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law), which is relevant to cross-border insolvency proceedings with respect to an individual group member, but does not address issues pertinent to the insolvency of different group members in different States and upon the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the Practice Guide).

Purpose of part three

3. The purpose of this part is to permit, in both domestic and cross-border contexts, treatment of the insolvency proceedings of one or more enterprise group members within the context of the enterprise group to address the issues particular to insolvency proceedings involving those groups and to achieve a better, more effective result for the enterprise group as a whole and its creditors and, in particular:

- (a) To promote the key objectives of recommendation 1; and
- (b) To more effectively address, in the context of recommendation 5, instances of cross-border insolvency proceedings involving enterprise group members.

Glossary

4. The following additional terms relate specifically to enterprise groups and should be read in conjunction with the terms and explanations included in the main glossary above.

- (a) “Enterprise group”: two or more enterprises that are interconnected by control or significant ownership;
- (b) “Enterprise”: any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;¹
- (c) “Control”: the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;
- (d) “Procedural coordination”: coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct;²

¹ Consistent with the approach adopted with respect to individual debtors, the focus of this part is upon the conduct of economic activities by entities that would conform to the types of entities described as an “enterprise”. It is not intended to include consumers or other entities of a specialized nature (e.g. banks and insurance companies) that would not be governed by insolvency law pursuant to recommendations 8 and 9 (see above, footnote 6 to recommendation 9). The special considerations arising from the insolvency of such debtors are not specifically addressed in the *Legislative Guide* (see above, part two, chap. I, paras. 1-11).

² The concept of procedural coordination is explained in detail in the commentary, see below paras. 22-25.

(e) “Substantive consolidation”: the treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate.³

I. General features of enterprise groups

A. Introduction

1. Most jurisdictions recognize the legal concept of “corporation”, an entity which has a legal personality separate from the individuals comprising it, whether as owners, managers, or employees. As a legal or juristic person, a corporation is capable of enjoying and being subject to certain legal rights, duties and liabilities, such as the capacity to sue and be sued, to hold and transfer property, to sign contracts and to pay taxes. The corporation also enjoys the characteristic of perpetuity, in the sense that its existence continues, independent of its members at any given time and over time, and shareholders can transfer their shares without affecting the entity’s corporate existence. Corporations may also have limited liability, whereby investors will only be liable for the amount they have intentionally put at risk in the enterprise, providing certainty and encouraging investment; without that limitation, investors would put their entire assets at risk for every business venture they entered into. A corporation depends on a legal process to obtain its legal persona and once formed, will be subject to the regulatory regime applying to entities so formed. That law generally will determine not only the requirements for formation, but also the consequences of formation, such as the powers and capacities of the company, the rights and duties of its members and the extent to which members may be liable for the company’s debts. The corporate form can thus be seen as promoting certainty in the ordering of business affairs, as those dealing with a corporation know that they can rely upon its legal personality and the rights, duties and obligations that attach to it.

2. The business of corporations is increasingly conducted, both domestically and internationally, through “enterprise groups”. The term “enterprise group” covers different forms of economic organization based upon the single entity and for a working definition may be loosely described as two or more legal entities (group members) that are linked together by some form of control (whether direct or indirect) or ownership (see below). The size and complexity of enterprise groups may not always be readily apparent, as the public image of many is that of a unitary organization operating under a single corporate identity.

3. Enterprise groups have been in existence for some time, emerging in some countries, according to commentators, at the end of the 19th and beginning of the 20th centuries through a process of internal expansion, which involved companies taking control of their own financial, technical or commercial capacities. These single entity enterprises then expanded externally to take legal or economic control of other corporations. Initially these other corporations may have been in the same market, but eventually the expansion encompassed corporations working in related fields and later in fields that were different or unrelated, whether by reference to a

³ For the effects of substantive consolidation and the treatment of security interests, see below, recommendations 224 to 225 and the commentary at chap. II, paras. 129-133.

product or geographical location or both. One of the factors supporting this expansion, at least in some jurisdictions, was the legitimatization of ownership of the shares of one corporation by another corporation, a phenomenon originally prohibited in both common law and civil law systems.

4. Throughout this expansion, corporations retained and continue to retain, their separate legal personality even though individual corporations are now probably the typical form of organization only for small private businesses. Enterprise groups are ubiquitous in both emerging and developed markets, with a common characteristic of operations across a large number of sometimes unrelated industries, often with family ownership in combination with varying degrees of participation by outside investors. The largest economic entities in the world include not only States, but also equal numbers of multinational enterprise groups. Major multinational groups may be responsible for significant percentages of Gross National Product worldwide and have annual growth rates and turnovers that exceed those of many States.

5. Despite the reality of the enterprise group, however, much of the legislation relating to corporations and particularly to their treatment in insolvency, deals with the single corporate entity. Despite the absence of legislation, judges and insolvency representatives in many countries, faced with issues that may better be addressed by reference to a single enterprise rather than a single corporate entity,⁴ have developed solutions to achieve results that more accurately reflect the economic reality of modern business.

B. Nature of enterprise groups

6. Enterprise group structures may be simple or highly complex, involving numbers of wholly or partly owned subsidiaries, operating subsidiaries, sub-subsidiaries, sub-holding companies, service companies, dormant companies, cross directorships, equity ownership and so forth. They may also involve other types of entity, such as special purpose entities (SPE),⁵ joint ventures,⁶ offshore trusts,⁷ income trusts⁸ and partnerships.

⁴ The distinction is discussed further below, see E, paras. 31-39.

⁵ Special purpose entities (SPE, also known as a “special purpose vehicle” or “bankruptcy-remote entity”) are created to fulfil narrow or temporary objectives, such as the acquisition and financing of specific assets, primarily to isolate financial risk or enhance tax efficiency. An SPE is typically a subsidiary owned almost entirely by the parent corporation; certain jurisdictions require that another investor own at least 3 per cent. Its asset and liability structure and legal status generally makes its obligations secure even if the parent becomes insolvent. The corporation establishing the SPE can accomplish its purpose without having to carry any of the associated assets or liabilities on its own balance sheet, thus they are “off-balance sheet.” SPEs may also be used for competitive reasons to ensure intellectual property, such as for the development of new technology, is owned by a separate entity that is not affected by pre-existing licence agreements.

⁶ A joint venture is often a contractual arrangement or partnership between two or more parties to pursue a joint business purpose. Such an arrangement may sometimes result in the formation of one or more legal entities that may involve both parties contributing equity, and sharing in the revenues, expenses, and control of the enterprise. The venture could be for one specific project only, or a continuing business relationship. Joint ventures are widely used in an international context, as some countries require foreign corporations to form joint ventures with a domestic partner in order to enter a market. This requirement often results in technology and managerial

7. Enterprise groups may have a hierarchical or vertical structure, with succeeding layers of parent and controlled companies, which may be subsidiaries or other types of affiliated or related companies, operating at different points in a production or distribution process. Vertical integration generally takes place within a single industry and combines, for example, some or all of the sequential operations between the sourcing of raw materials and sale of the final product. It can be pursued as a strategy by acquiring suppliers, wholesalers, and retailers to increase control and reliability. It can also be achieved when a company gains strong control over suppliers or distributors, usually by exercising purchasing power. One example of vertical integration that is often cited is the oil industry, where the large oil groups conduct exploration and crude recovery, transport and refining, and retail distribution and sale of fuel.

8. Enterprise groups may also have a horizontal structure, with many sibling group members, often with a high degree of cross-ownership, operating at the same level in a particular process, for example in book publishing, where one publisher might acquire others in order to increase its range of editors and authors or to otherwise enhance its competitiveness or the media industry, where one group may own multiple media outlets running the same or very similar content. Horizontal integration is generally associated with control of a single stage of production or a single industry, enabling the group to take advantage of economies of scale, but horizontally integrated groups may also conduct businesses in a related field or in a diverse range of unrelated fields. It has been suggested that horizontal groups are more common in some parts of the world, such as Europe, while vertical groups are more common in others, such as the USA and Japan. Additionally, vertical integration might be more common in manufacturing, while horizontal integration is more common in marketing.

9. The research literature on enterprise groups clearly shows that they can be based on different types of alliances such as bank relationships, interlocking board directorates, owner alliances, information sharing, joint ventures, and cartels. The research also shows that enterprise group structures vary across corporate

control being transferred to the domestic partner. Forming a joint venture might assist in spreading costs and risks; improving access to financial resources; providing economies of scale and advantages of size; and facilitating access to new technologies and customers or to innovative managerial practices. It may also serve competitive and strategic goals such as influencing structural evolution of an industry; pre-empting competition; creating stronger competitive units; and facilitating transfer of technology and skills, as well as diversification.

⁷ An offshore trust is a conventional trust that is formed under the laws of an offshore jurisdiction. They are similar in nature and effect to onshore trusts, involving a transfer of assets to a trustee to manage for the benefit of a person or class of persons. Offshore trusts may be formed for tax purposes or asset protection. In practice the effectiveness of such trusts may be limited if the insolvency law of the home jurisdiction of the person transferring the assets operates to set aside transfers to the trusts, and transactions entered into to defraud creditors. An income trust is an investment trust holding income-producing assets. It may also refer to a legal entity, capital structure and ownership vehicle for certain assets or businesses. Its shares or trust units are traded on securities exchanges and income is passed on to the investors or unit holders, through monthly or quarterly distributions.

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governance systems. In some States, they may be organized either vertically or horizontally and develop across industries. They generally include a bank, a parent or holding company⁹ (referred to as “parent company”) or a trading company, and a diverse group of manufacturing firms. In contrast, in other States such groups are typically controlled by a single family or a small number of families and are uniformly vertically organized or have strong ties to the State, but not to particular families. Degrees of diversification also vary considerably, with some groups involving significant intra-group trading and others not.¹⁰

10. The degree of financial and decision-making autonomy in enterprise groups can vary considerably. In some groups, members may be active trading entities, with primary responsibility for their own business goals, activities and finances. In others, strategic and budgetary decisions may be centralized, with group members operating as divisions of a larger business and exercising little independent discretion within the cohesive economic unit. A parent company may exercise close control by allocating equity and loan capital to group members through a central group finance operation, deciding their operational and financial policies, setting performance targets, selecting directors and other key personnel, and continuously monitoring their activities. The power of the group may be centralized in the ultimate parent company or in a company further down the group chain, with the parent company owning the key group shares, but not having any direct productive or managerial role. The largest groups might have their own banks and perform the principal functions of a capital market. Group financing might involve intra-group lending between the parent company and subsidiaries, involving loans both from and to the parent company and the granting of cross-guarantees.¹¹ Intra-group lending might be working capital or unpaid short-term debt, such as unpaid dividends or credit in respect of intra-group trading; they may or may not involve the payment of interest.

⁹ A holding company or parent company is a company that directly or indirectly owns enough voting stock in another firm to control management and operations by influencing or electing its board of directors. The term may signify a company that does not produce goods or services itself, but whose purpose is to own shares of other companies (or own other companies outright).

¹⁰ Some research suggests that groups in Chile, for example, are more diverse than groups in South Korea, while groups in the Philippines are more vertically integrated than groups in India and far more involved in financial services than groups in Thailand. See T. Khanna and Y. Yafeh, *Business Groups in Emerging Markets: Paragons or Parasites?* *Journal of Economic Literature*, Vol. XLV (June 2007) pp. 331-372.

¹¹ In many countries a significant method of enterprise group capital raising is cross-guarantee financing, where each company within a group guarantees the performance of the others. Implementing cross-guarantee claims in liquidation has proved difficult in some jurisdictions and they have sometimes been set aside. In one jurisdiction, cross-guarantees may operate to reduce the regulatory burden on companies by bestowing accounting and auditing relief on companies that are party to the arrangement. The deed of cross-guarantee makes the group of companies that are party to that deed akin to a single legal entity in many respects and operates as a form of voluntary contribution or pooling in the event that one or more of the companies party to the deed goes into liquidation while the cross-guarantee is still operative. One advantage of this arrangement is that creditors and potential creditors can focus on the consolidated position for those entities, rather than on the individual financial statements of the wholly owned subsidiaries that are party to the deed.

11. In some States, family ties play an important connecting factor in enterprise groups. It may be the case, for example, that the more important family members and close associates of family members will sit on the board of the parent company of a group, with members of that board spread around the boards of group members so that there is a web of interlinked common directorships, enabling the family to maintain control over the group. For example, the chart of a large group in India shows a complex web of shared directorships between the board of the parent company and 45 other group members.¹²

12. In some countries, enterprise groups have enjoyed close ties to governments and government policies, such as those affecting access to credit and foreign currency and competition, which have significantly influenced the development of groups. Equally, there are examples where government policies have targeted the operations of enterprise groups, removing certain types of preferential treatment, such as access to capital.

13. The structure of many enterprise groups shows the dimension and potential complexity of the arrangements. They may involve many layers of different companies controlled to a greater or lesser extent by the level or levels above,¹³ in some cases involving hundreds if not thousands of different companies.

14. A study based upon the 1979 accounts and reports of a number of large British-based multinationals, for example, had to be abandoned with respect to two of the largest groups, with 1,200 and 800 subsidiaries respectively, because of the impossibility of completing the task. Researchers noted that few people inside the group could have had a clear understanding of the precise legal relationships between all group members and that none of the groups studied appeared to have its own complete chart.¹⁴ Similarly, the group charts of several Hong Kong property groups such as Carrian, which failed over 20 years ago, ran to several pages and a reader would have needed a good magnifying glass to identify the subsidiaries. The group chart of the Federal Mogul group, an automotive component supplier, when blown up to the point where you can read the names of all the subsidiaries, fills a wall of a small office. The group chart of Collins and Aikman, another automotive group, is printed in a book, with sub-sub-groups having the complexity of structure of many domestic enterprise groups.

15. The degree of integration of a group might be determined by reference to a number of factors, which might include the economic organization of the group (e.g., whether the administrative structure is arranged centrally or maintains the independence of the various members, whether subsidiaries depend on the enterprise group for financing or loan guarantees, whether personnel matters are

¹² See Khanna and Yafeh, note 10.

¹³ A 1997 survey in Australia of the Top 500 listed companies showed that 89 per cent of those companies controlled other companies; the greater the market capitalization of a listed company, the more companies it was likely to control (this ranged from an average of 72 controlled companies for those companies with the largest market capitalization to an average of 9 for the smallest); 90 per cent of controlled companies were wholly owned; the number of vertical subsidiary levels in an enterprise group ranged from 1 to 11, with an overall average of 3 to 4. In other countries the figures are much larger. Cited in Companies and Securities Advisory Committee (CASAC), Corporate Groups Final Report, 2000 (Australia), paragraph 1.2.

¹⁴ Hadden, *Inside Corporate Groups*, 1984 *International Journal of Sociology of Law*, 12, pp. 271-286, at 273.

handled centrally, the extent to which the parent makes key decisions on policy, operations and budget and the extent to which the businesses of the group are integrated vertically or horizontally); how the group manages its marketing (e.g., the importance of intra-group sales and purchases, the use of common trademarks, logos and advertising programmes and the provision of guarantees for the products); and the public image of the group (e.g., the extent to which the group presents itself as a single enterprise and the extent to which the activities of the constituent companies are described as operations of the group in external reports, such as those for shareholders, regulators and investors).

16. The legal structure of a group as a number of separate legal entities is not necessarily determinative of how the business of the group is managed. While each group member is a separate entity, management may be arranged in divisions along product lines and subsidiaries may have one or many product lines with the result that they fall across different divisions. In some cases, management may treat wholly owned subsidiaries as if they were branches of the parent company.

C. Reasons for conducting business through enterprise groups

17. Diverse factors shape the formation, operation and evolution of enterprise groups, ranging from legal and economic factors to societal, cultural, institutional and other norms. State leadership, inheritance customs, kinship structures (including inter-generational considerations), ethnicity and national ideology, as well as the level of development of the legal (e.g., effectiveness of contract enforcement) and institutional framework supporting commercial activity may influence enterprise groups in different environments. Some studies suggest that group structures can make up for under-developed institutions, with consequent benefits for transaction costs.

18. The advantages of conducting business through an enterprise group structure may include reduction of commercial risk and maximization of financial returns, by enabling the group to diversify its activities into various types of businesses, each operated by a separate group company. One company may acquire another to expand and increase market power, at the same time preserving the acquired company and continuing to operate it as a separate entity to utilize its corporate name, goodwill and public image. Expansion may occur to acquire new, technical or management skills. Once formed, groups may continue to exist and proliferate because of the administrative costs associated with rationalizing and liquidating redundant subsidiaries.

19. A group structure may enable a group to attract capital to only part of its business without forfeiting overall control, by incorporating that part of the business as a separate subsidiary and allowing outside investors to acquire a minority shareholding in it. A group structure may enable a group to lower the risk of legal liability by confining high liability risks, such as environmental and consumer liability, to particular group members, thus isolating the remaining group assets from this potential liability. Better security for debt or project financing may be facilitated by moving specific assets into a separate member incorporated for that purpose, thus ensuring that the lender has a first priority over the whole or most of the new member's property. A separate group member may also be formed to

undertake a particular project and obtain additional finance by means of charges over its own assets and undertaking or may be required for the purpose of holding a government license or concession. A group structure can simplify the partial sale of a business as it may be easier, and sometimes more tax effective, to transfer the shares of a group member to the purchaser, rather than sell discrete assets. A group may also be formed incidentally when a company acquires another company, which in turn might be a parent company for various other companies.

20. Meeting regulatory requirements may be easier where the companies subject to those requirements are separate group members. In the case of multinational groups, the domestic law of particular countries in which the group wishes to conduct business may require that local businesses be conducted through separate subsidiaries (sometimes subject to minimum local equity requirements) or impose other requirements or limitations, relating for example to employment and labour regulation. Arrangements not involving equity have been used for foreign expansion because of, for example, local obstacles to equity participation, the level of regulation imposed upon foreign investment operations and the relative cost advantages of those types of arrangement. Another relevant factor for multinational groups may be geographical imperatives, such as the need to acquire raw materials or to market products through a subsidiary established in a particular location. A related consideration of increasing importance that perhaps relates more to where parts of the groups structure are to be located than to the question of whether or not to organize a business through a group structure, is the importance of local law on issues such as the cost and simplicity of incorporation in the first instance, obligations of incorporated entities and treatment of the group in insolvency. Differences in law across jurisdictions can significantly complicate these issues.

21. Other key drivers for complicated group structures include fiscal considerations and their influence on the flow of money within groups. The incidence of tax is often cited as the reason for the formation of and subsequent growth of enterprise groups and many legal systems have traditionally given weight to the economic unity of related entities. While separate taxation of individual entities might be the underlying principle, it may be qualified to fulfil basic purposes such as protecting the revenue interests of governments and alleviating the tax burden that would otherwise result from the separate taxation of each group member.¹⁵ Measures that take into account the connections between parent and subsidiary companies include tax exemptions for intra-group dividends; group relief; and measures aimed at combating tax evasion. Tax exemptions may be available, for example, on the dividends paid by a company to its resident corporate shareholders and for intra-group dividends where companies are linked by substantial ownership. Tax credits may be allowed for the foreign tax paid on the underlying profits of the subsidiary and for the foreign tax that is charged directly on a dividend. Group relief might be available where related companies can be treated as a single fiscal unit and file consolidated accounts. The losses of one subsidiary may be offset against the income of another or profits and losses may be pooled amongst group members.

¹⁵ International Investment and Multinational Enterprises — Responsibility of parent companies and their subsidiaries, OECD, 1979.

22. As a result of the importance of fiscal considerations, inter-group pricing policies and national taxation rates and policies often determine the distribution of assets and liabilities within enterprise groups. Differential corporate tax rates across States, as well as certain exceptions (such as reduced tax rates for profits from manufacturing activities or financial services income) applicable in some States may make them more attractive locations than others that have higher tax rates and fewer or no exceptions. Nevertheless, tax authorities may have the right to revisit transfer-pricing structures aimed at locating profits in low taxation domiciles.

23. Choices such as between establishing a branch or a subsidiary might also be affected by fiscal regulation where, for example, repatriation of profits from a foreign subsidiary may be effected tax free by loan repayments to a parent company or may be tax free provided the parent owns a specified percentage (ranging from 5-20 per cent) of the foreign company's share capital; interest on funds borrowed to finance the acquisition of a subsidiary can be offset against their profits and as already noted, the profits and losses of different subsidiaries can be offset against each other in a consolidated tax return. Business activities have also been divided between two or more corporations to exploit tax allowances, limits imposed on the amounts of tax allowances or progressive rates of taxation. Other reasons might include: taking advantage of differences in accounting methods, taxable years, depreciation methods, inventory valuation methods and foreign tax credits; segregating activities that if combined in a single taxable entity, might be disadvantageous in fiscal terms; and taking advantage of favourable treatment for certain activities (e.g., anticipated or potential sales, mergers, liquidations or intra-family gifts or bequests) that is available for some operations, but not for others.

24. Accounting requirements also have a role to play in determining the structure of enterprise groups. In some jurisdictions, certain devices such as "agent only" subsidiaries might be created to manage certain aspects of the business and enable the parent company to avoid submitting detailed trading accounts for that subsidiary, which is just an agent of the parent company that owns all of the relevant assets.

25. Many of these benefits of conducting business through an enterprise group may be illusory. Protection against devastating losses may fall away as a result of group financing agreements; intra-group trading; cross-guarantees; and letters of comfort¹⁶ given to group auditors and the inclination of major creditors, and particularly bankers, to ensure that they have the indemnity of the top member in any group. To avoid doubt, group structures are not required from the accounting point of view — accountants are just as happy with consolidating branches as groups of subsidiaries. It seems probable that the banking, commercial and legal sectors often fail to appreciate the accounting aspects of enterprise groups.

¹⁶ A letter of comfort is generally provided by a parent company to persuade another entity to enter into a transaction with a subsidiary. It may include various types of undertaking, none of which would amount to a guarantee, which may include an undertaking to maintain its shareholding or other financial commitment to a subsidiary; using its influence to see that the subsidiary meets its obligation under a primary contract; or confirming that it is aware of a contract with the subsidiary, but without any express indication that it will assume any responsibility for the primary obligation.

D. Defining the “enterprise group” — ownership and control

26. Although the existence of enterprise groups and the importance of relationships between the group members are increasingly acknowledged, both in legislation and court decisions, there is no coherent body of rules that directly governs those relationships in a comprehensive manner. In jurisdictions where there is legislation that recognizes enterprise groups, it may not specifically deal with the regulation of such groups, by way of commercial or corporate legislation, but rather be contained in legislation on taxation, corporate accounting, competition and mergers or other issues; legislation addressing the treatment of enterprise groups in insolvency is rare. Furthermore, an analysis of legislation that does address aspects of enterprise groups reveals a diversity of approaches to the various issues associated with groups, not only between jurisdictions, but also on a comparison of the different legislation within a single jurisdiction. Thus different tests may apply to what constitutes a group for different purposes, although there may be common elements, and where those tests employ a particular concept, such as “control”, definitions may be broader or narrower, depending upon the purpose of the legislation, as noted above.

27. While much legislation avoids specifically defining the term “enterprise group”, several concepts are common to determining the relationships between companies that will be sufficient to constitute them as an enterprise group for certain specific purposes, such as extending liability, accounting purposes, taxation and so on. These concepts are found both in legislation and in numerous court decisions concerning groups in various countries and generally include aspects of ownership and ability to control or influence, both direct and indirect, although in some examples only direct ownership or ability to control or influence is considered. The choice between the two concepts often reflects a balance between the desirability of certainty, which can be achieved by setting a prescribed level of ownership, and flexibility, which might be better achieved by referring to the ability to control or influence and acknowledging the diverse economic realities of enterprise groups.

28. Some examples consider ownership by reference to a formal relationship between the companies, such as what constitutes a parent-subsidary relationship. This may be determined by reference to a formal standard, such as the holding, whether directly or indirectly, of a specified percentage of capital or votes. Examples of those percentages vary from as little as 5 per cent to more than 80 per cent. Those laws specifying lower percentages generally consider additional factors such as the ones discussed below as indicators of control or influence. In some examples, the percentages may establish a rebuttable presumption as to ownership, while higher percentages may establish a conclusive presumption.

29. Other examples of what constitutes an enterprise group adopt a more functional approach and focus on aspects of control, or controlling or decisive influence (referred to as “control”), where “control” is often a defined term. The key elements of control include actual control or capacity to control, either directly or indirectly, financial and operating policy and decision-making. Where the definition includes capacity to control, it generally envisages a passive potential for control, rather than focusing upon control that is actively exercised. Control may be obtained by ownership of assets, or through rights or contracts that give the

controlling party the capacity to control. What is important is not so much the strict legal form of the relationship, such as parent-subsidary, between the entities, but rather the substance of that relationship.

30. Factors that might indicate the existence of control of one entity by another could include: the ability to dominate the composition of the board of directors or governing body of the second entity; the ability to appoint or remove all or a majority of the directors or governing members of the second entity; the ability to control the majority of the votes cast at a meeting of the board or governing body of the second entity; and the ability to cast or regulate the casting of, a majority of the votes that are likely to be cast at a general meeting of the second entity, irrespective of whether that capacity arises through shares or options. Information that may be relevant to consideration of these factors might include: the group member's incorporation documents; details about the member's shareholding; information relating to substantive strategic decisions of the member; internal and external management agreements; details of bank accounts and their administration and authorized signatories; and information relating to employees.

E. Regulation of enterprise groups

31. Regulation of enterprise groups is generally based on one of two approaches or in some cases on a combination of the two: the separate entity approach (which is the traditional approach and by far the most prevalent) and the single enterprise approach.

32. The separate entity approach relies on several basic principles, foremost of which is the separate legal personality of each group company. It is also based upon the limited liability of shareholders of each group company and the duties of directors of each separate group entity to that entity.

33. The separate legal personality of a corporation generally means that it has its own rights and duties, irrespective of who controls it or owns it (i.e., whether it is wholly or partly owned by another company) or its participation in the activities of the enterprise group. The debts it incurs are its debts and the assets of the group generally cannot be pooled¹⁷ to pay for these debts. Contracts entered into with external persons do not automatically involve the parent company or other group members. A parent company cannot take into account the undistributed profits of other group companies in determining its own profits. Limited liability of a corporation means that unlike in a partnership or sole proprietorship, enterprise group members generally have no liability for the group's debts and obligations, with the result that potential losses cannot exceed the amount contributed to the group member by purchasing shares.

34. The single enterprise approach, in comparison, relies upon the economic integration of enterprise group members, treating the group as a single economic unit that operates to further the interests of the group as a whole, or of the dominant group member, rather than of individual members. Borrowing may be conducted on a group basis, with group treasury arrangements being used to offset the credit and debit balances of each group member; group members may be permitted to operate

¹⁷ See part three, chap. II, paras. 105-137 for a discussion of substantive consolidation.

at a loss, or be undercapitalized, as part of the overall group financial structure and strategy; assets and liabilities may be moved between group members in various ways; and intra-group loans, guarantees or other financial arrangements may be entered into on essentially preferential terms.

35. While many countries follow the separate entity approach, there are some countries that recognize exceptions to strict application of that approach and others that have developed, either by legislation or the courts, a single enterprise approach that applies to certain situations.

36. Some of the circumstances in which strict application of the separate entity approach has been overridden may include: consolidation of enterprise group accounts for a company and any controlled entity; related person transactions (where a company is otherwise prohibited from giving any financial benefit, including intra-group loans, guarantees, indemnities, releases of debt or asset transfers, to a related company unless that transaction is approved by shareholders or is otherwise exempt); cross-shareholding (where group members are generally prohibited from acquiring, or taking a security over, the shares of any controlling member or issuing or transferring their shares to any controlled member); and insolvent trading (where a parent company which ought to suspect the insolvency of a subsidiary can be made liable for the debts of that subsidiary incurred when it was insolvent).

37. A few countries have established various categories of enterprise groups that can operate as a single enterprise, in exchange for enhanced protection of creditors and minority shareholders. In one,¹⁸ enterprise group structures involving public companies are divided into three categories: (a) integrated groups; (b) contract groups; and (c) de facto groups, to which a set of harmonized single enterprise principles dealing with corporate governance and liability applies:

(a) Integrated groups are based upon a vote, by a specified proportion of shareholders of the parent company, which in turn owns a specified proportion of the shares of the subsidiary, to approve the complete integration of the subsidiary. The parent company will have unlimited power to direct the subsidiary, in return for the parent company being jointly and severally liable for the debts and obligations of the subsidiary;

(b) Contract groups can be formed by a specified proportion of shareholders of each of two companies entering into a contract that grants one company (the parent) the right to direct the other company, provided the directions are consistent with the interests of the parent company or the group as a whole. In return for giving the parent company the right of control, minority shareholders and creditors are given enhanced protection; and

(c) De facto groups are those where one company exercises, either directly or indirectly, a dominant influence over another company. Although not created by any formal arrangement, there must nevertheless be systematic involvement by the parent in the affairs of the controlled company.

¹⁸ Germany.

38. In one country¹⁹ where single enterprise principles have been introduced into corporate legislation, directors of wholly or partly owned subsidiaries may act in the interests of the parent company rather than their subsidiary company; there are provisions for streamlined group mergers; and legislation also permits contribution and substantive consolidation or pooling orders.

39. In another country,²⁰ commercial regulatory laws affecting enterprise groups increasingly use single enterprise principles to ensure that the policy underlying specific commercial legislation cannot be undermined or avoided by the use of enterprise groups. The courts have assisted in this development, selectively introducing the single enterprise concept to achieve the underlying policies of the legislation. The concept has been applied to insolvency law to avoid specified intra-group transactions, to support intra-group guarantees and in limited cases, to achieve substantive consolidation. The courts also have the power to alter the priority of claims in the liquidation of a group entity, either by treating some intra-group loans to that entity as equity rather than debt, or by subordinating intra-group loans to that entity to the claims of its external creditors.

II. Addressing the insolvency of enterprise groups: domestic issues

A. Introduction

1. Enterprise groups may be structured in ways that minimize the threat of insolvency to one or more group members, by entering into cross-guarantees, indemnities and similar types of arrangements. Where problems do arise, a parent or controlling group member may seek to avoid the insolvency of other group members in order to preserve its reputation and maintain its credit in commercial and financial spheres by providing additional finance and agreeing to subordinate intra-group claims to external liabilities.

2. However, if the complexity of an enterprise group's structure is disturbed by the onset of financial difficulty affecting one or more, or even all of the group members that leads to insolvency, problems arise simply because the group is constituted by members that are each recognized as having a separate legal personality and existence. Since, as noted above, the great majority of domestic insolvency and corporate laws do not address the insolvency of enterprise groups, even though group issues might be addressed outside the insolvency area in relation to accounting treatment, regulatory issues and taxation, the absence of legislative authority to the contrary or judicial discretion to intervene in insolvency means that each entity has to be separately considered and, if necessary, separately administered in insolvency. In certain situations, such as where the business activity of group members is closely integrated, that approach may not always achieve the best result for the individual debtor or for the business of the group as a whole, unless the parallel insolvency proceedings concerning all group members can be closely coordinated.

¹⁹ New Zealand.

²⁰ USA.

3. Much of what already exists in domestic law regarding the insolvency of enterprise groups concentrates on the circumstances in which it might be appropriate to consolidate insolvency estates. What is lacking is guidance on how the insolvency of enterprise groups should be addressed more comprehensively and, in particular, whether and in what circumstances enterprise groups should be treated differently from a single corporate entity.

4. A second key issue with respect to the treatment of enterprise groups in insolvency is the degree to which the group is economically and organizationally integrated and how that level of integration might affect treatment of the group in insolvency and in particular, the extent to which a highly integrated group should be treated differently to a group where individual members retain a high degree of independence. In some cases, where for example the structure of a group is diverse, involving unrelated businesses and assets, the insolvency of one or more group members may not affect other members or the group as a whole and the insolvent members can be administered separately. In other cases, however, the insolvency of one group member may cause financial distress in other members or in the group as a whole, because of the group's integrated structure, with a high degree of interdependence and linked assets and debts between its different parts. In those circumstances, it might often be the case that the insolvency of one or more group members would lead inevitably to the insolvency of all members (the "domino effect") and there may be some advantage in judging the imminence of the insolvency by reference to the group situation as a whole or coordinating that consideration with respect to multiple members.

B. Application and commencement

5. General considerations with respect to application for and commencement of insolvency proceedings are discussed above in part two, chapters I and II. Since those chapters apply equally to individual enterprise group members, they should be considered in conjunction with the additional issues specific to enterprise groups discussed below.

1. Joint application for commencement

(a) Background

6. As a general rule, insolvency laws respect the separate legal status of each enterprise group member and a separate application for commencement of insolvency proceedings is required to be made with respect to each of those members. Moreover, each of those members must be covered by the insolvency law (see recommendation 10) and satisfy the standard for commencement of insolvency proceedings (see recommendations 15 and 16). Some laws make provision for limited exceptions that allow a single application to be extended to other group members where, for example, all interested parties consent to the inclusion of more than one group member; the insolvency of one group member has the potential to affect other group members; the parties to the application are closely economically integrated, such as by intermingling of assets or a specified degree of control or ownership; or consideration of the group as a single entity has special legal relevance, especially in the context of reorganization plans.

7. The recommendations above concerning application for and commencement of insolvency proceedings apply to debtors that are enterprise group members in the same manner as they apply to debtors that are individual commercial enterprises. Recommendations 15 and 16 establish the standards for debtor and creditor applications for commencement of insolvency proceedings and form the basis upon which an application could be made for each group member that satisfied those standards.²¹ In the enterprise group context, the insolvency of a parent or controlling group member may affect the financial stability of a subsidiary or controlled member or the insolvency of a number of such members might adversely affect the solvency of others, so that insolvency is imminent across the group. That situation is covered by the terms of recommendation 15 if, at the time of applications by the insolvent group members, it could be said of the other group members that they are or will be generally unable to pay their debts as they mature.

(b) Purpose of a joint application

8. Permitting group members that satisfy the commencement standard to make a joint application for commencement of insolvency proceedings has the potential to improve efficiency and reduce costs by facilitating the coordinated consideration of those applications by the court, without affecting the separate identity of each of those group members or removing the need for each to individually satisfy the applicable commencement standard. It would also alert the court to the existence of a group, particularly if the application was accompanied by information substantiating the existence of the group and the relationship between the relevant group members and, where proceedings subsequently commenced on the basis of that joint application, would have the advantage of establishing a common commencement date for each insolvent group member. This common date could simplify compliance with time deadlines and the calculation of the suspect period for avoidance purposes.

9. Such a joint application might include, where permitted under the law and feasible in the circumstances, a single application covering all group members that satisfy the commencement standard or parallel applications made at the same time in respect of each of those members. The latter approach may be appropriate where the group members are not located in the same domestic jurisdiction and different courts have competence (as discussed below) or where other circumstances of the case, such as that there is a significant number of proceedings to be coordinated, suggest that a single application would not be practical. In both cases, it is desirable that the insolvency law facilitate the court undertaking a coordinated consideration of whether the commencement standards with respect to the individual group members are satisfied, taking into account the group context where relevant.

(c) Joint application and procedural coordination distinguished

10. The making of a joint application for commencement of insolvency proceedings should be distinguished from an application for what is referred to below as procedural coordination. The purpose of permitting a joint application is to facilitate coordination of commencement considerations and potentially reduce costs. Commencement of multiple proceedings on the basis of a joint application

²¹ In the case of an application by a debtor, recommendation 15 includes imminent insolvency.

should also facilitate coordination of those proceedings; the commencement date, and any other dates calculated by reference to that date, such as those relating to the suspect period, would be the same for each member. Permitting a joint application is not intended to predetermine, if the proceedings commence, how they would be administered and, in particular, whether they would be subject to procedural coordination. It is desirable, therefore, that an insolvency law does not establish a joint application as a prerequisite for procedural coordination. Nevertheless, a joint application for commencement might include an application for procedural coordination, as noted below, and might facilitate the court taking a decision on procedural coordination.

(d) Including a solvent group member in a joint application

11. A question that is often discussed in the group context is whether a solvent group member can be included in an application for commencement of insolvency proceedings with respect to insolvent group members and if so, in what circumstances. Where a group member appears to be solvent, but further investigation shows insolvency to be imminent, inclusion of that member in the application would be covered by recommendation 15, as noted above.

12. Where the question is not one of imminent insolvency and the group member is clearly solvent, different approaches may be taken. Where a group is closely integrated, an insolvency law may permit an application for commencement to include group members that do not satisfy the commencement standard, on the basis that it is desirable in the interests of the group as a whole that those members be included in the proceedings. Factors relevant to determining whether the necessary degree of integration exists might include: the relationship between the group members that is variously described, but involves, for example, a significant degree of interdependence or control; intermingling of assets; unity of identity, reliance on management and financial support or other similar factors that need not necessarily arise from the legal relationship (such as parent-subsidiary) between the group members. A further situation in which including a solvent group member in a joint application might be appropriate is where the existence of the “group” is fictitious. This might occur where, for example, the activities of the group are conducted as if they relate to a single entity and the existence of the group is a mere front for the activities of that single entity. It may also occur where members are so interlinked that there is really only one asset base and the legal separation between group members is not maintained, with management and creditors treating the different entities as if they were one and the same.

13. Such an approach may facilitate development of an insolvency solution for the whole group, avoiding piecemeal commencement of proceedings over time, if and when additional group members become affected by the insolvency proceedings initiated against the originally insolvent members. It could also facilitate the preparation of a comprehensive reorganization plan, covering the assets of both solvent and insolvent group members.

14. One of the problems with including a solvent group member, however, is that the insolvency law will generally only cover those entities properly regarded as satisfying the standard for commencement of insolvency proceedings. A solvent group member may, however, be voluntarily covered by a reorganization plan, where a commercial decision is taken by the board of directors or the management

of that member (in accordance with applicable law) that it should participate in the plan (see below, para. 152).

15. A joint application for commencement might also be permitted under some insolvency laws where all interested group members consent to the inclusion of one or more other members, whether they are insolvent or not, or all parties in interest, including creditors, so consent. It would generally be the case, however, that obtaining the consent of all creditors in such circumstances could prove to be very difficult and potentially time-consuming. An insolvency law might also consider whether a group member not involved at the time of commencement of insolvency proceedings with respect to other group members might later be joined in those proceedings if it is subsequently adversely affected by those proceedings or it is determined that its joinder would be in the interests of the group as a whole.

(e) Persons permitted to make a joint application

16. Consistent with the approach of recommendation 14, an insolvency law may permit a joint application to be made by two or more enterprise group members that satisfy the commencement standard of the insolvency law (see part two, chap. I, paras. 32-53). An application might also be made by a creditor with respect to any of the group members of which it is a creditor. Permitting a creditor to make an application with respect to group members of which it is not a creditor would be inconsistent with the commencement standard of recommendation 14.

(f) Competent courts

17. A joint application for commencement with respect to two or more enterprise group members may raise issues of jurisdiction, even in the domestic context, if those group members are located in different places and different courts potentially have jurisdiction over those individual group members and therefore competence to consider the application. This may occur, for example, in respect of a group operating nationally in States where jurisdiction for insolvency matters lies with courts in different places or applications for commencement may be made in different courts. Some laws may allow a joint application for commencement to be handled by a single court that will have jurisdiction over the individual group members included in the application.

18. Although that approach is desirable, it will ultimately be a question of whether domestic law permits joint applications involving different debtors (albeit members of the same group) in different jurisdictions or courts to be treated in such a way. In some States, proceedings in different courts may be transferred to or consolidated in a single court. Various criteria might be relevant, in such circumstances, to determining which court would be the most appropriate to handle such an application. It might, for example, be the court with competence to administer insolvency proceedings with respect to the parent or controlling member of a group, where that member is included in the application. Other criteria, such as the size of indebtedness of the various group members or the centre of control of the group might also be chosen to establish the prevailing competence of one court in the domestic setting. Creditors of different group members might also be located in different places, raising issues of representation and the location in which creditor committees would meet or be constituted.

19. Although the issue of which court is competent to consider a joint application for commencement where the subject group members are located in different domestic jurisdictions might be addressed by law other than the insolvency law, it is desirable that the approach of recommendation 13 be followed. This would require the insolvency law to clearly indicate, or include a reference to, the law that establishes the court with jurisdiction over such an application. Adoption of that approach should make it clear to all relevant parties where and how such an application can be pursued. This will be of particular importance where more than one court might have jurisdiction over individual group members.

20. Where a joint application is permitted under the insolvency law, there is the potential for cost savings where, for example, the same court is considering the commencement criteria with respect to a number of members of the same enterprise group at the same time. The fees payable and other associated procedural issues associated with an application for, and commencement of, insolvency proceedings may therefore merit reconsideration in the context of joint applications (see part two, chap. I, paras. 76-78).

(g) Notice of application

21. The recommendations above with respect to notification of an application for commencement of insolvency proceedings would apply to a joint application (see part two, chap. I, paras. 64-67). A joint application by a creditor should be notified to the group members that are the subject of the application in accordance with recommendation 19 (a). Where group members make a joint application, notice to creditors and other parties in interest would not be required until proceedings commenced on the basis of that application, in accordance with recommendation 22.

Recommendations 199-201

Purpose of legislative provisions

The purpose of provisions on joint application²² for commencement of insolvency proceedings with respect to two or more enterprise group members is:

- (a) To facilitate coordinated consideration of an application for commencement of insolvency proceedings with respect to those enterprise group members;
- (b) To enable the court to obtain information concerning the enterprise group that would facilitate determination of whether commencement of insolvency proceedings with respect to those group members should be ordered;
- (c) To promote efficiency and reduce the costs; and
- (d) To provide a mechanism²³ for the court to assess whether procedural coordination of those insolvency proceedings would be appropriate.

²² A joint application for commencement does not affect the legal identity of each group member included in the application; each member remains separate and distinct.

²³ A joint application is not a prerequisite for procedural coordination, but may facilitate the court's consideration of whether an order for procedural coordination should be made.

Contents of legislative provisions

Joint application for commencement of insolvency proceedings (para. 8)

199. The insolvency law may specify that a joint application for commencement of insolvency proceedings may be made with respect to two or more enterprise group members, each of which satisfies the applicable commencement standard.²⁴

Persons permitted to apply (para. 16)

200. [Where the insolvency law provides for joint applications in accordance with recommendation 199,] the insolvency law should specify that a joint application may be made by:

- (a) Two or more enterprise group members, each of which satisfies the applicable commencement standard in recommendation 15; or
- (b) A creditor, provided it is a creditor of each group member that satisfies the commencement standard in recommendation 16 and is to be included in the joint application.

Competent courts (paras. 17-19)

201. For the purposes of recommendation 13, the words “commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings” include a joint application for commencement of insolvency proceedings with respect to two or more enterprise group members.²⁵

2. Procedural coordination

(a) Purpose of procedural coordination

22. Procedural coordination is intended to promote procedural convenience and cost-efficiency and may not only facilitate comprehensive information being obtained on the business operations of the group members subject to the insolvency proceedings, but also assist the valuation of assets and the identification of creditors and others with legally recognized interests and avoid duplication of effort. Procedural coordination refers to what in practice may be varying degrees of coordination with respect to the conduct and administration of multiple insolvency proceedings commenced with respect to two or more enterprise group members involving, possibly, one or more courts. Although administered in a coordinated manner, the assets and liabilities of each group member involved in the procedural coordination remain separate and distinct, thus preserving the integrity and identify of individual group members and the substantive rights of claimants. Accordingly, the effect of procedural coordination is limited to administrative aspects of the

²⁴ See above, recommendation 15, which addresses debtor applications and recommendation 16, which addresses creditor applications for commencement.

²⁵ Recommendation 13 provides: The insolvency law should clearly indicate (or include a reference to the relevant law that establishes) the court that has jurisdiction over the commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings. The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, para. 18.

proceedings and does not touch upon substantive issues. The scope of an order for procedural coordination would generally be determined by the court in each case.

23. Multiple proceedings may be streamlined in various ways through an order for procedural coordination, facilitating sharing of information to obtain a more comprehensive evaluation of the situation of the various debtors; combining of hearings and meetings, including joint meetings of creditors; preparation of a single list of creditors and other parties in interest for the provision of notice and coordination of the provision of notice; establishment of joint deadlines; agreement on a joint claims procedure and coordinated realization and sale of assets; coordination of avoidance proceedings; and the holding of single creditor meetings or coordination among creditor committees. Streamlining may also be facilitated by the appointment of a single or the same insolvency representative to administer the insolvency proceedings or by ensuring coordination between insolvency representatives where two or more are appointed (see below, paras. 139-140). It may also involve cooperation between two or more courts or, when permitted by domestic law, administration of the multiple proceedings concerning group members in a single court.

24. Where two or more courts are involved, cooperation between them might include, for example, coordinating the holding of hearings and sharing and disclosure of information. As noted below with respect to cross-border cooperation (see chap. III, paras. 38-40), coordinated hearings may significantly promote the efficiency of parallel insolvency proceedings involving members of an enterprise group by bringing relevant stakeholders together at the same time to discuss and resolve outstanding issues or potential conflicts, thus avoiding protracted negotiations and resulting time delays. Such hearings would generally involve two or more courts holding hearings at the same time with provision for simultaneous communication so that parties can at least hear and preferably see the proceedings in each court. These hearings may be relatively more convenient to organize in a domestic setting, as they would not generally involve the challenges posed by different languages, time zones, laws, procedures and judicial traditions that may occur in the cross-border context. However, as in the international context, the conduct of such hearings might require the use of common procedures and agreement, for example, as to how filing of documents and submission of information is to be handled between different courts.

25. Various factors might be relevant to considering whether procedural coordination is appropriate in a particular case. These may relate, for example, to information substantiating the existence of the group and identifying the linkages between group members, including the position in the group of each member covered by the application, particularly where one of them was the controlling group member or parent. Although a requirement to provide such detail might be onerous in cases where creditors are permitted to apply for procedural coordination, the essence of the application is that the debtors are members of the same group and that procedural coordination will benefit the conduct and administration of insolvency proceedings. Accordingly, the court would need to be satisfied as to that relationship when determining whether proceedings should commence and procedural coordination should be ordered.

(b) Creditor participation

26. With respect to creditor participation, the interests of creditors of the different group members have the potential to diverge and it is unlikely that those interests could be represented in a single committee. It may be, however, that in cases of procedural coordination involving many group members, establishing a separate committee for the creditors of each member might prove to be extremely costly and inefficient for administration of the proceedings. For that reason, the courts in some States have the discretion not to establish a creditor committee for each separate entity in appropriate circumstances. Accordingly, the general principle may be that it is desirable that the insolvency law permit a single creditor committee to be established in suitable cases.

(c) Timing of application

27. 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. It is therefore desirable that an insolvency law adopt a flexible approach to the timing of an application for procedural coordination. An application might be made at the same time as an application for commencement of proceedings or at any subsequent time. However, since the goal of procedural coordination is to coordinate the administration of multiple proceedings, the feasibility of making an order at a late stage of the proceedings would be limited, in practice, by the usefulness of so doing. In other words, there may be little advantage in seeking to coordinate proceedings that are almost completed. Similarly, the time at which additional group members became insolvent would determine whether they could be added to an existing order for procedural coordination.

28. An insolvency law might adopt the approach of stipulating a time limit for applying for procedural coordination to provide a degree of certainty. However, as is generally the case with any consideration of the need for a time limit, the advantages of establishing such a limit must be weighed against the potential disadvantages of inflexibility and the need to ensure that the time limit is properly observed (see part two, chap. I, para. 60).

(d) Persons permitted to apply

29. It is desirable that procedural coordination be as widely available as possible and that the court be given the discretion to consider whether coordination of the various proceedings would advantage their administration. The court may consider whether to order procedural coordination on its own initiative, particularly to address situations where it is determined that procedurally coordinating the proceedings would be in the best interests of the enterprise group and facilitate administration, but no application for procedural coordination is forthcoming from a party authorized to do so. The court might also order procedural coordination in response to an application from authorized parties, such as any group member subject to insolvency proceedings, the insolvency representative of a member, who would generally possess the information most relevant for making such an application, or a creditor.

30. In the case of creditors, the eligibility limitation that applies with respect to an application for commencement of insolvency proceedings (recommendation 200 (b))

need not necessarily apply. Where the application for procedural coordination is made at the time of the application for commencement, the issue of commencement should be treated separately from that of procedural coordination, since the criteria required to satisfy each issue will generally be different. Once proceedings have commenced, there is no reason to limit the ability to make an application for procedural coordination to those creditors who are creditors of the group members to be coordinated, if procedural coordination will benefit the conduct and administration of the proceedings. Creditors of other group members might also apply; the decision to order procedural coordination should not be conditioned upon the status of the creditor applying.

(e) Competent courts

31. Procedural coordination may also raise the issues of jurisdiction noted above with respect to joint applications for commencement (see above, paras. 17-19), where different domestic courts have competence over the various group members subject to insolvency proceedings. In jurisdictions where those issues arise, they would generally be determined by reference to domestic procedural law. In some States, proceedings in different courts may be consolidated or transferred to a single court, for example, the court with competence to administer insolvency proceedings with respect to the parent of a group. A range of other criteria, such as priority of filing, size of indebtedness or centre of control, might also be chosen to establish the prevailing competence of one court in the domestic setting. A key element of consolidating or transferring proceedings to a single court would be establishing communication between the courts involved prior to that transfer. Creditors of different group members might also be located in different places, raising issues of representation and the location in which creditor committees would meet or be constituted.

32. Although these issues might be addressed by law other than the insolvency law, it is desirable, as noted above with respect to joint applications (see para. 19), that the approach of recommendation 13 be followed. That would require the insolvency law to clearly indicate or include a reference to the relevant law that establishes the court with jurisdiction over an application for procedural coordination.

(f) Notice with respect to procedural coordination

33. An application for procedural coordination could be subject to the same requirements for giving of notice as an application for commencement of proceedings (see recommendations 19, 22-24 and part two, chap. I, paras. 64-68). When made at the same time as the application for commencement of proceedings, only an application for procedural coordination by creditors would require notice to be given to the relevant debtors, consistent with recommendation 19.

34. An application made at that time by group members would not require creditors to be notified, consistent with recommendations 23-24, but relevant information, such as the content or implications of the order, could be included with the notice of commencement of proceedings.

35. When an application for procedural coordination is made subsequent to commencement of proceedings, it may be appropriate to provide notice to creditors, notwithstanding that procedural coordination does not affect their substantive rights.

The provision of notice may be particularly important where the law makes provision, as noted above, for cases commenced in different jurisdictions to be transferred to, or administered by, a single court and that transfer may affect procedural aspects of the proceedings of interest to creditors, such as the location of meetings of a creditor committee or the place for submission of claims.

36. Provision of notice to all creditors may be satisfied with collective notification, such as by notice in a particular legal publication, when domestic legislation so permits and when appropriate, for instance, in the case of a large number of creditors (see part two, chap. I, paras. 69-70). In addition to the information required by the recommendations above addressing provision of notice on commencement of proceedings (recommendation 25 and part two, chap. I, para. 71), notice of an order for procedural coordination might include the terms of the order and information relevant to, for example, coordination of hearings and meetings, and arrangements to be made with respect to post-commencement finance.

(g) Modifying or terminating an order for procedural coordination

37. Given that the purpose of procedural coordination is to promote administrative convenience and cost-efficiency, an insolvency law may include provisions relating to modification or reversal of an order for procedural coordination to accommodate changed circumstances. That approach might be appropriate when, for example, a coordinated reorganization is not successful and the individual members should be liquidated separately. Reversal of an order, although rarely required, should be possible as the initial order is not intended to affect substantive rights. As a safeguard, the insolvency law could provide that reversal or modification would be possible, provided it was without prejudice to vested rights and interests arising from the initial order.

Recommendations 202-210

Purpose of legislative provisions

The purpose of provisions on procedural coordination of insolvency proceedings with respect to two or more enterprise group members is:

- (a) To facilitate coordination of the administration of those insolvency proceedings, while respecting the separate legal identity of each group member; and
- (b) To promote cost-efficiency and a better return to creditors.

Contents of legislative provisions

Procedural coordination of two or more insolvency proceedings

202. The insolvency law should specify that the administration of insolvency proceedings with respect to two or more enterprise group members may be coordinated for procedural purposes.

203. The insolvency law should specify that, at the request of a person permitted to make an application under recommendation 206 or on its own initiative, the court²⁶ may order procedural coordination.

204. Procedural coordination may involve, for example, appointment of a single or the same insolvency representative; cooperation between the courts, including coordination of hearings; cooperation between insolvency representatives, including information sharing and coordination of negotiations; joint provision of notice; coordination of procedures for submission and verification of claims; and coordination of avoidance proceedings. The scope and extent of the procedural coordination should be specified by the court.

Application for procedural coordination

— *Timing of application*

205. The insolvency law should specify that an application for procedural coordination may be made at the same time as an application for commencement of insolvency proceedings or at any subsequent time.²⁷

— *Persons permitted to apply*

206. The insolvency law should specify that an application for procedural coordination may be made by:

- (a) An enterprise group member that is subject to an application for commencement of insolvency proceedings or subject to insolvency proceedings;
- (b) The insolvency representative of an enterprise group member; or
- (c) A creditor²⁸ of an enterprise group member that is subject to an application for commencement of insolvency proceedings or subject to insolvency proceedings.

Coordinating consideration of an application

207. The insolvency law should specify that the court²⁹ may take appropriate steps to coordinate with any other competent court consideration of an application for procedural coordination of insolvency proceedings concerning two or more enterprise group members. Those steps might involve, for example, coordinated proceedings; coordinated hearings; sharing and disclosure of information.

²⁶ Coordination might involve different courts competent with respect to different group members or a single court that is competent with respect to a number of different insolvency proceedings concerning members of the same group. Accordingly, an order for procedural coordination may require action by more than one court.

²⁷ The possibility of ordering procedural coordination at an advanced stage of the insolvency proceedings is discussed in the commentary; see above, para. 27.

²⁸ To be eligible to make an application for procedural coordination, a creditor does not have to be a creditor of all the group members in respect of which it is seeking procedural coordination.

²⁹ See recommendation 203, footnote 26 above.

Modification or termination of an order for procedural coordination

208. The insolvency law should specify that an order for procedural coordination may be modified or terminated, provided that any actions or decisions already taken pursuant to the order should not be affected by the modification or termination. Where more than one court is involved in ordering procedural coordination, those courts may take appropriate steps to coordinate modification or termination of the procedural coordination.

Competent courts

209. For the purposes of recommendation 13, the words “commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings” include applications and orders for procedural coordination of insolvency proceedings with respect to two or more enterprise group members.³⁰

Notice of procedural coordination

210. The insolvency law should establish requirements for giving notice with respect to applications and orders for procedural coordination and modification or termination of procedural coordination, including the scope and extent of the order; the parties to whom notice should be given; the party responsible for giving notice; and the content of the notice.

C. Treatment of assets on commencement of insolvency proceedings

38. The manner in which the commencement of insolvency proceedings affects the debtor and its assets is discussed in detail above in part two, chapter II. In general, those effects would apply equally to commencement of insolvency proceedings with respect to two or more enterprise group members. Some of the effects that might differ in the group context are discussed below, with respect to protection and preservation of the insolvency estate; post-application finance; use and disposal of assets; post-commencement finance; avoidance; subordination; and remedies, including substantive consolidation orders.

1. Protection and preservation of the insolvency estate**(a) Application of the stay to a solvent group member**

39. As noted above (see part two, chap. II, para. 26), many insolvency laws include a mechanism to protect the value of the insolvency estate that not only prevents creditors from commencing actions to enforce their rights through legal remedies during some or all of the period of insolvency proceedings, but also suspends actions already under way against the debtor. The recommendations relating to the application of that mechanism, referred to as a “stay”, would apply generally in the case of insolvency proceedings concerning two or more enterprise group members (see recommendations 39-51).

³⁰ The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, para. 18.

40. One issue that might arise in the context of the insolvency of enterprise groups, but not in the case of individual debtors, is the extension of the stay to an enterprise group member that is not subject to the insolvency proceedings (where the insolvency law permits a group member that is not insolvent to be included in the proceedings, this issue will not arise). The issue may be of particular relevance to enterprise groups because of the interrelatedness of the business of the group. For example, when finance 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 group members not subject to insolvency proceedings may also affect the assets and liabilities or the ability to continue their ordinary course of business of group members with respect to which applications for commencement have been made or insolvency proceedings have commenced.

41. Extension of the stay to include the solvent member might be sought in a number of situations, for example, to protect an intra-group guarantee that relies upon the assets of the solvent group member providing the guarantee; to restrain a lender from seeking to enforce an agreement against a solvent group member, where that enforcement might affect the liability of another member subject to an application for insolvency proceedings; and to restrain enforcement of a security interest against assets of a solvent member that are central to the business of the group, including the business of group members subject to an application for insolvency proceedings. Extension of the stay in these cases has the potential to affect the business of the solvent member and the interests of its creditors, depending upon the nature of the solvent member and its function within the group structure. The day-to-day activities of a trading group member, for example, may be more adversely affected than those of a group member established to hold certain assets or obligations.

42. In some States, ordering insolvency-related relief with respect to a solvent group member (not included in insolvency proceedings) might not be possible as it would conflict, for example, with the protection of property rights or raises issues of constitutional rights. Nevertheless, it might be possible to achieve the same effect if a court could order measures of protection in conjunction with the commencement of insolvency proceedings with respect to other enterprise group members in certain cases, such as where there is an intra-group guarantee. The measures may be available at the courts' discretion, subject to such conditions as the court determines appropriate.

43. These measures might be covered by recommendation 48, which provides for the court to grant relief in addition to any relief that might be applicable automatically on commencement of insolvency proceedings (as addressed in recommendation 46). As the footnote to recommendation 48 points out, that additional relief would depend upon the types of measures available in a particular jurisdiction and the measures that might be appropriate in a particular insolvency proceeding.

44. Measures might also be available on a provisional basis. Recommendation 39 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”.

45. Protection for the interests of the creditors, both secured and unsecured, of the solvent group member, might also be found in the relevant recommendations above. Recommendation 51, for example, specifically addresses the issue of protection of secured creditors and grounds for relief from the stay applicable on commencement and might be extended to secured creditors of the solvent group member. Other grounds for relief from the stay might relate to the financial situation of the solvent member and the continuing effect of the stay on its day-to-day operations and, potentially, its solvency.

46. Where a secured creditor is a member of the same enterprise group as the debtor or debtors, a different approach to the question of protection might be required, especially where the insolvency law permits substantive consolidation or subordination of related person claims (see below, paras. 84-88).

(b) Post-application finance

47. The discussion on post-commencement finance in part two, chapter II recognizes that the continued operation of the debtor’s business after the commencement of insolvency proceedings is critical to reorganization and, to a lesser extent, liquidation, where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services, including labour costs, insurance, rent, maintenance of contracts and other operating expenses, as well as costs associated with maintaining the value of assets.

48. The same need for finance also occurs in the period between the time an application for commencement of insolvency proceedings is made and commencement of those proceedings (referred to as post-application finance). When an enterprise group member becomes insolvent and makes an application for commencement of insolvency proceedings, that application often triggers an event of default under existing loan agreements, entitling the lender to discontinue advancing funds under those agreements. Where an insolvency law does not provide for automatic commencement of insolvency proceedings upon application, it can often take a period of several months between the making of an application and the commencement of the proceedings, during which time, the courts must make an independent evaluation as to whether the debtors subject to the application meet the statutory criteria to commence proceedings. However, if the group member is to continue as a going concern while this determination is being made, it must be able to continue to conduct its business, pay its employees, pay its suppliers and generally continue its day-to-day activities. The availability or lack of financing during this interim period can determine or significantly influence whether reorganization will ultimately be a viable option or whether liquidation will be required. Where the business of the insolvent group member is closely related to that of other group members, its ability to keep operating may affect the solvency of those other members and ultimately, depending upon its position in the group hierarchy, the solvency of the group as a whole.

49. As noted above (part two, chap. II, para. 96), in the absence of enabling or clarifying treatment in the insolvency law, the provision of finance in this period

before commencement of the insolvency proceedings may raise difficult questions relating to the application of avoidance powers and the liability of both the lender and the debtor. Some insolvency laws provide, for example, that where a lender advances funds to an insolvent debtor in the period before commencement of proceedings, the lender may be responsible for any increase in the liabilities of other creditors or the advance may be subject to avoidance in any ensuing insolvency proceedings as a preferential transaction.

50. The existence of a provision under the insolvency law enabling finance to be obtained for the period of time between the making of an application and the commencement of the proceedings would provide the necessary authorization and give any existing or new lender the assurance and incentive necessary to provide additional financing to cover that period.

51. As noted above (see para. 44), recommendation 39 permits the court to order provisional measures to preserve the assets of the debtor prior to the commencement of insolvency proceedings. Since those measures could include authorizing post-application finance, the provision of that finance should therefore be regarded as being within the purview of recommendation 39.

2. Use and disposal of assets

52. It is noted above (see part two, chap. II, para. 74) that, although as a general principle it is desirable that an insolvency law not interfere unduly with the ownership rights of third parties or the interests of secured creditors, the conduct of insolvency proceedings will often require assets of the insolvency estate, and assets in the possession of the debtor being used in the debtor's business, to continue to be used or disposed of (including by way of encumbrance) in order to enable the goal of the particular proceedings to be realized.

53. Where insolvency proceedings concern two or more enterprise group members, issues may arise with regard to the use of assets belonging to a group member not subject to insolvency proceedings to support ongoing operations of those members subject to such proceedings, pending resolution of the proceedings. Where those assets are in the possession of one of the group members subject to insolvency proceedings, recommendation 54, which addresses the use of third-party owned assets in the possession of the debtor, may be sufficient.

54. Where those assets are not in the possession of any of the group members subject to insolvency proceedings, recommendation 54 generally will not apply. There may be circumstances, however, where the solvent group member in possession of those assets is included in the insolvency proceedings or the provisions of a group reorganization plan should cover the assets (see below, para. 152, for a discussion of the inclusion of a solvent group member in a reorganization plan). Where the solvent group member is not included in the proceedings, the question will be whether those assets can be used to support group members subject to insolvency proceedings and if so, the conditions to which that use would be subject. The use of those assets might raise questions of avoidance, particularly where the supporting member subsequently became insolvent, and also raises concerns for creditors of that member.

3. Post-commencement finance

(a) The need for post-commencement finance

55. The discussion on post-commencement finance above in part two, chapter II (see paras. 94-95), recognizes that the continued operation of the debtor's business after the commencement of insolvency proceedings is critical to reorganization and, to a lesser extent, liquidation where the business is to be sold as a going concern. To maintain its business activities, the debtor must have access to funds to enable it to continue to pay for crucial supplies of goods and services, including labour costs, insurance, rent, maintenance of contracts and other operating expenses, as well as costs associated with maintaining the value of assets. It is also noted, however, that many jurisdictions restrict the provision of new money in insolvency or do not specifically address the issue of new finance or the priority for its repayment in insolvency. Of those laws that do address post-commencement finance, very few, if any, specifically address the issue in the context of enterprise groups.

56. Post-commencement finance may be even more important in the group context than it is in the context of individual insolvency proceedings. If there are no ongoing funds there is very little prospect of reorganizing an insolvent enterprise group or selling all or parts of it as a going concern. The economic impact of that failure is likely to be much greater, especially in large groups, than it would be in the case of an individual debtor. The reasons for promoting the availability of post-commencement finance in the group context are therefore similar to the case of the individual debtor, although a number of issues different to those relating to the individual debtor are likely to arise. These issues may include: balancing the interests of individual enterprise group members with what is required for the reorganization of the group as a whole; provision of post-commencement finance by solvent group members, especially in cases where issues of control might arise (such as where that solvent member is controlled by the insolvent parent of the group); treatment of transactions between group members that are essentially related parties (see glossary, para. (jj)); provision of finance by group members subject to insolvency proceedings; and the desirability of maintaining, in insolvency proceedings, the financing structure that the group had before the onset of insolvency, especially where that structure involved pledging all of the assets of the group for finance that was channelled through a centralized group entity with treasury functions.

57. The use of post-commencement finance in the group context will involve consideration of the desirability and impact of that financing not only for the group member receiving the benefit of the finance but also the group member providing the finance or facilitating its provisions by way of a security interests or guarantee. Where that consideration involves more than one insolvency representative, coordination and agreement between them will be crucial. Where only one insolvency representative is appointed to administer several group members, potential conflicts of interest connected with post-commencement finance will need to be considered and addressed.

(b) Sources of post-commencement finance in a group context

58. As noted above in part two, chapter II (see para. 99), post-commencement finance is likely to come from a limited number of sources. In the enterprise group

context, that might include sources both external and internal to the group, where internal sources might include both solvent group members and group members already subject to insolvency proceedings. While some of the incentives for providing post-commencement finance might be the same for internal and external lenders, internal lenders may have the added inducement of their own survival where they are to be part of a reorganization.

(i) *Provision of post-commencement finance by a solvent group member*

59. As noted above, one of the questions with respect to post-commencement finance in the enterprise group context is whether the assets of a solvent group member can be used, for example, as the basis for granting a security interest or providing a guarantee, to obtain financing for an insolvent member from an external source or to fund the insolvent member directly and, if so, the implications for the recommendations concerning priority and security. A solvent group member might have an interest in the financial stability of the parent, other group members or the group as a whole in order to ensure its own financial stability and the continuation of its business, particularly where it is closely integrated with or reliant upon insolvent members for ongoing business activity. This may commonly occur, for example, in a vertically integrated manufacturing group. Different types of solvent entities, such as special purpose entities with few liabilities and valuable assets, might be involved in different ways in the insolvency of other group members, such as by granting a guarantee or security interest to secure new finance for insolvent group members.

60. However, use of the assets of a solvent group member in that way, especially where that solvent member is likely to become, or subsequently becomes, insolvent, raises a number of questions. While the solvent entity might provide that finance on its own authority under relevant company law and not under the insolvency law, the consequences of that provision of finance ultimately may be regulated by the insolvency law. Questions may arise, for example, as to: whether a solvent group member would be entitled to the priority provided by recommendation 64 if it provided funding to an insolvent group member; whether the claim arising from that transaction would be subject to special treatment because it occurred between related parties pursuant to recommendation 184; or whether such a transaction might be considered a preferential transaction and thus subject to avoidance in any subsequent insolvency of the member providing the finance. Under some laws, providing such finance may be prohibited as constituting a transfer of the assets of a solvent entity to an insolvent entity to the detriment of the creditors and shareholders of the solvent entity.

61. Some of the difficulties associated with provision of finance by a solvent group member might be solved if addressed in the context of a reorganization plan, in which the solvent group member, as well as external finance providers, could participate on a contractual basis. While there might be situations in which that approach would be appropriate, the requirement for post-commencement finance at any early stage of the insolvency proceedings suggests it is likely to be of limited application. In reorganization proceedings, for example, such finance would generally be required before a reorganization plan could be negotiated and approved. Where the business was to be sold as a going concern there would be no

reorganization plan, but finance might nevertheless be required to maintain the business prior to a sale.

(ii) *Provision of post-commencement finance by an insolvent group member*

62. Provision of post-commencement finance by one group member subject to insolvency proceedings to another such member is not directly addressed elsewhere in the *Guide*. Some of the general prohibitions under existing laws associated with insolvent entities borrowing and lending funds may need to be further considered to facilitate provision of post-commencement finance in that situation. The policy rationale for those prohibitions is likely to be clearly evident when both the lender and the borrower are not only insolvent and subject to insolvency proceedings, but also members of the same enterprise group. The group context may also raise concerns with respect to the duties and obligations of the insolvency representatives, when the insolvency representative of one insolvent group member seeks to facilitate the provision of post-commencement finance to another insolvent group member and the insolvency representative of the second group member to obtain that post-commencement finance. In those cases, it is desirable that the insolvency law address both the providing and receiving sides of the post-commencement finance.

63. While it may generally be expected that a group member subject to insolvency proceedings would not have the ability to provide post-commencement finance to another such member or to provide support for its provision, there may be circumstances, albeit potentially limited, where it would be both possible, and desirable, particularly when the interests of the enterprise group are considered as a whole. To the extent that the provision of such finance has an impact on the rights of existing creditors, both secured and unsecured, of both group members, it is desirable that it be balanced against the prospect that preservation of going concern value by the continued operation of the business will ultimately provide benefit to those creditors. A balance might also be desirable between sacrificing one group member for the benefit of other members and achieving a better overall result for all members. Although potentially difficult to achieve, the goal might be fair apportionment of any harm that arises from such post-commencement finance in the short term with a view to the long term gain, rather than the sacrifice of one member (and its creditors) for the benefit of others involved in the post-commencement finance.

(c) **Addressing the provision and receipt of post-commencement finance in the group context**

64. Recommendations 63-68 aim to promote the availability of finance for continued operation or survival of the debtor's business and ensure appropriate protection for the providers of post-commencement finance, as well as for other parties whose rights may be affected by the provision of post-commencement finance. In the enterprise group context, these recommendations would apply to the provision of post-commencement finance to group members subject to insolvency proceedings by lenders external to the group and solvent members of the group.

65. Recommendation 63 establishes the basis for obtaining post-commencement finance (that the insolvency representative determines it to be necessary for the continued operation or survival of the business of the debtor or the preservation or

enhancement of the value of the estate) and its authorization (by the court or by creditors). Those requirements remain relevant in the context of enterprise groups and for the avoidance of doubt, recommendation 63 should be interpreted as including a group member subject to insolvency proceedings that obtains post-commencement finance from either an external lender or a solvent member of the same group. What recommendation 63 does not address is a group member subject to insolvency proceedings providing post-commencement finance directly to another group member subject to insolvency proceedings or facilitating its provision by way of security interest or guarantee or the receipt of such finance by the insolvent group member.

66. To parallel the requirements of recommendation 63 and address the group member providing the finance, it might be desirable to require the insolvency representative of that providing group member to determine that the provision of the post-commencement finance is necessary for the continued operation or survival of the business of that group member or the preservation or enhancement of the value of its estate. An additional requirement might be that any harm to creditors of the providing group member must be offset by the benefit to be derived from the granting of the security interest.

67. Consistent with recommendation 63, the insolvency law might also require the court to authorize or creditors of the providing group member to consent to the post-commencement finance. Given that new finance may be required on a fairly urgent basis to ensure the continuity of the business, it is desirable that the number of authorizations required be kept to a minimum. The advantages and disadvantages of the different considerations with respect to authorization that would also apply in the group context are discussed above (see part two, chap. II, paras. 105-106). It may be added that since the issues to be determined are likely to be more complex in that context, involving as they do a larger number of parties and complex interrelationships, it is most likely to be the insolvency representatives of the relevant group members who will be in the best position to assess the impact of the proposed financing arrangement, in much the same way as they are with respect to determining the need for new finance under recommendation 63. If the involvement of the courts or creditors is considered desirable, however, it should be borne in mind that issues of delay may be encountered where there are a large number of creditors to be consulted or where the court does not have the ability to make speedy decisions.

(d) Conflict of interest

68. The provision of finance in the group context raises issues concerning possible prejudice and conflict of interest that are not relevant in the case of a single debtor. A conflict of interest might arise, for example, in balancing the interests of the group as a whole against the potentially different interests of the lender and the receiver of post-commencement finance. A particular concern might arise where a single or the same insolvency representative is appointed to administer the insolvency proceedings of a number of group members. The insolvency representative of the member providing the finance might also be the insolvency representative of the receiving member and will be required to assess the interests of each member individually, as well as the interests of the group. That situation might be addressed in several ways in the insolvency law, such as by requiring court or

creditor approval of the post-commencement finance as suggested by recommendation 63 or by appointing one or more additional insolvency representatives to ensure the interests of the creditors of the different group members are protected (see below paras. 144). The appointment might be for the time required to address that specific conflict or on more general terms for the duration of the proceedings.

69. There is also the question of whether an insolvent group member might, as part of the financing arrangements of the enterprise group as a whole, be requested to guarantee finance provided to a solvent group member as part of the ongoing financial arrangements of the group. Since the provision of that guarantee is likely to constitute a disposal of the assets of the insolvent group member, it would probably be covered by the recommendations addressing that issue (see recommendations 52-62).

(e) Priority for post-commencement finance

70. Recommendation 64 specifies the need to establish the priority to be accorded to post-commencement finance and the level of that priority, i.e. ahead of ordinary unsecured creditors, including those with administrative priority, and would apply in the group context where post-commencement finance is provided to a group member by an external lender. In that situation, according priority continues to provide an important incentive for the provision of such financing. However, the inducement required for the provision of post-commencement finance to a group member subject to insolvency proceedings by another group member is perhaps slightly different.

71. The particular interest of a group member providing finance may relate more to the insolvency outcome for the group as a whole (including that member), than to commercial considerations of profit or short-term gains, especially where there is a high degree of integration or reliance between the businesses of the group members. In those circumstances, it might be necessary to consider whether the level of priority accorded by recommendation 64 would be appropriate. One view might be that that level of priority provides appropriate incentive for the provision of finance and affords appropriate protection to the creditors of the provider, irrespective of whether the provider is external or internal to the group. Another view might be that because the transaction involves related persons in a group context, it is desirable to accord a lower priority to protect the interests of creditors more generally and achieve a balance between the interests of the finance provider's creditors and those of the group member receiving the finance. Whichever approach is adopted, it is desirable that the insolvency law accords priority to such lending and specifies the appropriate level.

(f) Security for post-commencement finance

72. Recommendations 65-67 address issues relating to the granting of security for post-commencement finance and generally would be applicable in the enterprise group context. A group member subject to insolvency proceedings may grant a security interest of the type referred to in recommendation 65 to secure post-commencement finance it has obtained for its own use. That situation is clearly covered by recommendations 65-67. A group member subject to insolvency proceedings may also grant a security interest of the type referred to in

recommendation 65 to secure repayment of post-commencement finance provided to another group member subject to insolvency proceedings. In the latter situation, the group member is granting the security over its unencumbered assets, but is not directly receiving the benefit of the post-commencement finance and is potentially diminishing the pool of assets available to its creditors. It may, however, derive an indirect benefit when the provision of the finance facilitates a better solution for the insolvency of the group as a whole and, as noted above, any short-term detriment is offset by the long-term gain for creditors, including its own creditors. The member receiving the finance is deriving a direct benefit, but increasing its indebtedness to the potential detriment of its creditors, although they should also benefit in the longer term.

73. Where it is considered desirable to accord a security interest granted to secure new finance a priority ahead of an existing security interest over the same asset, as contemplated by recommendation 66, the safeguards applicable under that recommendation and recommendation 67 would apply in the group context.

(g) Guarantee or other assurance of repayment for post-commencement finance

74. The granting of a guarantee by one group member for payment of new finance to another is not a situation that arises in the case of an individual debtor and is therefore not addressed elsewhere in the *Guide*. However, since the considerations that arise are similar to those discussed above with respect to the granting and obtaining of a security interest, it may be appropriate to adopt the same approach with respect to the determinations to be made by the insolvency representatives of both the granting and obtaining group members and the possible authorization by the court or consent of creditors.

Recommendations 211-216

Purpose of legislative provisions

The purpose of provisions on post-commencement finance in the context of enterprise groups is:

(a) To facilitate finance to be obtained by enterprise group members subject to insolvency proceedings for the continued operation or survival of their business or the preservation or enhancement of the value of their assets;

(b) To facilitate the provision of finance by enterprise group members, including group members subject to insolvency proceedings;

(c) To ensure appropriate protection for the providers and receivers of post-commencement finance and for those parties whose rights may be affected by the provision of that finance; and

(d) To advance the objective of fair apportionment of the benefit and detriment associated with the provision of post-commencement finance among all group members involved.

Contents of legislative provisions*Post-commencement finance provided by a group member subject to insolvency proceedings to another group member subject to insolvency proceedings*

211. The insolvency law should permit an enterprise group member subject to insolvency proceedings to:

- (a) Advance post-commencement finance to other enterprise group members subject to insolvency proceedings;
- (b) Grant a security interest over its assets for post-commencement finance provided to another enterprise group member subject to insolvency proceedings; and
- (c) Provide a guarantee or other assurance of repayment for post-commencement finance provided to another enterprise group member subject to insolvency proceedings.

212. The insolvency law should specify that post-commencement finance may be provided in accordance with recommendation 211, where the insolvency representative of the group member advancing finance, granting a security interest or providing a guarantee or other assurance:

- (a) Determines it to be necessary for the continued operation or survival of the business of that enterprise group member or for the preservation or enhancement of the value of the estate of that enterprise group member; and
- (b) Determines that any harm to creditors of that group member is [will be] offset by the benefit to be derived from advancing finance, granting a security interest or providing a guarantee or other assurance.

213. The insolvency law may require the court to authorize or creditors to consent to the advance of finance, grant of a security interest or provision of a guarantee or other assurance in accordance with recommendations 211 and 212.

Post-commencement finance obtained by a group member subject to insolvency proceedings from another group member subject to insolvency proceedings

214. The insolvency law should specify that in accordance with recommendation 63, post-commencement finance may be obtained from an enterprise group member subject to insolvency proceedings by another group member subject to insolvency proceedings where the insolvency representative of the receiving group member determines it to be necessary for the continued operation or survival of the business of that group member or for the preservation or enhancement of the value of its estate. The insolvency law may require the court to authorize or creditors to consent to the obtaining of that post-commencement finance.

Priority for post-commencement finance

215. The insolvency law should specify the priority that applies to post-commencement finance provided by one enterprise group member subject to insolvency proceedings to another group member subject to insolvency proceedings.

Security for post-commencement finance

216. The insolvency law should specify that recommendations 65, 66 and 67 apply to the granting of a security interest in accordance with recommendation 211 (b).

4. Avoidance proceedings**(a) Nature of enterprise group transactions**

75. Recommendations 87-99 relating to avoidance would generally apply to avoidance of transactions in the context of an enterprise group, although additional considerations may apply to transactions between group members because of the group structure and the different relationships that group members may have to each other. 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. As noted above (part two, chapter II, para. 155), that cost associated with avoidance proceedings must be weighed against the likelihood of recovering assets and the overall benefit to the estate in the circumstances of each case. 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 an enterprise group, where the benefits and detriments of transactions might be more widely assigned. Those transactions, for example, contracts entered into for purposes of transfer pricing³¹ may involve terms and conditions that are different to those included in similar contracts entered into by unrelated commercial parties on usual commercial terms. Similarly, some legitimate transactions occurring within an enterprise group may not be commercially viable outside the group context if the benefits and detriments were to be analysed on normal commercial grounds.

76. Intra-group transactions may represent a range of different activities. They may include: trading between group members; channelling of profits upwards from one group member to a controlling group member; loans from one member to another to support continued trading by the borrowing member; asset transfers and guarantees between group members; payments by one group member to a creditor of a related group member; or a guarantee or mortgage given by one group member to support a loan by an external lender to another group member. 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 interests or benefit of the group member to which they belong. This might include sweeping cash from some group members into the financing group member. Although this might not always be in the best interests of the individual group members, some laws permit directors of wholly owned group members, for example, to act in that manner, provided it is in the best interests of the controlling group member.

³¹ Transfer pricing refers to the pricing of goods and services within a multidivisional organization. Goods from the production division may be sold to the marketing division, or goods from a parent company may be sold to a foreign subsidiary. The choice of the transfer prices affects the division of the total profit among the parts of the company. It can be advantageous to choose them so that, in terms of bookkeeping, most of the profit is made in a country with low taxes.

(b) Avoidance criteria in the enterprise group context

77. An issue that may need to be considered in the group context is the goal of avoidance provisions. It could be to protect intra-group transactions in the interests of the group as a whole, on the basis that they are normal “ordinary course” business transactions or it could be to subject them to particular scrutiny and a greater likelihood of avoidance because of the relationship between transacting parties as group members and the provisions of the insolvency law applicable to related person transactions. “Related person” is defined to include enterprise group members such as a parent, subsidiary, partner or affiliate of the insolvent group member with respect to which insolvency proceedings have commenced or a person, including a legal person, that is or has been in control of the debtor (glossary, para. (jj)).

78. In some cases, a stricter regime may be justified on the basis that related persons are more likely to be favoured and, because they tend to have the earliest knowledge of when a particular group member is, in fact, in financial difficulty, they also have a greater opportunity to take advantage of that situation. Assets may, for example, be transferred from the distressed group member to other group members to enable those assets to continue to be used in the group context and avoid them being subject to any insolvency proceedings. Moreover, group members may have common shareholders and directors that control transactions between group members or have the ability to determine operational and financial policy decisions. Such situations have the potential to render intra-group transactions more vulnerable to avoidance than where they occurred between unrelated parties. The mere existence of the enterprise group, however, may not always provide sufficient justification to treat all intra-group transactions as transactions between related persons that should be subject to avoidance, as noted above (part two, chap. V, para. 48).

79. Therefore, while 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, other transactions may not be so clearly within the scope of that recommendation and may need to be carefully examined to determine where the associated benefits and detriments actually lie. These transactions may raise issues concerning the extent to which the group was operated as a single enterprise or the assets and liabilities or activities of group members were closely intermingled, thus potentially affecting the nature of the transactions between members and between members and external creditors. There may be transactions that are intra-group transactions because they cannot be conducted in other ways or because they result from the manner in which the group is structured. In some situations, for example, finance may only be available on an intra-group basis and there would be no justification to treat such a transaction more strictly than if it involved an external lender. Similarly, a group may involve centralized cash flow and transfers of cash, as noted above, that would not occur where there was no group. In the situation of intra-group guarantees described above with respect to post-commencement finance, the provider of a guarantee may not derive direct benefit from the finance provided, but rather indirect benefit because they might be dependent upon the borrowing entity in the context of the activities of the group (e.g. as a supplier of component parts in a manufacturing business or a provider of intellectual property) or for some other group related reason. In

considering such intra-group transactions, it will be desirable for the court to be able to take the group context into account and consider factors such as those mentioned above.

80. There may also be transactions occurring in a group context 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. For these reasons, it is desirable that an insolvency law consider those issues in the group context and include group-related factors as matters to be taken into account in determining whether a particular transaction between group members would be subject to avoidance under recommendation 87.

81. Recommendation 97 addresses the elements to be proven to avoid a particular transaction and defences to avoidance. It may be appropriate to consider how those elements would apply in the group context and whether a different approach is required. One approach to the burden of proof in the case of transactions with related persons, for example, might be to provide that the requisite intent or bad faith is deemed or presumed to exist where certain types of transactions are undertaken within the suspect period and the counterparty to the transaction will have the burden of proving otherwise. Some laws, for example, have established a rebuttable presumption that certain transactions among group members and the shareholders of that group would be detrimental to creditors and therefore subject to avoidance. A different approach would be to acknowledge that, as noted above, transactions occurring within a group, although not always commercially viable if occurring outside the group context, are generally legitimate, especially when occurring within the limits of relevant applicable law and within the ordinary course of business of the group members concerned. Such a transaction might nevertheless be subjected to special scrutiny in much the same way as is recommended for claims by related persons in recommendation 184, an approach followed by some laws that also permit the rights of related group members under intra-group debt arrangements to be deferred or subordinated to the rights of external creditors of the insolvent members.

82. Recommendation 93 makes limited provision for a creditor to commence an avoidance proceeding with the approval of the insolvency representative or leave of the court. In the group context, it may be desirable to maintain the same approach, even though it may prove difficult in practice. The level of integration of the group may have the potential to significantly affect the ability of creditors to identify the group member with which they dealt and thus provide the requisite information for commencing avoidance proceedings.

Recommendations 217-218

Purpose of legislative provisions

The purpose of avoidance provisions as among enterprise group members is to provide, in addition to the considerations set forth in recommendations 87-99, that the insolvency law may permit the court to take into account that the transaction took place in the context of an enterprise group and establish the circumstances that may be considered by the court.

Contents of legislative provisions

Avoidable transactions

217. The insolvency law should specify that, in considering whether a transaction of the kind referred to in recommendation 87 (a), (b) or (c) that took place between enterprise group members or between an enterprise group member and other related persons should be avoided, the court may have regard to the circumstances in which the transaction took place. Those circumstances may include: the relationship between the parties to the transaction; the degree of integration between enterprise group members that are parties to the transaction; the purpose of the transaction; whether the transaction contributed to the operations of the group as a whole; and whether the transaction granted advantages to enterprise group members or other related persons that would not normally be granted between unrelated parties.

Elements of avoidance and defences

218. The insolvency law should specify the manner in which the elements referred to in recommendation 97 would apply to avoidance of transactions in the enterprise group context.³²

5. Subordination

83. It is noted above (see part two, chap. V, para. 56) that subordination refers to a rearranging of creditor priorities in insolvency and does not relate to the validity or legality of the claim. Notwithstanding the validity of a claim, it might nevertheless be subordinated because of a voluntary agreement between creditors, where one creditor agrees to subordinate its claim to that of the other creditor or by a court order, as the result, for example, of improper conduct by a creditor or related party of the debtor, in which case the claim might be subordinated to the claims of all other creditors. Two types of claims that typically may be subordinated in insolvency are those of persons related to the debtor and of owners and equity holders of the debtor, both of which are relevant in the enterprise group context.

(a) Related person claims

84. In the group context, subordination of related person claims might mean, for example, that the rights of group members under intra-group arrangements could be deferred to the rights of external creditors of those group members subject to insolvency proceedings.

85. As explained, the term “related person” would include enterprise group members. However, the mere fact of a special relationship with the debtor, including, in the group context, membership of the same enterprise group, may not be sufficient in all cases to justify special treatment of a creditor’s claim, especially since to do so can in turn disadvantage the creditors of that creditor. In some cases, those claims will be entirely transparent and should be treated in the same manner as similar claims made by creditors who are not related persons; in other cases, they may give rise to suspicion and will deserve special attention. An insolvency law may need to include a mechanism to identify those types of conduct or situation in

³² 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.

which claims will deserve additional attention. Similar considerations apply, as noted above, with respect to avoidance of transactions occurring between enterprise group members.

86. A number of situations in which special treatment of a related person's claim might be justified (e.g., where the debtor is severely undercapitalized and where there is evidence of self-dealing) are identified in part two, chapter V, para. 48 and would generally be relevant in the group context. Additional considerations might include, as between a controlling and a controlled group member: the controlling member's participation in the management of the group member; whether the controlling member has sought to manipulate intra-group transactions to its own advantage at the expense of external creditors; or whether the controlling member has otherwise behaved unfairly, to the detriment of creditors and shareholders of the controlled group member. Examples of unfair behaviour might include the imposition of excessive management or consulting fees or dividend policies designed to strip the controlled group member of its funds. Under some laws, the existence of those circumstances might result in the controlling member having its claims subordinated to those of unrelated unsecured creditors or even minority shareholders of the controlled group member.

87. Some laws include other approaches to intra-group transactions such as permitting debts owed by a group member that borrowed funds under an intra-group lending arrangement to be involuntarily subordinated to the rights of external creditors of that borrowing member; permitting the court to review intra-group financial arrangements to determine whether particular funds given to a group member should be treated as an equity contribution rather than as a loan, where the law subordinates equity contributions to creditor claims (on treatment of equity, see below); and allowing voluntary subordination of intra-group claims to those of external creditors.

88. The practical result of subordination in an enterprise group context might be to reduce or effectively extinguish any repayment to those group members whose claims have been subordinated if the claims of secured and unsecured external creditors are large in relation to the funds available for distribution. In some cases this might threaten the viability of the subordinated group member and be detrimental not only to its own creditors, but also its shareholders and, in the case of reorganization, to the group as a whole. The adoption of a policy of subordinating such claims may also have the effect of discouraging intra-group lending.

(b) Treatment of equity

89. Many insolvency laws distinguish between the claims of owners and equity holders that may arise from loans extended to the debtor or their ownership interest in the debtor (see above, part two, chap. V, para. 76). With respect to claims arising from equity interests, many insolvency laws adopt the general rule that the owners and equity holders of the business are not entitled to a distribution of the proceeds of assets until all other claims that are senior in priority have been fully repaid (including claims of interest accruing after commencement). As such, these parties will rarely receive any distribution in respect of their interest in the debtor. Where a distribution is made, it would generally be made in accordance with the ranking of shares specified in the company law and the corporate charter. Debt claims, such as those relating to loans, however, are not always subordinated.

90. Few insolvency laws specifically address subordination of equity claims in the enterprise group context. One law that does, allows the courts to review intra-group financial arrangements to determine whether particular funds given to a group member subject to insolvency proceedings should be treated as an equity contribution, rather than as an intra-group loan, enabling it to be postponed behind creditors' claims. Those funds are likely to be treated as equity where the original debt to equity ratio was high before the funds were contributed and the funds would reduce the ratio; if the paid-up share capital was inadequate; if it is unlikely that an external creditor would have made a loan in the same circumstances; and if the terms on which the advance was made were not reasonable and there was no reasonable expectation of repayment.

91. Subordination is discussed above in the context of treatment of claims and priorities, but the *Guide* does not recommend the subordination of any particular types of claims under the insolvency law, simply noting that subordinated claims would rank after claims of ordinary unsecured creditors (recommendation 189).³³

D. Remedies

92. Because of the nature of enterprise groups and the way in which they operate, there may be a complex web of financial transactions between group members, and creditors may have dealt with different members or even with the group as a single economic entity, rather than with members individually. Disentangling the ownership of assets and liabilities and identifying the creditors of each group member may involve a complex and costly legal inquiry. However, because adherence to the separate entity approach means that each group member is only liable to its own creditors, it may become necessary, when insolvency proceedings have commenced with respect to two or more group members, to disentangle the ownership of assets and liabilities.

93. When this disentangling can be effected, adherence to the separate entity principle operates to limit creditor recovery to the assets of the specific group member of which they are creditors. Where it cannot be affected or other specified reasons exist to treat the group as a single enterprise, some laws include remedies that allow the single entity approach to be set aside. Historically, these remedies have been developed to overcome the perceived inefficiency and unfairness of the traditional separate entity approach in specific group cases. In addition to setting aside intra-group transactions or subordinating intra-group lending, the remedies may include: the extension of liability for external debts to solvent group members, as well as to office holders and shareholders; contribution orders; and pooling or substantive consolidation orders. Some of these remedies require findings of fault to be made, while others rely upon the establishment of certain facts with respect to the operations of the enterprise group. In some cases, particularly where misfeasance of management is involved, other remedies might more appropriately be employed, such as removing the offending directors and limiting management participation in reorganization.

³³ See also the UNCITRAL Legislative Guide on Secured Transactions.

94. Because of the potential inequity that may result when one group member is forced to share assets and liabilities with other group members that may be less solvent, remedies setting aside the single entity approach are not universally available, generally not comprehensive and apply only in restricted circumstances. Those remedies involving extension of liability may involve “piercing” or “lifting the corporate veil”, which may result in shareholders, who are generally shielded from liability for the enterprise’s activities, being held liable for certain activities. The remedies discussed below do not involve lifting the corporate veil, although in some circumstances the effect may appear to be similar.

1. Extension of liability

95. Extending the liability for external debts and, in some cases, the actions of the group members subject to insolvency proceedings to solvent group members and relevant office holders is a remedy available under some laws to individual creditors on a case-by-case basis and depends upon the circumstances of that creditor’s relationship with the debtor.

96. Many laws recognize circumstances in which exceptions to the limited liability of corporate entities are available and one group member and relevant office holders could be found liable for the debts and actions of another group member. Some laws adopt a prescriptive approach and the circumstances are strictly limited; other laws adopt a more expansive approach, giving the courts broad discretion in evaluating the circumstances of a particular case on the basis of specific guidelines. In both cases, however, the basis for extending liability beyond the insolvent group member is the relationship between that group member and related group members in terms of both ownership and control. A further relevant factor may be the conduct of the related group member with respect to the creditors of the member subject to insolvency proceedings.

97. Whilst there are different formulations of the circumstances in which liability might be extended, examples generally fall into the following categories, although it should be noted that not all laws reflect all of these categories and to some extent they may overlap:

(a) Exploitation or abuse by one group member (perhaps the parent) of its control over another group member, including operating that group member continually at a loss in the interests of the controlling group member;

(b) Fraudulent conduct by the dominant shareholder, which might include fraudulently siphoning off a group member’s assets or increasing its liabilities, or conducting the affairs of the group member with intent to defraud creditors;

(c) Operating a group member as the parent or controlling group member’s agent, trustee or partner;

(d) Conducting the affairs of the group or of a group member in such a way that some classes of creditors might be prejudiced (for example, incurring liabilities to employees of one group member);

(e) Artificial fragmentation of a single enterprise into several different entities for the purposes of insulating the single enterprise from potential liabilities; failure to follow the formalities of treating group members as separate legal entities, including disregarding the limited liability of group members or confusing personal

and corporate assets; or where the enterprise group structure is a mere sham or facade, such as where the corporate form is used as a device to circumvent statutory or contractual obligations;

(f) Inadequate capitalization of an entity, so that it does not have an adequate capital basis for carrying out its operations. This may apply at the time of establishment, or be the result of depletion of the capital by way of refunds to shareholders or by shareholders drawing more than distributable profits;

(g) Misrepresentation of the real nature of the enterprise group, leading creditors to believe that they are dealing with a single enterprise, rather than with a member of a group;

(h) Misfeasance, where any person, including a group member, can be required to compensate for any loss or damage to another group member arising from fraud, breach of duty or other misfeasance, such as actions causing significant injury or environmental damage;

(i) Wrongful trading, where directors, including shadow directors of a group member have a duty to monitor, for example, whether that group member can properly continue carrying on business in the light of its financial condition and are required to apply for insolvency within a specified period once it has become insolvent. Permitting or directing a group member to incur debts when it is or is likely to become insolvent would fall into this category; and

(j) Failing to observe regulatory requirements, such as keeping regular accounting records of a subsidiary or controlled group member.

98. Generally, the mere incidence of control or domination of a group member by another group member, or other form of close economic integration within an enterprise group, is not regarded as sufficient reason to justify disregarding the separate legal personality of each group member and piercing the corporate veil.

99. In a number of the examples where liability might be extended to the controlling group member, that liability may include the personal liability of the members of the board of directors of the controlling group member (who may be described as *de facto* or shadow directors). While directors of an individual group member may generally owe certain duties to that group member, they may be faced with balancing those duties against the overall commercial and financial interests of the group. Achieving the general interests of the group, for example, may require that the interests of individual members be sacrificed in certain circumstances. Some of the factors that might be relevant to determining whether directors of a controlling group member will be personally liable for the debts or actions of a controlled group member subject to insolvency proceedings include: whether there was active involvement in the management of the controlled group member; whether there was grievous negligence or fraud in the management of the insolvent group member; whether the management of the controlling group member could be in breach of duties of care and diligence or there was abuse of managerial power; or whether there was a direct relationship between the management of the controlled group member and its insolvency. In some jurisdictions, directors may also be found criminally liable. One of the principal difficulties with extending liability in such cases is proving the behaviour in question to show that the controlling group member was acting as a *de facto* or shadow director.

100. There are also laws that provide for a controlling group member or parent to accept liability for debts of controlled group members or subsidiaries by contract, especially where the creditors involved are banks, or by entering into voluntary cross-guarantees. Under other laws, which provide for various forms of integration of enterprise groups, the principal group member can be jointly and severally liable to the creditors of the integrated group members, for liabilities arising both before and after the formalization of the integration.

2. Contribution orders

101. A contribution order is an order by which a court can require a solvent group member to contribute specific funds to cover all or some of the debts of other group members subject to insolvency proceedings, particularly where the solvent group member had acted inappropriately towards the insolvent group member. Such inappropriate behaviour might include, for example, transferring the assets of a failing group member to another group member for an inadequate price or one group member taking the benefit of tax advantages accruing to a failing group member and leaving the creditors of the failing member to a reduced payout in a subsequent insolvency. Allowing that inappropriate behaviour to occur without a remedy could result in detriment to the creditors of the insolvent group member and a windfall to the shareholders of the solvent member.

102. Although contribution orders are not widely available under insolvency laws, a few jurisdictions have adopted or are considering adopting these measures, generally only in liquidation proceedings. A number of the issues that contribution orders are designed to address, however, may not require specific provisions to be included in the insolvency law, as remedies may already exist under other laws, such as those addressing liability and wrongful trading.

103. The most common difficulty in deciding whether to make a contribution order is balancing the interests of the shareholders and unsecured creditors of the solvent group member with the unsecured creditors of the group member in liquidation, particularly where the contribution order might affect the solvency of the former. Creditors of the solvent group member could argue that they had relied on the separate assets of that member when trading with it and should not be denied full payment of their claim because of the relationship of that solvent group member with, and behaviour towards, other group members. The difficulty of reconciling these different interests has meant that the power to make a contribution order is not commonly exercised. Courts have also taken the view that a full contribution order may be inappropriate if the effect is to threaten the solvency of the group member not already subject to insolvency proceedings, although it might be possible to order a partial contribution that is limited to certain assets, such as the balance remaining after meeting bona fide obligations.

104. Under laws that permit contribution orders, the court must take into account certain specified circumstances in considering whether to make an order. These concern the relationship between the solvent group member and the member subject to insolvency proceedings and include: the extent to which the solvent group member took part in the management of the insolvent group member; the conduct of the solvent group member towards the creditors of the insolvent member, although creditor reliance on the existence of a relationship between the group members is not sufficient grounds for making an order; the extent to which the circumstances

giving rise to the insolvency proceedings are attributable to the actions of the solvent group member; the conduct of a solvent group member after commencement of insolvency proceedings with respect to the insolvent group member, particularly if that conduct indirectly or directly affects the creditors of that group member, such as through failure to perform a contract involving the insolvent group member; and such other matters as the court thinks fit.³⁴ Such an order might also be possible, for example, in cases when the subsidiary or controlled group member had incurred significant liability for personal injury or the parent or controlling group member had permitted the subsidiary or controlled group member to continue trading whilst insolvent.

3. Substantive consolidation

(a) Introduction

105. As noted above, when procedural coordination is ordered, the assets and liabilities of the debtors remain separate and distinct, with the substantive rights of claimants unaffected. Substantive consolidation, on the other hand, permits the court, in insolvency proceedings involving two or more enterprise group members, to disregard the separate identity of each group member in appropriate circumstances and consolidate their assets and liabilities, treating them as though held and incurred by a single entity. The assets are thus treated as if they were part of a single estate for the general benefit of all creditors of the consolidated group members. Only a few jurisdictions provide statutory authority for substantive consolidation orders and in those where the remedy is available, it is subject to strict evidentiary rules and is not widely used. A principal concern is that consolidation overturns the principle of the separate legal identity of each group member, which is often used to structure an enterprise group to respond to various business considerations, serving different purposes and having important implications, in terms for example of taxation law, corporate law and corporate governance rules. If the courts routinely agreed to substantive consolidation, many of the benefits to be derived from the flexibility of enterprise structure could be undermined.

106. Notwithstanding the absence of direct statutory authority or a prescribed standard for the circumstances in which substantive consolidation orders can be made, the courts of some jurisdictions have played a direct role in developing these orders and delimiting the appropriate circumstances. While this practice may reflect increased judicial recognition of the widespread use of interrelated corporate structures for taxation and business purposes, the circumstances that would support a consolidation order are, nevertheless, very limited. They include situations where there is a high degree of integration of the operations and affairs of group members, through control or ownership, that would make it very difficult, if not impossible, to disentangle the assets and liabilities of the different group members to identify, for example, ownership of assets and the creditors of each group member, without expending significant time and resources that would ultimately hurt all creditors.

107. Consolidation is typically discussed in the context of liquidation and the legislation that authorizes it does so only in that context. There are, however, legislative proposals that would permit consolidation in the context of various types of reorganization. In jurisdictions without specific legislation, consolidation orders

³⁴ New Zealand Companies Act 1993, Sections 271 (1) (a) and 272 (1).

may be available in both liquidation and reorganization, where such an order would, for example, assist the reorganization of the group. While typically requiring a court order, consolidation may also be possible on the basis of consensus of the relevant interested parties. Some commentators suggest that consolidation by consensus frequently occurs in cases involving enterprise groups, and often in situations where the courts would generally uphold creditor objections to consolidation if a formal application were to be made. Substantive consolidation may also be possible by way of a reorganization plan. Some laws permit a plan to include proposals for a debtor to be consolidated with other group members, whether insolvent or solvent, to be included in a plan, which could be implemented if approved by the requisite vote of creditors.

108. Consolidation might be appropriate where there is no real separation between the group members, and the group structure is being maintained solely for dishonest or fraudulent purposes. A further ground that is used in some jurisdictions is where substantive consolidation leads to greater return of value for creditors, either because of the structural relationship between the group members and their conduct of business and financial relationships or because of the value of assets common to the whole group, such as intellectual property in both a process conducted across numerous group members and the product of that process.

109. The principal concerns with the availability of such orders, in addition to those associated with the fundamental issue of overturning the separate entity principle, include the potential unfairness caused to one creditor group when forced to share *pari passu* with creditors of a less solvent group member and whether the savings or benefits to the collective class of creditors outweighs incidental detriment to individual creditors. Some creditors might have relied on the separate assets or separate legal entity of a particular group member when trading with it, and should therefore not be denied a full payout because of their trading partner's relationship with another group member of which they were unaware. Other creditors might have relied upon the assets of the whole group and it would be unfair if they were limited to recovery against the assets of a single group member.

110. Because it involves pooling the assets of different group members, consolidation may not lead to increased recovery for each creditor, but rather operate to level the recoveries across all creditors, increasing the amount distributed to some at the expense of others. Additionally, the availability of consolidation may enable stronger, larger creditors to take advantage of assets that should not be available to them; encourage creditors who disagree with such an order to seek its review, thus prolonging the insolvency proceedings; and damage the certainty and enforceability of security interests (where intra-group claims disappear as a result of consolidation, creditors that have security interests in those claims would lose their rights).

111. Consolidation would generally involve the group members subject to insolvency proceedings, but in some cases and as permitted by some insolvency laws, might extend to an apparently solvent group member. This might occur when the affairs of that member were so closely intermingled with those of other group members that it would be impractical to exclude it from the consolidation, where it would be beneficial to include it in the consolidation if further investigation showed it to be actually insolvent because of the intermingling of assets or where the legal entity is a sham or involves a fraudulent scheme. When the solvent group member is

to be included, the creditors of that group member may have particular concerns and a limited approach might be taken so that the consolidation order extends only to the net equity of the solvent group member in order to protect the rights of those creditors, although this approach would be difficult in cases of intermingling or fraud.

(b) Circumstances supporting consolidation

112. A number of elements have been identified as relevant to determining whether or not substantive consolidation is warranted, both in the legislation that authorizes consolidation orders and in those cases where the courts have played a role in their development. In each case, it is a question of balancing the various elements to reach a just and equitable decision; no single element is necessarily conclusive and all of the elements do not need to be present in any given case. Those elements have included: the presence of consolidated financial statements for the group; the use of a single bank account for all group members; the unity of interests and ownership between the group members; the degree of difficulty in segregating individual assets and liabilities; sharing of overhead, management, accounting and other related expenses among different group members; the existence of intra-group loans and cross-guarantees on loans; the extent to which assets were transferred or funds moved 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.

113. While these many factors remain relevant, some courts have begun to focus on a limited number and in particular on whether the affairs of the group members are so intermingled that separating assets and liabilities can only be achieved at extraordinary cost and expenditure of time or group members are engaged in fraudulent schemes or activity that has no legitimate business purpose. With respect to the first ground, the degree of intermingling required is hard to quantify and has been variously described by different courts as involving a degree of intermingling that was hopeless or a practical impossibility to disentangle; that would require such time and expense to disentangle the interrelationships between the group members and the ownership of assets that it would be disproportionate to the result; that was so substantial that it would threaten the realization of any net assets for the creditors; or involved an allocation of assets and liabilities between the relevant members that was essentially arbitrary and without economic reality. In reaching a decision that the degree of intermingling in a particular case justified substantive consolidation, the courts have looked at various factors, including the manner in which the group members operated and related to each other, including with respect to management and financial matters; the sufficiency of record keeping of the individual group members; the observance of proper corporate formalities; the manner in which funds and assets were transferred between the various members; and other similar factors concerning group operations.

114. The type of fraud contemplated is not fraud occurring in the daily operations of a company, but rather the total absence of a legitimate business purpose, which may relate either to the reasons for which the company was formed or, once formed, the activities it undertakes (see above, para. 97 (e)). Examples of such fraud may include transfers by a debtor of substantially all of its assets to a newly formed entity or to self-owned separate entities for the purpose of preserving and conserving those assets for its own benefit and to hinder, delay and defraud its creditors, simulation³⁵ or Ponzi³⁶ and other such fraudulent schemes.

(c) Application for substantive consolidation

(i) Persons permitted to apply

115. An insolvency law should address the question of who may apply for substantive consolidation and at what time. With respect to the parties permitted to apply, it would seem appropriate to follow the approach of recommendation 14 concerning the parties permitted to apply for commencement of insolvency proceedings. In the group context, that would include a group member and a creditor of any such group member. In addition, it would be appropriate to permit applications by the insolvency representative of any group member, since in many instances, it will be the insolvency representative or representatives appointed to administer group members that will have the most complete information on group members and is therefore in the best position to assess the appropriateness or desirability of substantive consolidation.

116. Although in some States it might be possible for the court to act on its own initiative to order substantive consolidation, the serious impact of such an order requires that a fair and equitable process be followed and that parties in interest have the opportunity to be heard and to object to such an order, in accordance with recommendations 137-138. For that reason, it seems appropriate to draw a distinction between substantive consolidation and procedural coordination and adopt the approach that courts do not act on their own initiative with respect to substantive consolidation.

(ii) Timing of an application

117. Since the factors supporting substantive consolidation might not always be apparent or certain at the time insolvency proceedings commence, it is desirable that an insolvency law adopt a flexible approach to the issue of timing, allowing an application to be made at the same time as an application for commencement of proceedings or at any subsequent time. It should be noted, however, that the possibility of applying for substantive consolidation subsequent to commencement might be limited, in practice, by the state reached in administration of the proceedings, particularly for example, with respect to implementation of a reorganization plan. Certain key matters may already have been resolved, such as sale or disposal of assets or submission and admission of claims, or certain

³⁵ Simulation may involve contracts that either do not express the true intent of the parties and have no effect between the parties or produce different effects between the parties than those expressed in the contracts, i.e. sham contracts.

³⁶ A fraudulent investment operation that pays returns to separate investors from their own money or money paid by subsequent investors, rather than from any actual profit earned.

decisions taken and acted upon with respect to individual group members, creating practical difficulties with consolidating partly administered proceedings. In this situation, it is desirable that the order take account of the status of administration, consolidating the separate proceedings already in progress and preserving existing rights. Claims already admitted against a group member, for example, might therefore be treated as claims admitted against the consolidated estate.

118. The same approach might apply to adding group members to an existing substantive consolidation. As the administration of various enterprise group members proceeds, it may become apparent that additional group members should be included because the grounds for the initial order are also satisfied with respect to those members. If the consolidation order was made with the consent of the creditors, or if creditors were 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 that originally agreed or notified to creditors. In that situation, it is desirable that creditors have a further opportunity to consent or object to the addition to the consolidation. Where substantive consolidation is ordered subsequent to a partial distribution to creditors, the introduction of a hotchpot rule might be desirable. This would help to ensure that a creditor who has received a partial distribution in respect of its claim against the single group member may not receive payment for the same claim in the consolidated proceedings, so long as the payment of the other creditors of the same class is proportionately less than the partial distribution the creditor has already received.

(d) Competing interests in consolidation

119. In addition to the competing interests of the creditors of the different group members, the interests of other stakeholders may warrant consideration in the context of consolidation, including those of creditors vis-à-vis shareholders; of the shareholders of the different group members, in particular those who are shareholders of some of the members but not of others; and of secured and priority creditors of different consolidated group members.

(i) Owners and equity holders

120. 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 (see part two, chap. V, para. 76). 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 all consolidated members of the group, all creditors of those group members could be paid before the shareholders of any of those group member received a distribution.

(ii) Secured creditors

121. The position of secured creditors in insolvency proceedings is discussed throughout the *Legislative Guide* (see Annex I for relevant references) and the

approach adopted that, as a general principle, the effectiveness and priority of a valid security interest should be recognized and the economic value of the encumbered assets should be preserved in insolvency proceedings. That approach will also apply to the treatment of secured creditors in the enterprise group context. It is also recognized that an insolvency law may nevertheless affect the rights of secured creditors in order to implement business and economic policies, subject to appropriate safeguards (see part two, chap. II, para. 59).

122. Questions arising with respect to substantive consolidation might include: whether a security interest over some or all of the assets of one group member could extend to include assets of another group member where a consolidation order was made or whether that security interest should be limited to the defined pool of assets upon which the secured creditor had originally relied; whether secured creditors with insufficient security could make a claim against the pooled assets as unsecured creditors; and whether internal secured creditors (i.e., creditors that are at the same time group members) should be treated differently to external secured creditors. Security interests over the whole of a debtor's estate would generally crystallize on the commencement of insolvency proceedings and the issue of that interest expanding to cover the pooled assets of all consolidated group members should not arise. To allow any secured creditor's security interest to be extended or expanded as the result of an order for substantive consolidation would improve that creditor's position at the expense of other creditors and amount to an unjust benefit or windfall, which is generally undesirable. The same point could be made with respect to employee claims.

123. One solution with respect to the treatment of external secured creditors might be to exclude them from the process of 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. The guarantee could not be enforced where the relevant group members were subject to an order for consolidation and their individual identity disappeared. That might result in the secured creditor being treated as an unsecured creditor, unless the law permitted them to be treated as having some priority over other creditors in the substantive consolidation. Where encumbered assets are required for reorganization, a different solution might be possible, such as allowing the court to adjust the consolidation order to make specific provision for such assets or requiring the consent of the affected secured creditor. A secured creditor could surrender its security interest following consolidation, and the debt would become payable by all of the consolidated entities.

124. The interests of internal secured creditors might also need to be considered. Under some laws, those internal security interests might be extinguished, leaving the creditors with an unsecured claim, or those claims might be modified or subordinated.

(iii) *Priority creditors*

125. 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, the treatment of those priorities across the group may need to be considered, 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 they may have as a result of their priority position with respect to the assets of a single entity. Where there is intermingling of assets so that it is not possible to determine who owns what assets, it may be very difficult to quantify the priorities and determine how much might be available to settle each priority claim. Accordingly, although it is desirable that the priorities established under the insolvency law with respect to each individual debtor be recognized where that debtor is subject to substantive consolidation, it might not always be possible to give them full effect.

(e) Notification of creditors

126. An application for substantive consolidation may be subject to the same requirements for giving notice as an application for commencement of proceedings.³⁷ When made at the same time as the application for commencement of proceedings, only an application for substantive consolidation by creditors would require notice to be given to the relevant debtors, consistent with recommendation 19. An application by group members made at the same time as the application for commencement would not require creditors to be notified under recommendations 22 and 23, which do not mandate notification of an application for commencement of insolvency proceedings to the creditors of the concerned entity.

127. The potential impact of substantive consolidation on creditor rights suggests that affected creditors should have the right to be notified of any order for consolidation made at the time of commencement and have the right to appeal, consistent with recommendation 138. One issue to be considered in that situation is whether a single objection would be sufficient to prevent consolidation from occurring. It may be possible, for example, to provide objecting creditors who will be significantly disadvantaged by the consolidation relative to other creditors with a greater level of return than other unsecured creditors, thus departing from the strict policy of equal distribution. It may also be possible to exclude specific groups of creditors with certain types of contracts, for example, limited recourse project financing arrangements entered into with clearly identified group members at arm's length commercial terms.

128. Where the application is made by creditors after proceedings have commenced, it might be desirable for notice of the application to be given to insolvency representatives of the entities to be consolidated. Notice should be given in an effective and timely manner in the form determined by domestic law.

(f) Effect of an order for substantive consolidation

129. The insolvency law should establish the effects of an order for substantive consolidation. These might include: treatment of the assets and liabilities of the consolidated group members as if they were part of a single insolvency estate; the

³⁷ See, part two, chap. I, para. 64-71 and recommendations 19 (a), 22-25.

extinguishment of intra-group claims; treatment of claims against the individual group members to be consolidated as if they were claims against the consolidated estate; and recognition of priorities established against the individual group members as priorities against the consolidated estate (to the extent possible, given the difficulty noted above). Intra-group claims would generally disappear on consolidation on the basis that the claim and the obligation to pay belong or are owed by the same insolvency estate, and therefore effectively cancel each other out.

Avoidance of transactions involving group members subject to consolidation

130. Where group members are substantively consolidated, there will be a practical difficulty in seeking to avoid transactions between consolidated group members, since the assets to be recovered and the estate for which they would be recovered will be treated as part of the same consolidated estate. However, transactions between a consolidated group member and other members of the group or an external party would be subject to avoidance under the usual avoidance rules, including any rules concerning calculation of the suspect period where consolidation is ordered. Where those transactions can be avoided and assets or value recovered, that recovery will be for the benefit of the consolidated estate.

Calculation of the suspect period

131. Where substantive consolidation is ordered after the commencement of proceedings or where group members are added to a substantive consolidation at different times, the choice of the date from which the suspect period for the purposes of avoidance (see part two, chap. II, paras. 188-191 and recommendation 89) would be calculated may need to be considered to provide certainty for lenders and other third parties. The issue may become more important as the period of time between an application for or commencement of individual insolvency proceedings and the order for substantive consolidation increases. Choosing the date of the order for substantive consolidation for calculation of the suspect period for avoidance purposes may create problems with respect to transactions entered into between the date of application for or commencement of insolvency proceedings for individual group members and the date of the substantive consolidation. One approach might be to calculate that date in accordance with recommendation 89. That approach might result in a different date for each group member subject to the consolidation order, which might in practice be cumbersome to implement. Another approach might be to establish a common date by reference to the earliest date on which an application for commencement was made or insolvency proceedings with respect to those group members to be consolidated commenced. In either case, it is desirable that the date be specified in the insolvency law to ensure transparency and predictability.

Reorganization

132. With respect to the impact of substantive consolidation on reorganization, the liquidation value for the purposes of recommendation 152 (b), would be the liquidation value of the consolidated estate, and not the liquidation value of the individual members before substantive consolidation. An order for substantive consolidation might also combine the creditors for the purposes of voting on any reorganization plan for the consolidated group members. Where creditor meetings

are required to be held subsequent to an order for substantive consolidation, following commencement of proceedings, all creditors of the consolidated group members would be eligible to attend.

Treatment of guarantees

133. Guarantees involving group members might be affected in several ways by an order for substantive consolidation. A guarantee may have been provided by one group member to another group member. Both may be subject to the order for substantive consolidation or the guarantor may not be subject to that order. In the first situation, the guarantee and any associated claims would be extinguished as an intra-group claim. The second situation might be addressed by provisions in the insolvency law on related person transactions (see part two, chap. V, para. 48). A guarantee might also have been provided by an external guarantor to a group member that is subject to the substantive consolidation. Unless specifically addressed in the insolvency law, this situation would be subject to treatment under domestic law, which might restrict the guarantor's claim where it had made a payment under the guarantee. A guarantee might also have been provided to an external lender by one group member to secure finance provided to another, where both group members become subject to consolidation. As noted above, where enforcement of the guarantee relies upon the separate identity of the group members, the external lender is likely to be treated as an unsecured creditor unless the insolvency law permits them to be treated as retaining some priority over other creditors of the consolidated group members.

(g) Modification of an order for substantive consolidation

134. Although modification of an order for substantive consolidation might not always be possible or desirable, given the substantive effect of that order, there may be cases where circumstantial changes or the availability of new information indicate the desirability of modifying the original order. Any such modification should be subject to the condition that any vested rights or interests arising pursuant to the initial order should not be unjustly affected by the order for modification. Those rights or interests, whether arising by decision of the court or the insolvency representative, may relate to sales of assets and provision of finance to group members.

(h) Exclusions from an order for substantive consolidation

135. Some laws make provision for what may be termed an order for partial or limited substantive consolidation, that is, an order for substantive consolidation that excludes certain assets or claims.

136. Generally, these exclusions will be rare, given the assumption in favour of substantive consolidation where the requirement for intermingling or a fraudulent scheme is met. However, there may be circumstances where exclusion may be justified. Those circumstances might include where the ownership of certain specific assets could readily be identified or part of the business activities of the consolidated group members could be separated because it was not involved in the fraudulent scheme. Claims associated with excluded assets would go with the asset. consolidation might also be limited, for example, to unsecured creditors, thereby excluding external secured creditors, who might be free to enforce their security

interests (unless those security interests depend upon the separate identity of the group members to be consolidated). Another approach excludes certain assets from substantive consolidation if otherwise creditors would be unfairly prejudiced, although this ground is unlikely to be relevant in cases of intermingling or fraud.

(i) Competent court

137. The issues discussed above with respect to both joint applications and procedural coordination would apply also with respect to the court competent to order substantive consolidation (see above, paras. 17-19 and recommendation 209).

Recommendations 219-231

Purpose of legislative provisions

The purpose of provisions on substantive consolidation is:

(a) To provide legislative authority for substantive consolidation, while respecting the basic principle of the separate legal identity of each enterprise group member;

(b) To specify the very limited circumstances in which the remedy of substantive consolidation may be available in order to ensure transparency and predictability; and

(c) To specify the effect of an order for substantive consolidation, including the treatment of security interests.

Contents of legislative provisions

The principle of separate legal identity

219. The insolvency law should respect the separate legal identity of each enterprise group member. Exceptions to that general principle should be limited to the grounds set forth in recommendation 220.

Circumstances in which substantive consolidation may be available

220. The insolvency law may specify that, at the request of persons permitted to make an application under recommendation 223, the court may order substantive consolidation with respect to two or more enterprise group members only in the following limited circumstances:

(a) Where the court is satisfied that the assets or liabilities of the enterprise group members are intermingled to such an extent that the ownership of assets and responsibility for liabilities cannot be identified without disproportionate expense or delay; or

(b) Where the court is satisfied that enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential to rectify that scheme or activity.

Exclusions from substantive consolidation

221. Where the insolvency law provides for substantive consolidation in accordance with recommendation 220, the insolvency law should permit the court to exclude

specified assets and claims from an order for substantive consolidation and specify the conditions applicable to those exclusions [the circumstances in which those exclusions might be ordered].

Application for substantive consolidation

— *Timing of application*

222. The insolvency law should specify that an application for substantive consolidation may be made at the same time as an application for commencement of insolvency proceedings with respect to enterprise group members or at any subsequent time.³⁸

— *Persons permitted to apply*

223. The insolvency law should specify the persons permitted to make an application for substantive consolidation, which may include an enterprise group member, a creditor or the insolvency representative of any such enterprise group member.

Effect of an order for substantive consolidation

224. The insolvency law should specify that an order for substantive consolidation has the following effects:³⁹

- (a) The assets and liabilities of the consolidated group members are treated as if they were part of a single insolvency estate;
- (b) Claims and debts between group members included in the order are extinguished; and
- (c) Claims against group members included in the order are treated as [if they were] claims against the single insolvency estate.

Treatment of security interests in substantive consolidation

225. The insolvency law should specify that the rights and priorities of a creditor holding a security interest over an asset of an enterprise group member subject to an order for substantive consolidation should, as far as possible, be respected in substantive consolidation, unless:

- (a) The secured indebtedness is owed solely between enterprise group members and is extinguished by an order for substantive consolidation;
- (b) It is determined that the security interest was obtained by fraud in which the creditor participated; or
- (c) The transaction granting the security interest is subject to avoidance in accordance with recommendations 87, 88 and 217.

³⁸ The possibility of ordering substantive consolidation at an advanced stage of the insolvency proceedings is discussed in the commentary, see above, paras. 117-118.

³⁹ The effect on security interests is addressed in recommendation 225.

Recognition of priorities in substantive consolidation

226. The insolvency law should specify that the priorities established under insolvency law and applicable to individual enterprise group members prior to an order for substantive consolidation should, as far as possible, be recognized in substantive consolidation.

Meetings of creditors

227. The insolvency law should specify that, to the extent a meeting of creditors is required by the law to be held subsequent to an order for substantive consolidation, creditors of all consolidated group members are eligible to attend.

Calculation of the suspect period in substantive consolidation

228. (1) 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 should be calculated when substantive consolidation is ordered.

(2) When substantive consolidation is ordered at the same time as commencement of insolvency proceedings, the specified date from which the suspect period is calculated retrospectively should be determined in accordance with recommendation 89.

(3) When substantive consolidation is ordered subsequent to commencement of insolvency proceedings, the specified date from which the suspect period is calculated retrospectively may be:

(a) A different date for each enterprise group member included in the substantive consolidation, being either the date of application for or commencement of insolvency proceedings with respect to each such group member, in accordance with recommendation 89; or

(b) A common date for all enterprise group members included in the substantive consolidation, being the earliest of the dates of application for, or commencement of, insolvency proceedings with respect to those group members.

Modification of an order for substantive consolidation

229. The insolvency law should specify that an order for substantive consolidation may be modified, provided that any actions or decisions already taken pursuant to the order are not affected by the modification.⁴⁰

Competent court

230. For the purposes of recommendation 13, the words “commencement and conduct of insolvency proceedings, including matters arising in the course of those proceedings” include an application or order for substantive consolidation, including modification of that order.⁴¹

⁴⁰ It is not intended that use of the term “modification” would include termination of an order for substantive consolidation.

⁴¹ The criteria that might be relevant to determining the competent court are discussed in the commentary, see above, para. 18.

Notice of substantive consolidation

231. The insolvency law should establish requirements for giving notice with respect to applications and orders for substantive consolidation and modification of substantive consolidation, including [the scope and extent of the order]; the parties to whom notice should be given; the party responsible for giving notice; and the content of the notice.

E. Participants**1. Appointment of an insolvency representative**

138. The appointment and role of the insolvency representative are discussed above (see part two, chap. III, paras. 36-74). The issues discussed, together with recommendations 115-125, would generally apply in the enterprise group context.

(a) Coordination of proceedings

139. When multiple proceedings commence with respect to group members, an order for procedural coordination may or may not be made, but in either case, coordination of those proceedings may be facilitated if the insolvency law was to include specific provisions promoting coordination and indicating how it might be achieved, along the lines of article 27 of the Model Law. That approach could be adopted with respect to coordination between the different courts involved in administering proceedings for different group members and between the different insolvency representatives appointed in those proceedings, including those appointed on an interim basis.⁴² The obligations of an insolvency representative, specifically, recommendations 111, 116-117, and 120, might be extended in the group context to include various aspects of coordination, including: 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, the proposal and negotiation of coordinated reorganization plans (unless preparation of a single group plan is possible as discussed below), the use of avoidance powers, obtaining of post-commencement finance, submission and admission of claims and distributions to creditors. The insolvency law could also address timely resolution of disputes between the different insolvency representatives appointed.

140. Where a number of insolvency representatives are appointed to the different proceedings concerning group members, the insolvency law may permit one of them to take a leading role in coordinating those proceedings. That representative could be, for example, the representative of the parent or controlling group member if it is subject to the insolvency proceedings. While such a leading role might reflect the economic reality or structure of the enterprise group, equality under the law of all insolvency representatives should be preserved. Coordination under the leadership of one insolvency representative may also be achieved on a voluntary basis, to the extent possible under applicable law. Notwithstanding such arrangements for cooperation and coordination, each insolvency representative would remain

⁴² The glossary explains that “insolvency representative” includes one appointed on an interim basis.

responsible for meeting their obligations under the law of the jurisdiction in which they were appointed; such arrangements cannot be used to diminish or remove those obligations.

141. In certain jurisdictions, courts, rather than insolvency representatives, may have the principal authority to coordinate insolvency proceedings. When the insolvency law so provides, and different courts are involved in administering proceedings for different group members, it is desirable that the provisions concerning coordination of proceedings apply also to the courts and that they have powers along the lines of article 27 of the Model Law.

(b) Appointment of a single or the same insolvency representative

142. Coordination of multiple proceedings might also be facilitated by the appointment of a single or the same insolvency representative to administer the different group members subject to insolvency. In practice, it might be possible to appoint one insolvency representative to administer multiple proceedings or it might be necessary to appoint the same insolvency representative to each of the proceedings to be coordinated, depending upon procedural requirements and the number of courts involved. Although the administration of each of the group members would remain separate (as in the case of procedural coordination), such an appointment could help to ensure coordination of the administration of the various group members, reduce related costs and delays and facilitate the gathering of information on the group as a whole. With respect to the latter point, care might need to be exercised in how that information is treated, ensuring in particular that confidentiality requirements with respect to separate group members are observed. While many insolvency laws do not address the question of appointing a single insolvency representative, there are some jurisdictions where such an appointment in the group context has become a practice. This has also been achieved to a limited extent in some cross-border insolvency cases, where insolvency representatives from the same international firm have been appointed in the different jurisdictions.⁴³

143. In deciding whether it is appropriate to appoint a single or the same insolvency representative, the nature of the group, including the level of integration of the members and its business structure, need to be considered. In addition, it is highly desirable that any person to be appointed in that capacity has the appropriate experience and knowledge as noted above (part two, chapter III, para. 39) and that that knowledge and experience be carefully scrutinized before the appointment is made to ensure it is appropriate to the group members concerned. It is desirable that a single or the same insolvency representative only be appointed to administer two or more group members where it will be in the interests of the insolvency proceedings to do so.

144. Where a single or the same insolvency representative is appointed to administer several members of a group with complex financial and business relationships and different groups of creditors, there is the potential for loss of neutrality and independence. Conflicts of interest may arise, for example, with respect to cross-guarantees, intra-group claims and debts, post-commencement finance, lodging and verification of claims or the wrongdoing by one group member

⁴³ See UNCITRAL Practice Guide, chap. III, para. 10 (j).

with respect to another group member. The obligation to disclose potential or existing conflicts of interest contained in recommendations 116 and 117 would be relevant to the group context. As a safeguard against possible conflicts, the insolvency representative could be required to provide an undertaking or be subject to a practice rule or statutory obligation to seek direction from the court. Additionally, the insolvency law could provide for the appointment of one or more further insolvency representatives to administer the entities in conflict. That appointment might relate to the specific area of conflict, with the appointment being limited to its resolution, or be more general and for the duration of the proceedings.

(c) Debtor in possession

145. When the insolvency law permits the debtor to remain in possession of the business, and no insolvency representative is appointed, special consideration may be required to determine how multiple proceedings should be coordinated and the extent to which the obligations applicable to the insolvency representative, including any additional obligations referred to above, will apply to the debtor in possession (see part two, chap. III, paras. 16-18). To the extent that the debtor in possession performs the functions of an insolvency representative, consideration might also be given to how provisions of an insolvency law permitting the appointment of a single or the same insolvency representative or one of several insolvency representatives to take a lead role in coordinating proceedings might apply to the debtor in possession context.

Recommendations 232-236

Purpose of legislative provisions

The purpose of provisions on appointment of insolvency representatives in an enterprise group context is:

(a) To permit appointment of a single or the same insolvency representative to facilitate coordination of insolvency proceedings commenced with respect to two or more enterprise group members; and

(b) To encourage cooperation where two or more insolvency representatives are appointed, with a view to avoiding duplication of effort; facilitating gathering of information on the financial and business affairs of the enterprise group as a whole; and reducing costs.

Contents of legislative provisions

Appointment of a single or the same insolvency representative

232. The insolvency law should specify that, where it is determined to be in the best interests of the administration of the insolvency proceedings with respect to two or more enterprise group members, a single or the same insolvency representative may be appointed to administer those proceedings.⁴⁴

⁴⁴ Although recommendation 118 addresses selection and appointment of the insolvency representative, it does not recommend appointment by any particular authority, but leaves it up to the insolvency law. The same approach would apply in the enterprise group context.

Conflict of interest

233. The insolvency law should specify measures to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members. Such measures may include the appointment of one or more additional insolvency representatives.

Cooperation between two or more insolvency representatives

234. The insolvency law may specify that when different insolvency representatives are appointed to administer insolvency proceedings with respect to two or more enterprise group members, those insolvency representatives should cooperate with each other to the maximum extent possible.⁴⁵

Cooperation between two or more insolvency representatives in procedural coordination

235. The insolvency law should specify that, when more than one insolvency representative is appointed to administer insolvency proceedings that are subject to procedural coordination, those insolvency representatives should cooperate with each other to the maximum extent possible.

Cooperation to the maximum extent possible between insolvency representatives

236. The insolvency law should specify that the cooperation to the maximum extent possible between insolvency representatives [should][may] be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning the enterprise group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information;

(b) Approval or implementation of agreements with respect to allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating role;

(c) Coordination with respect to administration and supervision of the affairs of the group members subject to insolvency proceedings, including day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; use of avoidance powers; [communication with creditors and meetings of creditors;] submission and admission of claims, including intra-group claims; and distributions to creditors; and

(d) [Coordination with respect to the proposal and negotiation of reorganization plans] [The proposal and negotiation of coordinated reorganization plans].

⁴⁵ 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.

F. Reorganization of two or more enterprise group members

146. Recommendations 139-159 address issues specific to the preparation, proposal, content, approval and implementation of a reorganization plan. In general, those recommendations will be applicable in the context of an enterprise group.

1. Coordinated reorganization plans

147. When reorganization proceedings commence with respect to two or more enterprise group members, irrespective of whether or not those proceedings are to be procedurally coordinated, one issue not addressed elsewhere in the *Legislative Guide* is whether it will be possible to reorganize the debtors through a single reorganization plan covering several members or through coordinated, substantially similar plans for each member. Such plans have the potential to deliver savings across the group's insolvency proceedings, ensure a coordinated approach to the resolution of the group's financial difficulties and maximize value for creditors. Although several insolvency laws permit the negotiation of a single reorganization plan, under some laws this approach is only possible where the proceedings are procedurally coordinated or substantively consolidated, while under other laws it would generally only be possible where the proceedings could be coordinated on a voluntary basis.

148. In practice, the concept of a single reorganization plan or coordinated plans would require the same or a similar reorganization plan to be prepared and approved in each of the proceedings concerning group members covered by the plan. Approval of such a plan would be considered on a member-by-member basis with the creditors of each group member voting in accordance with the voting requirements applicable to a plan for a single debtor; it would not be desirable to consider approval on a group basis and allow the majority of creditors of the majority of members to compel approval of a plan for all members. The process for preparation of the plan and solicitation of approval should take into account the need for all group members to approve the plan and it would accordingly need to address the benefits to be derived from such approval and the information required to obtain that approval. Those issues would be covered by recommendations 143 and 144 concerning content of the plan and the accompanying disclosure statement. Additional details that could relevantly be disclosed in the group context might include details with respect to group operations, the linkages between group members, the position in the group of each member covered by the plan and functioning of the group as such.

149. Such a reorganization plan or plans 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. Classification of claims and classes of creditors also needs to be considered, as does voting of creditors and approval of a plan, particularly when group members are creditors of each other and therefore "related persons". Calculation of applicable majorities in the group context may require consideration of how creditors with the same claim

against different group members should be counted for voting purposes, particularly where the claims may have different priorities. Some consideration may also need to be given to whether rejection by the creditors of one of several group members might prevent approval of the plan across the group and the consequences of that rejection. One approach might be based upon provisions applicable to the approval of a reorganization plan for a single debtor. Another approach might be to devise different majority requirements that are specifically designed to facilitate approval in the group context. Safeguards analogous to those in recommendation 152 could also be included, with an additional requirement that the plans should be fair as between the creditors of different group members.

150. In the group context, a related person includes a person who is or has been in a position of control of the debtor or a parent, subsidiary or affiliate of the debtor (see glossary, (jj)). Voting by related persons on approval of the plan is discussed above (see part two, chap. IV, para. 46) and it is noted that although some insolvency laws restrict the ability of related persons to vote in various ways, most insolvency laws do not specifically address the issue. It should be noted that where the insolvency law includes such restrictions, they might cause difficulty in some groups when a particular member has only creditors classified as related persons or a very limited number of creditors who are not related persons.

151. 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 group members. Where solvent members participated in the plan by consent, special provisions may be required to prevent undue advantages or disadvantages arising from that liquidation.

2. Inclusion of a solvent group member in a reorganization plan

152. Paragraphs 11-15 above discuss the possibility of including a solvent group member in an application for commencement of proceedings. It is noted that an apparently solvent member may, on further investigation, satisfy the commencement standard of imminent insolvency and thus be covered, for commencement purposes, by recommendation 15. That situation may not be uncommon in an enterprise group where the insolvency of some members leads almost inevitably to the insolvency of others. Where imminent insolvency is not an issue, however, a solvent group member generally could not participate in a reorganization plan for other members of the same group subject to insolvency proceedings under the insolvency law. There may, however, be circumstances in which different levels of participation by a solvent member in a reorganization plan might be both appropriate and feasible, on a voluntary basis. Such participation by solvent group members is, in fact, not unusual in practice. The solvent group member could thus aid the reorganization of other enterprise group members and would be contractually bound by the plan once it were approved and, where required, confirmed. The decision of a solvent group member to participate in a reorganization plan would be an ordinary business decision of that member, and the consent of creditors would not be necessary unless required by applicable company law. With respect to any disclosure statement accompanying a plan that included a solvent group member, caution would need to be exercised in disclosing information relating to that solvent group member and its business affairs.

Recommendations 237-238**Purpose of legislative provisions**

The purpose of provisions relating to reorganization plans in an enterprise group context is:

(a) To facilitate the coordinated reorganization of the businesses of enterprise group members subject to the insolvency law, thereby preserving employment and, in appropriate cases, protecting investment; and

(b) To facilitate the negotiation and proposal of coordinated reorganization plans in insolvency proceedings with respect to two or more enterprise group members.

Contents of legislative provisions***Reorganization plan***

237. The insolvency law should permit coordinated reorganization plans to be proposed in insolvency proceedings with respect to two or more enterprise group members.

238. The insolvency law should specify that an enterprise group member that is not subject to insolvency proceedings may voluntarily participate in a reorganization plan proposed for two or more enterprise group members subject to insolvency proceedings.

A/CN.9/WG.V/WP.92/Add.1 (Original: English)

**Note by the Secretariat on the treatment of enterprise groups in
insolvency, submitted to the Working Group on Insolvency Law
at its thirty-eighth session**

ADDENDUM

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**III. Addressing the insolvency of enterprise groups:
international issues**

A. Introduction

1. The introduction to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (the Practice Guide)¹ notes that although the number of cross-border insolvency cases has increased significantly since the 1990s, the adoption of legal regimes, either domestic or international, equipped to address cases of a cross-border nature has not kept pace. The lack of such regimes has often resulted in inadequate and uncoordinated approaches that have not only hampered the rescue of financially troubled businesses and the fair and efficient administration of cross-border insolvencies, but also impeded the protection and maximization of the value of the assets of the insolvent debtor and are unpredictable in their application. Moreover, the disparities in and, in some cases, conflicts between national laws have created unnecessary obstacles to the achievement of the basic economic and social goals of insolvency proceedings. There has often been a lack of transparency, with no clear rules on recognition of the rights and priorities of existing creditors, the treatment of foreign creditors and the law that will be applicable to cross-border issues. While many of these inadequacies are also apparent in domestic insolvency regimes, their impact is potentially much greater in cross-border cases, particularly where reorganization is the goal.

2. In addition to the inadequacy of existing laws, the absence of predictability as to their application in practice and associated cost and delay has added a further layer of uncertainty that can impact upon capital flows and cross-border investment.

¹ Adopted by the Commission on 1 July 2009.

Acceptance of different types of proceedings, understanding of key concepts and the treatment accorded to parties with an interest in insolvency proceedings differ. Reorganization or rescue procedures, for example, are more prevalent in some countries than others. The involvement of, and treatment accorded to, secured creditors in insolvency proceedings varies widely. Different countries also recognize different types of proceedings with different effects. An example in the context of reorganization proceedings is the cases in which the law of one State envisages a debtor in possession continuing to exercise management functions, while under the law of another State in which contemporaneous insolvency proceedings are being conducted with respect to the same debtor existing management will be displaced or the debtor's business liquidated. Many national insolvency laws have claimed, for their own insolvency proceedings, application of the principle of universality, with the objective of a unified proceeding where court orders would be effective with respect to assets located abroad. At the same time, those laws do not accord recognition to universality claimed by foreign insolvency proceedings. In addition to differences between key concepts and treatment of participants, some of the effects of insolvency proceedings, such as the application of a stay or suspension of actions against the debtor or its assets, regarded as a key element of many laws, cannot be applied effectively across borders.

3. In the international context, the models that have been created to address cross-border insolvency issues have always stopped short of dealing satisfactorily with enterprise groups. When the United Kingdom's House of Lords considered whether the United Kingdom should subscribe to the European Convention on Insolvency Proceedings, the committee commented on the failure of the convention to deal with groups of companies — the most common form of business model. When the convention became the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (the EC Regulation), it still did not address the issue. When the text of what became the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) was debated, groups were regarded as “a stage too far”.

4. Many cases illustrate the key problem with respect to groups in the international context. Where business is conducted through group members in a number of different States in an integrated manner, such as in communications groups like KPNQwest group² or Nortel Networks Corporation, manufacturing groups such as Federal Mogul Global Inc. or financial services companies such as Lehman Brothers Holdings Inc., widespread failure is likely to result in commencement of a number, sometimes a very large number, of separate insolvency proceedings in different jurisdictions with respect to each of the insolvent group members. Unless those proceedings can be coordinated, it is unlikely that the group can be reorganized as a whole and may have to be broken up into its constituent parts. The interrelationships between group members that determine the manner in which the group is structured and operates whilst solvent are generally severed on

² KPNQwest was a telecoms group that owned and operated a fibre-optic cable network around Europe and to the United States. The main cables were in rings: for the ring around Europe, the French part of the ring was owned by a French subsidiary; the German part by a German subsidiary, and so on. When the Dutch parent failed, many of the subsidiaries were obliged to file for the protection of the court in the jurisdictions in which they were incorporated. No one was able to coordinate the proceedings and it was effectively broken up.

insolvency. There is often a clear tension between the traditional separate legal entity approach to corporate regulation and its implications for insolvency and the facilitation of insolvency proceedings concerning a group or part of a group in a cross-border situation in a manner that would enable the goal of maximizing value for the benefit of all creditors to be achieved. The history of cross-border insolvency since the Maxwell case in 1991³ underscores the problems encountered in managing numbers of parallel proceedings, and the need for the creative solutions that have been developed and adopted. Some of these solutions are discussed in the Practice Guide, but the development of a legislative regime to address the cross-border insolvency of enterprise groups remains a challenge to be met.

5. There has been considerable discussion in recent times as to what might form the basis of a legal regime to address the cross-border insolvency of enterprise groups. Some suggestions have included adapting the concept of “centre of main interests” as it applies to an individual debtor to apply to an enterprise group, enabling all proceedings with respect to group members to be commenced in, and administered from, a single centre through one court and subject to a single governing law. Another suggestion has been to identify a coordination centre for the group, which might be determined by reference to the location of the controlling member of the group or to permit group members to apply for insolvency in the State in which proceedings have commenced with respect to the insolvent parent of the group.⁴

6. These proposals raise significant and difficult issues. Some relate to the very nature of multinational enterprise groups and how they operate — how to define what constitutes an enterprise group for insolvency purposes and identify the factors that might be appropriate to determining where the group centre is located, assuming that there is only one centre for each group — as well as to questions of jurisdiction over the constituent members of the group, eligibility to commence insolvency proceedings and applicable law. Others relate to the challenge of reaching broad international agreement on these issues in order to achieve a consistently, widely applied and, possibly, binding solution that will deliver certainty and predictability to the cross-border insolvency of enterprise groups.

B. Promoting cross-border cooperation in enterprise group insolvencies

1. Introduction

7. The first step in finding a solution to the problem of how to facilitate the global treatment of enterprise groups in insolvency might be to ensure that existing principles for cross-border cooperation apply to enterprise group insolvencies. Cooperation

³ Maxwell Communication Corporation plc.: United States Bankruptcy Court for the Southern District of New York, Case No. 91 B 15741 (15 January 1992), and the High Court of Justice, Chancery Division, Companies Court, Case No. 0014001 of 1991 (31 December 1991) (England).

⁴ These issues are discussed in some detail in the working papers of UNCITRAL Working Group V (Insolvency law) — see A/CN.9/WG.V/WP.85/Add.1, paras. 3-12; A/CN.9/WG.V/WP.82/Add.4, paras. 3-15; A/CN.9/WG.V/WP.76/Add.2, paras. 2-17; A/CN.9/WG.V/WP.74/Add.2, paras. 6-12.

between courts and insolvency representatives in insolvency proceedings involving multinational enterprise groups may help to facilitate commercial predictability and increase certainty for trade and commerce, as well as fair and efficient administration of proceedings that protects the interests of the parties, maximizes the value of the assets of group members to preserve employment and minimizes costs. Although there are enterprise groups where separate insolvency proceedings may be a feasible option because there is a low degree of integration in the group and group members are relatively independent of each other, for many groups cooperation may be the only way to reduce the risk of piecemeal insolvency proceedings that have the potential to destroy going concern value and lead to asset ring-fencing, as well as asset shifting or forum shopping by debtors.

8. A widespread limitation on cooperation between courts and insolvency representatives from different jurisdictions in cases of cross-border insolvencies derives from the lack of a legislative framework, or from uncertainty regarding the scope of any existing legislative authorization, for pursuing cooperation with foreign courts and insolvency representatives. The Model Law provides that legislative framework, addressing issues of access to foreign courts, recognition of foreign insolvency proceedings and authorizing cross-border cooperation and communication between courts, between courts and insolvency representatives and between insolvency representatives.

9. However, since the provisions of the Model Law focus on individual debtors, albeit with assets in different States, they have limited application to enterprise groups with multiple debtors in different States. A key difference in enterprise group insolvencies is that the court in one jurisdiction is not necessarily dealing with the same debtor as the court in another jurisdiction (although there may be a common debtor in the case of individual group members that have assets in different States, a situation within the scope of the Model Law). The link between parallel proceedings is not a common debtor, but rather that the debtors are all members of the same enterprise group. Unless the existence (and possibly the extent) of that group is or can be recognized under national law, each proceeding will appear to be unconnected to each other proceeding and cooperation will appear to be unwarranted on the basis that it might interfere with the independence of local courts or be deemed unnecessary because each proceeding is, essentially, a national proceeding. While it may be possible in some instances to treat each group member entirely separately, for many enterprise groups the best result for each of the different members may be achieved through a more widely-based and potentially global solution that reflects the manner in which the group conducted its business before the onset of insolvency and addresses either distinct business units or the enterprise group as a whole, particularly where the business is closely integrated.

10. For these reasons, it is desirable that an insolvency law recognize the existence of enterprise groups and the need, with respect to cross-border cooperation, for courts to cooperate with other courts and with insolvency representatives, not just with respect to insolvency proceedings concerning the same debtor, but also with respect to different members of an enterprise group.

2. Access to courts and recognition of foreign insolvency proceedings

11. The current rules and practices on cross-border assistance and cooperation in insolvency matters are rather diverse, including those rules relating to access to the

courts and the recognition of foreign proceedings. In many States, some form of recognition of the foreign proceeding is a prerequisite to further assistance and cooperation. To achieve that recognition, those seeking the assistance and cooperation, whether the insolvency representative or creditors, generally require standing to make an application to the foreign court. That application might relate to assistance with respect to a stay of proceedings, examination of witnesses and other matters included in articles 20 and 21 of the Model Law. The work undertaken in preparation of the Model Law highlighted the widespread absence of domestic laws addressing these issues and the different approaches taken in the laws that had been enacted. To achieve a uniform approach, the Model Law provides the legislative framework for access to courts and recognition of foreign proceedings, establishing appropriate conditions to ensure expedited and direct access (chap. II, articles 9-14), the criteria for determining whether foreign proceedings are proceedings that qualify for recognition and the effects of recognition (chap. III, articles 15-24). Although the Model Law has limited application in the enterprise group context, it is desirable that the access to courts and recognition of foreign proceedings it provides with respect to individual debtors also be provided with respect to insolvency proceedings involving members of the same enterprise group.

12. It should be noted that cooperation between a court and a foreign court or foreign representatives as envisaged under the Model Law does not require a previous formal decision to recognize the foreign proceeding, encouraging cooperation from the earliest time in the proceedings.⁵

13. In States where access and recognition are not required to facilitate cooperation, further legislation may not be required. However, the existence of such provisions may not be sufficient, as available mechanisms may be cumbersome, costly and time-consuming. Only where access and recognition are readily available in a timely manner is it likely that effective cooperation with respect to the administration of proceedings concerning multinational groups can be achieved.

Recommendation 239

Purpose of legislative provisions

[The purpose of provisions on access and recognition of foreign insolvency proceedings with respect to two or more enterprise group members is to ensure that, where access to the courts and recognition of those foreign proceedings are prerequisites to cooperation between the courts, insolvency representatives and creditors, access and recognition are available under applicable law.]

Contents of legislative provisions

Access to courts and recognition of foreign proceedings

239. The insolvency law should provide, in the context of insolvency proceedings with respect to enterprise group members,

- (a) Access to the courts for foreign representatives and creditors; and
- (b) Recognition of the foreign proceedings, if necessary, under applicable law.

⁵ Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, para. 177.

C. Forms of cooperation involving courts

14. Cooperation in cross-border insolvencies may take different forms and may include, as suggested in article 27 of the Model Law, communication between the courts, between the courts and insolvency representatives and between the insolvency representatives, as well as the use of cross-border insolvency agreements, coordination of hearings, and coordination of the supervision and administration of the debtor's affairs. In the context of a single debtor, authorization for cooperation is provided by articles 25 and 26 of the Model Law. Article 25 authorizes the court to cooperate to the maximum extent possible with foreign courts, while article 26 authorizes an insolvency representative, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign courts and representatives. The issue of cooperation is also addressed, within the European Union, by the EC Insolvency Regulation. Recital 20 notes that in the context of main and secondary proceedings the liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. The liquidator in the main proceedings should have the ability to intervene in the non-main proceedings and to propose a reorganization plan or apply for suspension of the realization of assets in those proceedings. Article 31 of the EC Regulation establishes a duty of liquidators in main and non-main proceedings to communicate information, particularly information that may be relevant to the other proceedings and relates to progress made with respect to the submission and verification of claims and measures aimed at terminating the proceedings. Neither the Model Law nor the EC Regulation addresses the need for cooperation with respect to enterprise groups, where those obligations need to be more broadly applicable and the distinction between main and non-main proceedings is not relevant, except as it applies to multiple proceedings concerning an individual group member.

1. Communication by courts

(a) General considerations

15. Both the Guide to Enactment of the Model Law⁶ and the UNCITRAL Practice Guide⁷ point to the desirability of enabling courts in cross-border insolvency proceedings to communicate directly with foreign courts and insolvency representatives in order to avoid the use of the traditional, time-consuming procedures, such as letters rogatory or other diplomatic or consular channels and communications via higher courts. This ability is critical when the courts consider they should act with urgency to avoid potential conflicts or preserve value or the issues to be considered are time-sensitive. That ability to communicate should include the ability to initiate communication, by requesting information or assistance from foreign courts and insolvency representatives, as well as the ability to receive and process such requests from abroad. It is desirable that communication not be dependent upon the formal recognition of foreign proceedings, thus enabling communication to take place before, or irrespective of whether, an application for recognition is made.

⁶ Id., paras. 178-179.

⁷ UNCITRAL Practice Guide, chap. II, paras. 4-10 and chap. III, 146-181.

16. The different approaches taken to communication between the courts and parties serve to illustrate some of the problems that might be encountered when seeking to promote cross-border cooperation. In addition to the question of whether there is specific authorization for communication between courts, there is very often hesitation or reluctance on the part of courts of different jurisdictions to communicate directly with each other. That hesitation or reluctance may be based upon ethical considerations; legal culture; language; or lack of familiarity with foreign laws and their implementation. They may also relate to concerns about the implications of communication for judicial independence and impartial decision-making. Some States have a relatively liberal approach to communication between judges, while in other States judges may not communicate directly with parties or insolvency representatives or indeed with other judges, as such communication may give rise to constitutional issues. In some States, *ex parte* communications with the judge are considered normal and necessary, while in other States such communications would not be acceptable. Within States, judges and legal practitioners may have quite different views about the propriety of contacts between judges without the knowledge or participation of the legal representatives for the parties. Some judges, for example, accept that there is no difficulty with private contact amongst them, while some legal practitioners would strongly disagree with that practice. Courts typically focus on the matters before them and, as noted above, may be reluctant to provide assistance to related proceedings in other States, particularly when the proceedings for which they are responsible do not appear to involve an international element in the form of a foreign debtor, foreign creditors or foreign operations.

17. A further issue of relevance to facilitating cooperation between insolvency proceedings affecting group members might be the ability or willingness of courts to take a global view of the business of the debtor and note what is occurring in insolvency proceedings in other jurisdictions concerning the same debtor or other members of the same group. This may be of particular importance where what occurs in those other jurisdictions is likely to have a domestic impact (e.g. with respect to local employees and other social policy issues). Whilst it would not change the powers the courts have under domestic law, knowledge of or about the foreign proceedings might nevertheless affect the court's approach to local proceedings and its willingness to coordinate them with the foreign proceedings. The challenge, however, is for the court to obtain the information about an enterprise group's global operations and concurrent insolvency proceedings that would be necessary to facilitate coordination, especially where that involves gaining access to information and records that are part of insolvency proceedings in other jurisdictions concerning different debtors, albeit members of the same enterprise group. The first aspect is thus gaining access to relevant information. The second is making it available to the court in local proceedings. One approach might be to permit appropriate documentary evidence to be provided or a foreign practitioner or insolvency representative of related group members to appear in the local court. Notwithstanding the practical difficulties, it is desirable that a court be able to take note of foreign proceedings that might affect local proceedings concerning the same group, particularly where a global solution for the enterprise group is being sought.

18. Establishing communication in cross-border cases involving enterprise groups may facilitate cross-border proceedings in many ways. For instance, it may assist parties to better understand the implications or application of foreign law,

particularly the differences or overlaps that may otherwise lead to litigation; advance resolution of issues through a negotiated result acceptable to all; and provoke more reliable responses from parties, avoiding inherent bias and adversarial distortion that may be apparent where parties represent their own particular concerns in their own jurisdictions. It may also serve international interests by creating better understanding that will encourage international business and preserving value that would otherwise be lost through fragmented judicial action. Some of the potential benefits may be hard to identify at the outset, but may become apparent once the parties have communicated. Cross-border communication may reveal, for example, some fact or procedure that will substantially inform the best resolution of the case and may, in the longer term, serve as an impetus to law reform.

19. Communication between judges or other interested parties should follow proper procedures in order to ensure the communication is transparent, effective and credible. At a general level, it might be appropriate to consider whether communication should be treated as a matter of course or as a last resort; whether a judge may advocate that a particular course of action be taken; and, with respect to the conditions that might apply to communication, such as those mentioned below, whether they should apply in all cases or whether there might be exceptions. While courts should be given broad discretion in carrying out their communications with foreign counterparts, they should not be required to engage in communications they consider inappropriate in the circumstances of a particular case. A further issue relates to the subject matter of the communication, and in particular whether communication could address only matters of procedure or also matters of substance. Some judges take the view that they could discuss case management issues, issues of timing, use of cross-border agreements and identifying which court might resolve which issue, but not substantive issues that touch upon the merits of the case.

(b) Means of communication

20. Information may be communicated in several ways, such as by exchange of documents (e.g. copies of formal orders, judgements, opinions, reasons for decisions, transcripts of proceedings, affidavits and other evidence) or orally. The means of communication may be post, fax or e-mail or other electronic means, or telephone or videoconference, depending upon what is available and affordable in the States involved in the communication and what is appropriate or required in each case. Copies of written communications may also be provided to the parties in accordance with applicable notice provisions. Communication may be effected directly between judges or between or through court officials (or a court-appointed intermediary) or insolvency representatives, subject to local rules. The development of new communication technologies supports various aspects of cooperation and coordination, with the potential to reduce delays and, as appropriate, facilitate face-to-face contact. As global litigation multiplies, these methods of direct communication are increasingly being used. Videoconferences, for example, have been used in a number of cases in preference to telephone conferences, as they provide reasonable control of the process and facilitate disciplined organization of the communication as the participants can hear and see each other, an aspect that is central to court proceedings generally. However, since these technologies are not available to all courts, it is desirable that the focus be upon how the communication

might be facilitated to suit the needs of the particular case, rather than upon the use of any particular technology.

(c) Establishing rules or procedures for court-to-court communication

21. In any particular case it will be desirable to determine, as appropriate to the relevant jurisdictions and in accordance with applicable law, procedures to govern court-to-court communication to balance the interests of the different parties in interest and ensure that no one is prejudiced in any material way. The procedures might address: the parties to be notified of the proposed communication (e.g. all parties in interest and their legal representatives); the persons permitted to participate in the communication and any limitations that will apply; the questions to be considered; whether the parties share the same intentions or understanding with respect to communication; organization and timing of the communication; recording of the communication; any safeguards that will apply to protect the substantive and procedural rights of the parties; the language of the communication and any consequent need for translation of written documents or interpretation of oral communications (and who should bear the administrative costs); acceptable methods of communication; handling of objections to the proposed communication; and questions of confidentiality and transparency.

22. Courts may adopt guidelines, such as the Court-to-Court Guidelines,⁸ to address some of these issues. These guidelines typically are intended to promote transparent communication between courts, permitting courts of different jurisdictions to communicate with one another, without changing the applicable domestic rules or procedures or affecting or curtailing the substantive rights of any party in proceedings before the courts.

(i) Time, place and manner of communication

23. Generally, it is desirable that communications proceed at a time and place and in a manner mutually determined between the courts, the insolvency representatives and other parties in interest, as applicable. These arrangements need not necessarily be made by the judges directly, but might involve relevant court officials.

(ii) Notice of proposed communication

24. In insolvency proceedings involving multinational enterprise groups, a balance needs to be struck between facilitating the communication in a practical and convenient manner and protecting the integrity of the communication by ensuring an open and transparent process. Various parties may be affected by communications between courts, and it may often be difficult, if not impractical, to ascertain the identity of all of those parties, including, for example, the creditors. Moreover, the jurisdictions involved may operate under different rules regarding the provision of notice, affecting issues of timing and the identity of recipients (i.e. not all parties in interest may be entitled to notice of certain issues). A key question will therefore concern the parties to be notified of any proposed communication in accordance with applicable law and the extent to which the requirements of the

⁸ Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, published by the American Law Institute (16 May 2000) and adopted by the International Insolvency Institute (10 June 2001), available online at www.ali.org/doc/Guidelines.pdf.

different laws can be coordinated. The absence of clear rules on how this issue should be approached has the potential to cause delay and erosion of value, especially where the communication is required to resolve or avoid conflicts or to address the coordination of particular issues, such as sale of assets or submission and verification of claims.

25. Provision of notice generally might be assisted by cooperation between the various courts to develop a list of parties requiring notification, which may include parties that are entitled to notice of any court business related to the insolvency proceedings, including communication.⁹ Coordination of the provision of notice may be managed through an electronic system or a website, which could facilitate tracking of the changing identity of those persons entitled to notice in many insolvency proceedings, resulting from, for example, assignment or trading of claims; minimizing the costs associated with provision of notice; and the differences in the laws applicable to the provision of notice being taken into account. It would also, however, have to be taken into consideration possible language, access, and confidentiality issues.

(iii) *Right to participate*

26. To ensure the credibility of the communication and the parties directly involved in it, as well as fairness and transparency, it is desirable that communications proceed in a manner that is open to participation by relevant parties, rather than ex parte.

27. As noted above, however, there is a need to balance those requirements against the practicalities of organizing and conducting the communication. This may require participants to be limited to parties in interest. Although different standards may govern the issue of who may be considered a party in interest in the particular circumstances of the case or the communication in question, it might generally be assumed that key parties in interest would include the debtor (where it is a debtor in possession) or the insolvency representative and relevant legal representative. While the general principle should be that parties in interest are entitled to participate, it may be desirable for the courts to have the right to determine, as required, who should participate in a specific case in order to ensure the process is manageable and effective.

(iv) *Recording of the communication as part of the record*

28. To further ensure the transparency of court-to-court communication, the insolvency law may permit any communication to be recorded and a transcript prepared. The transcript may be made part of the record of the proceedings and, as such, generally would be available at least to those participating in the communication and their legal representatives or, more widely, in accordance with the rules applicable to the availability of such court records.

(v) *Confidentiality*

29. In general, communications between courts involved in parallel insolvency proceedings related to members of a multinational group should be as transparent as

⁹ See Court-to-Court Communication Guideline 12.

possible to ensure fairness to the parties involved and avoid creating incentives for the parties to hedge against the possibility of an adverse outcome. It is desirable that information not be treated as confidential simply because the communication occurs in a cross-border context.

30. However, much of the information relating to the debtors and their affairs that needs to be considered and shared in insolvency proceedings involving multinational enterprise groups may be commercially sensitive, confidential, or subject to obligations owed to third persons (such as trade secrets, research and development information, and customer information). Such information may be especially sensitive in the case of a debtor in reorganization proceedings where its continued ability to operate in the market and the protection of value may require confidentiality. Accordingly, the use of such information may need to be carefully considered and disclosure appropriately restricted to prevent third parties from taking unfair advantage of it.

31. The jurisdictions involved in insolvency proceedings relating to multinational enterprise group members may have different substantive rules regarding confidentiality and the release of information to parties. Those differences would need to be taken into account when considering cross-border communications and how they will be conducted and recorded, permitting the courts to reach agreement on the protections necessary to comply with applicable law.

32. Confidentiality of information may also be addressed in a cross-border insolvency agreement,¹⁰ which can establish requirements for access to that information, including the use of confidentiality agreements.

(vi) *Costs of communication*

33. The issue of costs of the communication may be a consideration, especially where many parties are affected and a means of communication is used that entails, in some States, relatively high costs, such as videoconferencing. Moreover, the use of multiple languages may complicate communication, with cost implications where translation of documents and interpretation of oral communication are required. It will be important to determine how the costs are to be borne by, or apportioned between, the relevant insolvency proceedings. If reimbursement of the costs of certain parties is involved, it should be clear how, and the currency in which, that will occur.

(vii) *Effect of communication*

34. Where a court communicates with a foreign court in the context of cross-border insolvency proceedings, the insolvency law should make it clear that the mere fact of communication having taken place would not imply a substantive effect on the authority or powers of the court, the matters before it, its orders, or the rights and claims of parties participating in the communication. Such a proviso reassures the parties that the communication between the authorities involved in the insolvency proceedings will not jeopardize their rights or affect the authority and independence of the court before which they are appearing. It is likely to reduce the

¹⁰ See UNCITRAL Practice Guide, III.B, paras. 168-171; Legislative Guide, part two, chap. III, paras. 28, 52 and 115 and recommendation 111.

likelihood of objections to planned communication and furnish the courts and their representatives with greater flexibility in their cooperation with each other. Such a proviso may also ensure that courts and their representatives do not operate beyond the limits of their authority in engaging in communication with their counterparts in different jurisdictions. Notwithstanding such a proviso, it should be possible for the courts to explicitly reach agreement on a range of matters, including approval of a cross-border insolvency agreement.

2. Coordination of the debtor's assets and affairs

35. The conduct of cross-border insolvency proceedings concerning enterprise groups will often require assets of the different insolvency estates to continue to be used, realized or disposed of in the course of the proceedings. Coordination of such use, realization and disposal will help to avoid disputes and ensure that the benefit of all parties in interest is the key focus, particularly in reorganization. For example, one member of an enterprise group may serve as the exclusive supplier of another group member or have exclusive control over a key resource used by another member, so that insolvency proceedings with respect to one of those members might have profound consequences on the continuing operation of the entire group. Coordinating the debtor's assets and affairs may involve both the courts and the insolvency representatives. Some matters may require specific approval by the courts, while others may be addressed by agreement between the insolvency representatives.

36. Some of the issues to be considered in facilitating this coordination may include: the location of the various assets and identification of the jurisdiction to which they are subject; determination of the law governing the assets and the parties responsible for determining how they can be used or disposed of (e.g. the insolvency representative, the courts or in some cases the debtor), including the approvals required; the extent to which responsibility for those assets can be shared among or allocated to different parties in different States; how information concerning the affairs of different debtors in different jurisdictions can be obtained and shared to ensure coordination and cooperation; and the sequence in which proceedings should evolve. Coordination may be relevant to investigating the debtor's assets, considering possible avoidance proceedings, and restricting the debtor's ability to move assets to locations beyond the reach of the court or insolvency representative. It may also require the courts to identify the optimal forum for addressing a particular issue, such as sale or disposal of a certain asset, and defer to that forum to the extent permitted by law.¹¹

3. Appointment of a court representative

37. Such a person may be appointed by a court to facilitate coordination of insolvency proceedings concerning enterprise group members taking place in different jurisdictions. The person may have a variety of possible functions as directed by the courts, but should not be regarded as an additional insolvency representative or as a substitute for an existing insolvency representative. Their potential functions might include: acting as a go-between for the courts and the

¹¹ Allocation of responsibility for certain actions between the different courts is discussed in the UNCITRAL Practice Guide, chap. II, paras. 18-20; chap. III, paras. 59-74.

insolvency representatives involved, especially where issues of language are raised; developing a cross-border insolvency agreement in consultation with the relevant parties; promoting consensual resolution of issues between the parties; facilitating the flow of information between the different proceedings; and ensuring that notice with respect to certain business before the courts is given to all parties in interest (e.g. other members of the enterprise group, creditors, and foreign courts or insolvency representatives). The appointing court will typically outline the terms under which the appointee is authorized to act and the extent of its powers. They may be appointed for a specific purpose, such as the negotiation of a cross-border insolvency agreement or more generally to carry out a range of the functions noted above. The person may be required to report to the court or courts involved in the proceedings on a regular basis, as well as to the parties.

4. Coordination of hearings

38. Hearings that might variously be described as joint, simultaneous or coordinated (“coordinated hearings”)¹² can significantly promote the efficiency of parallel insolvency proceedings involving members of a multinational enterprise group by bringing relevant parties in interest together at the same time to share information and discuss and resolve outstanding issues or potential conflicts, thus avoiding protracted negotiations and resulting time delays. What needs to be emphasized with respect to such hearings, however, is that each court should reach its own decision independently and without influence from the other court. While such hearings may be relatively convenient to organize in a domestic setting to ensure coordination of proceedings with respect to different group members, they can be logistically very complicated to organize in an international setting, involving as they may different languages, time zones, laws, procedures and judicial traditions. They may result in a deadlock if, for example, the competencies of the authorities engaged in the hearing are not precisely agreed or established.

39. Although they are potentially difficult to organize, such hearings have been used between some States that share a common language, legal tradition and similar time zones and have led to the successful resolution of difficult issues to the benefit of all parties concerned.¹³ Such hearings might be more widely used in the future, with the assistance of appropriate procedures and safeguards to assist careful planning and avoid complications. Those rules of procedure might address, for example, use of pre-hearing conferences; conduct of the hearings, including the language to be used and need for interpretation; requirements for the provision of notice; methods of communication to be used so that the courts can simultaneously hear each other; conditions applicable to the right to appear and be heard; documents that may be submitted; the courts to which participants may make submissions; the manner of submission of documents to the court and their

¹² These types of hearings are discussed in the UNCITRAL Practice Guide, chap. III, paras. 154-159.

¹³ See for example, the cases of *Quebecor World Inc.*, Montreal Superior Court, Commercial Division, (Canada) No. 500-11-032338-085 and the United States Bankruptcy Court for the Southern District of New York, No. 08-10152 (2008) and *Solv-Ex Canada Limited and Solv-Ex Corporation*, Alberta Court of Queen’s Bench, Case No. 9701-10022 (28 January 1998), and the United States Bankruptcy Court for the District of New Mexico, Case No. 11-97-14362-MA (28 January 1998).

availability to other courts; questions of confidentiality; limitations on the jurisdiction of each court to the parties appearing before it;¹⁴ and rendering of decisions.

40. Some guidelines and agreements dealing with these types of hearings provide that in order to best plan for orderly administration, the courts, their appointees or the insolvency representatives should communicate with their foreign counterparts in advance of the hearing to establish guidelines related to all procedural, administrative and preliminary matters. Once a hearing has been concluded, the relevant authorities may further communicate to assess the contents of the hearing, discuss next steps (including additional hearings), develop or modify guidelines for future hearings, consider whether issuing joint orders would be feasible or warranted and determine how certain procedural issues that were raised in the hearing should be resolved.¹⁵

Recommendations 240-245

Purpose of legislative provisions

The purpose of legislative provisions on cooperation involving courts in the context of multinational enterprise groups is:

(a) To authorize cooperation between the courts seized of insolvency proceedings relating to different members of an enterprise group in different States;

(b) To authorize cooperation between the courts and the insolvency representatives appointed to administer those different proceedings; and

(c) To facilitate and promote the use of various forms of cooperation to coordinate insolvency proceedings with respect to different enterprise group members in different States and establish the conditions and safeguards that should apply to those forms of cooperation to protect the substantive and procedural rights of parties and the authority and independence of the courts.

Contents of legislative provisions¹⁶

Cooperation between the court and foreign courts or foreign representatives

240. The insolvency law should permit the court that is competent with respect to insolvency proceedings concerning an enterprise group member to cooperate to the maximum extent possible with foreign courts or foreign representatives,¹⁷ either directly or through the insolvency representative or other person appointed to act at the direction of the court, to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.

¹⁴ Cf. UNCITRAL Model Law, article 10.

¹⁵ See also UNCITRAL Practice Guide, *supra*. note 12; Court-to-Court Communication Guideline 9 (e).

¹⁶ These recommendations on cooperation are intended to be permissive, not directive and are consistent with the corresponding articles of the Model Law, articles 25.1 and 26.1.

¹⁷ Defined in article 2(d) of the Model Law to mean “a person or body, including one appointed on an interim basis, authorized on a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.”

Cooperation to the maximum extent possible involving courts

241. The insolvency law should specify that cooperation to the maximum extent possible between the court and foreign courts or foreign representatives may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court, [including provision to the foreign court or the foreign representative of copies of documents issued by the court or that have been or are to be filed with the court concerning the enterprise group members subject to insolvency proceedings or participation in communications with the foreign court or foreign representative];

(b) Coordination of the administration and supervision of the affairs of the enterprise group members subject to insolvency proceedings;

(c) Appointment of a person or body to act at the direction of the court; and

(d) Approval or implementation of agreements concerning coordination of insolvency proceedings in accordance with recommendation 254.

*Direct communication between the court and foreign courts or foreign representatives*¹⁸

242. The insolvency law should permit the court that is competent with respect to insolvency proceedings concerning an enterprise group member to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives concerning those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.

Conditions applicable to cross-border communication involving courts

243. The insolvency law should specify that communication between the courts and between courts and foreign representatives [in accordance with these recommendations] should be subject to the following conditions:

(a) The time, place and manner of communication should be determined between the courts or between the courts and foreign representatives;

(b) Notice of any proposed communication should be provided to parties in interest in accordance with applicable law;

(c) An insolvency representative should be entitled to participate in person in a communication. A party in interest may participate in a communication in accordance with applicable law and when determined by the court to be appropriate;

(d) The communication may be recorded and a written transcript prepared as directed by the courts. That transcript may be treated as an official transcript of the communication and filed as part of the record of the proceedings;

(e) Communications should only be treated as confidential in exceptional cases to the extent considered appropriate by the courts and in accordance with applicable law; and

¹⁸ See UNCITRAL Model Law, articles 25.2 and 26.2.

(f) Communication should respect the mandatory rules of the jurisdictions involved in the communication, as well as the substantive and procedural rights of parties in interest, in particular the confidentiality of information.

244. The insolvency law should specify that communication involving the courts [in accordance with these recommendations] [in accordance with recommendations 240-245] shall not imply:

- (a) A compromise or waiver by the court of any powers, responsibilities or authority;
- (b) A substantive determination of any matter before the court;
- (c) A waiver by any of the parties of any of their substantive rights and claims; or
- (d) A diminution of the effect of any of the orders made by the court.

Coordination of hearings

245. The insolvency law may permit the court to conduct a hearing in coordination with a foreign court. Where hearings are coordinated, they may be subject to certain conditions to safeguard the substantive and procedural rights of parties and the jurisdiction of each court. Those conditions might address the rules applicable to the conduct of the hearing; the requirements for the provision of notice; the method of communication to be used; the conditions applicable to the right to appear and be heard; the manner of submission of documents to the court and their availability to a foreign court; and limitation of the jurisdiction of each court to the parties appearing before it.¹⁹ Notwithstanding the coordination of hearings, each court remains responsible for reaching its own decision on the matters before it.

D. Forms of cooperation involving insolvency representatives

1. Cooperation by the insolvency representatives

41. As noted above (see part two, chap. III, paras. 35 and following), the insolvency representative plays a central role in the effective and efficient implementation of the insolvency law, with day-to-day responsibility for administration of the insolvency estate of the debtor. As such, the insolvency representatives will play a key role in ensuring the successful coordination of multiple proceedings concerning enterprise group members through working with each other and the courts concerned. In order to fulfil that role, the insolvency representative, like the court, will need to have appropriate authorization to undertake the necessary tasks of, for example, sharing information, coordinating day-to-day administration and supervision of the debtors' affairs, negotiating cross-border insolvency agreements and so forth.

42. As noted above, such arrangements for cooperation and coordination cannot diminish or remove an insolvency representative's obligations under the law governing its appointment

¹⁹ See also UNCITRAL Model Law, article 10.

Recommendations 246-250**Purpose of legislative provisions**

The purpose of legislative provisions on cooperation between insolvency representatives in the context of multinational enterprise groups is:

(a) To authorize cooperation between insolvency representatives appointed to administer insolvency proceedings relating to different members of an enterprise group in different States; and

(b) To facilitate and promote the use of various forms of cooperation between those insolvency representatives and establish the conditions and safeguards that should apply to those forms of cooperation to protect the substantive and procedural rights of parties.

Contents of legislative provisions*Cooperation between the insolvency representative and foreign courts*

246. The insolvency law should permit the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign courts to facilitate coordination of those proceedings and insolvency proceedings commenced in other States with respect to members of [that] [the same] enterprise group.

Cooperation between insolvency representatives

247. The insolvency law should permit the insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent possible with foreign representatives²⁰ appointed to administer insolvency proceedings commenced in other States with respect to members of [that] [the same] enterprise group in order to facilitate coordination of those proceedings.

Communication between the insolvency representative and foreign courts

248. The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts concerning those proceedings and insolvency proceedings commenced in other States with respect to members of [that] [the same] enterprise group.

Communication between insolvency representatives

249. The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to

²⁰ See footnote 17 above with respect to the definition of a foreign representative, which would include an insolvency representative appointed on an interim basis.

communicate directly with foreign representatives appointed to administer insolvency proceedings commenced in other States with respect to members of [that] [the same] enterprise group concerning those proceedings.

Cooperation to the maximum extent possible between insolvency representatives

250. The insolvency law should specify that cooperation to the maximum extent possible between insolvency representatives may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning the enterprise group members subject to insolvency proceedings, provided appropriate arrangements are made to protect confidential information;

(b) Use of cross-border insolvency agreements in accordance with recommendation 253;²¹

(c) Allocation of responsibilities between insolvency representatives, including one insolvency representative taking a coordinating role;

(d) Coordination with respect to administration and supervision of the affairs of the enterprise group members subject to insolvency proceedings, [including day-to-day operations where the business is to be continued; post-commencement finance; safeguarding of assets; use and disposition of assets; use of avoidance powers; communication with creditors and meetings of creditors; submission and admission of claims, including intra-group claims; and distributions to creditors]; and

(e) Coordination with respect to proposal and negotiation of coordinated reorganization plans.

2. Appointment of a single or the same insolvency representative

43. The issue of promoting coordination may also be approached via the appointment of the insolvency representative, by considering, for example, the appointment of the same or a single insolvency representative in multiple insolvency proceedings affecting members of the same group in different States, where that person (whether natural or legal) met applicable local requirements (see chap. II, paras. 139-145 with respect to domestic proceedings). In addition to the benefits that such an appointment might bring to multiple domestic proceedings, in the international context it has the potential to greatly facilitate cooperation between the different proceedings and reorganization of the group as a whole.

44. As noted above with respect to the domestic context, in deciding whether it would be appropriate to appoint a single or the same insolvency representative, the nature of the group, including the level of integration of its members and its business structure, would need to be considered. In addition, it is highly desirable that any person to be appointed in that capacity have the appropriate experience and knowledge (see part two, chap. III, para. 39) of international insolvency matters and that that knowledge and experience be carefully scrutinized before the appointment is made to ensure it is appropriate to the particular group members concerned and

²¹ See the UNCITRAL Practice Guide, which compiles practice with respect to the use and negotiation of these agreements, including a discussion of the issues typically addressed.

the business they conduct. It is desirable that a single or the same insolvency representative only be appointed to administer two or more group members where it will be in the interests of the insolvency proceedings to do so.

45. Where such a person could be appointed, they would be subject to the local law of the States in which they were appointed, in particular as regards qualification, licensing (where applicable), powers and duties and supervision by the court. Accordingly, the insolvency representative would be subject to the same local requirements as any insolvency representative appointed in one of those States.

46. The appointment could be of a natural person qualified to act in different States or a legal person, where that legal person employed or had as its members appropriately qualified persons who could serve as insolvency representatives in a number of different States. Although the availability of those qualified persons might generally be limited, there may be regions where it is more common or the globalization of trade and services makes it increasingly feasible.

47. Where such an approach is adopted, provisions to avoid potential conflicts of interest may need to be considered. Such a conflict of interest might arise when the group members represented by a single insolvency representative had different interests in a particular issue, for example, post-commencement finance or the verification and admission of claims, especially intra-group claims, or when the obligations of the insolvency representative under different insolvency laws were directly in conflict. Those cases might be addressed in the same manner as indicated above with respect to appointment of a single or the same insolvency representative in the domestic context (see chap. II, para. 144 and recommendation 233).

Recommendations 251-252

Purpose of legislative provisions

The purpose of legislative provisions on appointment of the insolvency representative in the context of multinational enterprise groups is, in the interests of promoting efficient and effective administration of insolvency proceedings with respect to members of the same enterprise group in different States,

(a) To authorize, where the court determines it to be in the best interests of the relevant insolvency proceedings, the appointment of a single or the same insolvency representative to administer multiple proceedings; and

(b) To address any conflicts of interest that might arise where a single or the same insolvency representative is appointed.

Contents of legislative provisions

Appointment of a single or the same insolvency representative

251. The insolvency law should permit the court, in appropriate cases, to coordinate with foreign courts with respect to the appointment of a single or the same insolvency representative to administer insolvency proceedings concerning members of the same enterprise group in different States, provided that the insolvency representative is qualified to be appointed in each of the relevant States.

To the extent required by [the insolvency] [applicable] law, the insolvency representative would be subject to the supervision of each of the appointing courts.

Conflict of interest

252. The insolvency law should specify measures to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members in different States. Such measures may include the appointment of one or more additional insolvency representatives.

E. Use of cross-border insolvency agreements²²

48. The insolvency community, faced with the daily necessity of dealing with insolvency cases and attempting to coordinate administration of cross-border insolvencies in the absence of widespread adoption of facilitating national or international laws, has developed cross-border insolvency agreements. These agreements are discussed in detail in the UNCITRAL Practice Guide. They are designed to address issues arising in cross-border cases, facilitating their resolution through cooperation between the courts, the debtor, and other parties in interest across jurisdictional lines to work efficiently, and increase realizations for creditors in potentially competing jurisdictions. Their use can effectively reduce the cost of litigation and enable parties to focus on the conduct of the insolvency proceedings, rather than upon resolving conflict-of-laws and other such disputes. Moreover, in addition to clarifying parties' expectations, these agreements can assist with preservation of the debtor's assets and maximization of value. In the practice to date, these agreements have typically been approved by the courts, but they might also be approved by creditors or creditor committees or operate as contractual arrangements between the signatories.

49. Cross-border insolvency agreements are generally entered into for the purpose of facilitating international cooperation and coordination of multiple insolvency proceedings in different States. Typically, they are designed to assist in the management of those proceedings and are intended to reflect the harmonization of procedural rather than substantive issues between the jurisdictions involved (although in limited circumstances, substantive issues may also be addressed). They vary in form (written versus oral) and scope (generic to specific) and may be entered into by different parties. Simple generic agreements may emphasize the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements establish a framework of principles to govern multiple insolvency proceedings.

50. They can be regarded as contracts between the signatories or, in case of approval by the court, may obtain the legal status of a court order. Agreements may cover one or more matters and nothing prevents parties from concluding several agreements as proceedings progress to address different issues that arise. It is not uncommon, for example, to have agreements addressing general communication and cooperation at the start of insolvency proceedings, followed by specific agreements

²² For a detailed discussion of cross-border insolvency agreements, see the UNCITRAL Practice Guide.

on claims procedures at a later point. The conclusion of a cross-border insolvency agreement is thus not limited to a certain time period, such as before the commencement of proceedings. While it is certainly preferable at an early stage of the proceedings in order to address expectations and provide clarity, an agreement may be concluded at a later stage, when particular issues arise that indicate a need for cooperation. Existing agreements may also be modified, subject to any requirements of the agreement regarding modification.

51. As noted above, cross-border insolvency agreements may include only general principles on how cooperation and coordination should be handled, or also address specific issues, depending upon the needs of the particular case and the issues to be resolved. Issues typically addressed include some or all of the following:

- (a) Allocation of responsibility for various aspects of the conduct and administration of the proceedings between the different courts involved and between insolvency representatives, including limitations on authority to act without the approval of the other courts or insolvency representatives;
- (b) Availability and coordination of relief;
- (c) Coordination of recovery of assets for the benefit of creditors generally, in case claims for assets of a group member subject to bankruptcy proceedings in a different State are raised;
- (d) Submission and treatment of claims;
- (e) Use and disposal of assets;
- (f) Methods of communication, including language, frequency and means;
- (g) Provision of notice;
- (h) Coordination and harmonization of reorganization plans;
- (i) Issues related specifically to the agreement, including amendment and termination, interpretation, effectiveness and dispute resolution;
- (j) Administration of proceedings, in particular with respect to stays of proceedings or agreement between the parties not to take certain legal actions;
- (k) Choice of applicable law with respect to overlapping issues;
- (l) Allocation of responsibilities between the parties to the agreement;
- (m) Costs and fees; and
- (n) Safeguards.

52. The safeguards included typically relate to ensuring that nothing in the agreement derogates from court independence and authority, public policy and applicable law, particularly with respect to any obligations undertaken by the insolvency representative or parties, including the debtor.

53. These agreements are increasingly common, especially in certain States, and have been successfully employed in different situations, such as concurrent reorganization and liquidation proceedings in different States; main and non-main proceedings as defined by the Model Law; and concurrent insolvency and non-insolvency proceedings in different States. It should be noted, however, that while

the insolvency law of certain States may permit courts to approve cross-border agreements regarding the same debtor (for example, through provisions analogous to article 27 of the Model Law), that authorisation may not necessarily extend to the use of such agreements in the group context. What might be required to facilitate global resolution of a group's financial difficulties (be it global reorganization or a combination of different procedures) is an agreement to coordinate multiple proceedings with respect to different debtors in different States, albeit members of the same group. Many laws may lack the provisions necessary to enable a court to approve or recognize an agreement relating not only to debtors subject to its jurisdiction but also to debtors that are not, even if they are members of the same enterprise group.

54. It is desirable, therefore, that in order to enhance cross-border cooperation, an insolvency law should authorize the relevant parties — insolvency representatives and other parties in interest — to conclude cross-border insolvency agreements concerning different group members in different States and permit the courts to approve or implement them, taking into consideration the group context. It should be noted that different States may have different form requirements that will have to be observed in order for these agreements to be effective in the relevant jurisdictions.

Recommendations 253-254

Purpose of legislative provisions

The purpose of legislative provisions with respect to cross-border insolvency agreements is to ensure that the insolvency law:

- (a) Permits the use of such agreements to facilitate cooperation with respect to insolvency proceedings in different States concerning members of the same enterprise group; and
- (b) Authorizes the approval of such agreements by the court, as appropriate.

Contents of legislative provisions

Authority to enter into cross-border insolvency agreements

253. The insolvency law should permit the insolvency representative and other parties in interest to enter into a cross-border insolvency agreement involving two or more members of an enterprise group in different States to facilitate coordination of insolvency proceedings with respect to those group members.

Approval or implementation of cross-border insolvency agreements

254. The insolvency law should permit the court to approve or implement a cross-border insolvency agreement involving two or more members of an enterprise group in different States to facilitate coordination of the insolvency proceedings with respect to those enterprise group members.

A/CN.9/WG.V/WP.92/Add.2 (Original: English)**Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-eighth session****ADDENDUM****Explanatory notes on drafting issues****I. Introduction**

1. This document sets forth explanatory notes with respect to the revision of the recommendations contained in A/CN.9/WG.V/WP.92 and Add.1 and raises a number of questions for consideration by the Working Group concerning those recommendations.

II. Domestic issues**A. Joint application for commencement — draft recommendations 199-200**

2. Draft recommendation 199 provides only that the insolvency law “may” provide for joint applications for commencement, while recommendation 200 uses “The insolvency law should” with respect to specifying the parties that may make a joint application. To link the wording of the two draft recommendations, while retaining draft recommendation 199 as permissive, the Working Group may wish to consider whether the words “Where the insolvency law provides for joint applications in accordance with recommendation 199” should be added to draft recommendation 200. This is the approach adopted in the similar case of draft recommendations 220 and 221 dealing with substantive consolidation.

3. The words “satisfies the commencement standard in recommendation 16 and” have been added as requested by the Working Group at its thirty-seventh session (A/CN.9/686, para. 88).

B. Procedural coordination — draft recommendation 205

4. The wording “at the time of” has been revised to “at the same time as” for greater clarity.

C. Post-commencement finance — draft recommendation 212

5. Draft recommendation 212 has been revised in accordance with the decisions of the Working Group at its thirty-seventh session, combining former paragraphs (a) and (b) and clarifying, in paragraph (b), that the harm in question is harm suffered

by the creditors of the group member providing the post-commencement finance (A/CN.9/686, para. 77).

6. The Working Group may wish to consider the alternative wording suggested in paragraph (b). Currently the insolvency representative is required to determine that the harm is offset by the benefits of the post-commencement finance at the time the insolvency representative makes its decision. Since those benefits are rarely likely to be realised at the time the decision is made, but rather to accrue over the course of the proceedings and their successful resolution, it may be more appropriate for the draft recommendation to provide that the harm will be offset by the benefits.

D. Substantive consolidation — draft recommendations 220-228

Draft recommendation 220

7. In accordance with the decisions of the Working Group at its thirty-seventh session on draft recommendation 220 (A/CN.9/686, paras. 99, 101-102):

(a) The chapeau has been revised to include the word “only”; and

(b) Paragraph (b) has been revised to include the requirement that the court should be satisfied both as to the group members’ engagement in the fraudulent activity and as to the appropriateness of the remedy.

Draft recommendation 221

8. The introductory words to draft recommendation 221 have been revised to link it to draft recommendation 220. The wording at the end of the draft recommendation referring to the conditions applicable to exclusions might more accurately refer to the circumstances in which exclusions might be warranted or permitted. As discussed in the Working Group (A/CN.9/686, paras. 103-104), the issue was not so much that conditions should attach to such exclusions, but rather that since it was not possible to identify with clarity all situations in which it might be appropriate to exclude assets and claims, some guidance should be provided on the types of circumstances that would be relevant. The use of the word conditions, however, suggests the need to identify specific requirements, for example, that the exclusion should on balance benefit the relevant creditors; and so forth. The Working Group may wish to consider this issue further and perhaps suggest some additional wording that might provide more guidance to users of the Guide.

Draft recommendation 222

9. The proviso at the end of draft recommendation 222 has been deleted and the footnote revised as requested by the Working Group (A/CN.9/686, paras. 105-106). The words relating to the timing of the application have been revised as proposed for draft recommendation 205.

Draft recommendation 223

10. The order of the references to parties in draft recommendation 223 has been revised as requested by the Working Group (A/CN.9/686, para. 107).

Draft recommendation 224

11. With respect to draft recommendation 224, the Working Group may wish to consider whether, if assets are treated “as if they were part of the single insolvency estate” in paragraph (a), it may be appropriate to similarly provide, in paragraph (c), that claims should be “treated as if they were” claims against the single insolvency estate.

Draft recommendation 228 — calculation of the suspect period

12. The purpose of draft recommendation 228 is to have a clear rule for calculation of the suspect period in the case of substantive consolidation of a number of group members. It is currently drafted on the basis that the time of ordering substantive consolidation affects the calculation of the suspect period. The Working Group may wish to consider the following proposal.

13. In the cases covered by both paragraphs (2) and (3), there are really only two methods of calculation based, in accordance with recommendation 89, on the date of application for commencement or the date of commencement; the date of an order for substantive consolidation does not affect that calculation.

14. The relevant date will be either a different date for each member — the date of application for each member or the date of commencement for each member (currently covered by paragraph (3) (a)), or it will be a common date — the date of the earliest of all of the applications for commencement or the earliest of all of the dates of commencement (covered by paragraph (3) (b)). When all applications are made at the same time, it will be a single date and when commencement occurs at the same time, it will also be a single date, both of which fall within the scope of paragraph 3 (b).

15. Draft recommendation 228 could therefore be redrafted as follows:

(1) The current drafting could be retained, with the addition of the words “with respect to two or more enterprise group members” at the end.

(2) Deleted.

(3) The chapeau could be revised to provide “The specified date from which the suspect period is calculated retrospectively in accordance with recommendation 89 may be”.

(a) The current drafting could be retained, with the deletion of the words “in accordance with recommendation 89”.

(b) The current drafting could be revised along the following lines: “A common date for all enterprise group members included in the substantive consolidation, being either (i) the earliest of the dates of application for, or commencement of, insolvency proceedings with respect to those group members; or (ii) the date on which all applications for commencement were made or all proceedings commenced.”

Draft recommendation 231 — notice of substantive consolidation

16. The Working Group may wish to consider whether draft recommendation 231 (substantive consolidation) should be aligned with draft recommendation 210 (procedural coordination), as indicated by the additional words in square brackets, to require the context of the notice to be the same in both cases.

E. Participants — draft recommendation 236

17. In accordance with the decisions of the Working Group at its thirty-seventh session with respect to draft recommendation 236 (A/CN.9/686, para. 122):

- (a) The heading has been revised;
- (b) Additional wording has been added to paragraph (a) to align it with draft recommendation 250;
- (c) The references to the division of powers between insolvency representatives and to one of them taking a leading role have been deleted from paragraph (b);
- (d) A reference to intra-groups claims has been added to paragraph (c).

18. The Working Group may wish to consider the following additional issues:

- (a) Revision of the chapeau to provide that cooperation “may” be implemented rather than “should” be implemented to reflect the approach taken in draft recommendation 250 and article 27 of the Model Law. The cross-reference to draft recommendations 234 and 235 has been deleted in order to align the chapeau with that of the recommendations addressing cooperation to the maximum extent possible in the international context, that is draft recommendations 241 and 250;
- (b) The relocation of the references in square brackets to communication with creditors and meetings with creditors from paragraph (d) to paragraph (c) so that that communication is part of the general administration and supervision of affairs of the debtor and is not limited to the reorganization context of paragraph (d); and
- (c) The alternative wording in square brackets proposed with respect to paragraph (d) to reflect the usage in draft recommendation 237 of the phrase “coordinated reorganization plans”.

III. International treatment of enterprise groups in insolvency

A. Access to courts and recognition of foreign proceedings

Purpose clause

19. A new purpose clause has been added for completeness.

B. Forms of cooperation involving courts — purpose clause and draft recommendations 240, 241, 244 and 245

Purpose clause

20. The words “involving courts” have been added at the request of the Working Group (A/CN.9/686, para. 22). The word “administer” has been added to paragraph (b) to align this draft recommendation with draft recommendation 246 and the subsequent recommendations.

21. The word “protections” has been deleted in paragraph (c) and below in the purpose clause before draft recommendation 246 and the word “safeguards” substituted to improve the drafting.

Draft recommendation 240

22. As requested by the Working Group at its thirty-seventh session (A/CN.9/686, paras. 24-25), the words “to act at the direction of” have been added to draft recommendation 240, together with a footnote referring to the definition of foreign representative to confirm that the cooperation referred to in these recommendations would also apply in the case of an interim insolvency representative.

23. It was proposed at the last session of the Working Group that adding the word “other” in the last clause to refer to “members of that enterprise group” would make the meaning clearer (A/CN.9/686, para. 23). However, adding that word may limit the proceedings commenced in other States to those with respect to other members of the group; without it the draft contemplates that the proceedings in other States can be proceedings both with respect to other group members, as well as additional proceedings with respect to the same member. An alternative approach, as proposed below with respect to draft recommendations 247 and 249, might be to substitute the word “that” with the words “the same” before enterprise group.

Draft recommendation 241

24. The words in square brackets commencing with the word “including” in paragraph (a) have been added to conform the draft recommendation to draft recommendation 250. The chapeau and paragraphs (b), (c) and (d) have been revised as requested by the Working Group (A/CN.9/686, paras. 27-28 and 30).

Draft recommendation 244

25. Draft recommendation 244 has been revised as requested by the Working Group (A/CN.9/686, paras. 42-45). The Working Group may wish to consider whether the reference to “these recommendations” is preferable to a specific reference by number to all of the recommendations above or whether the draft recommendation should simply refer to “communication involving the courts” without any cross reference.

26. It was suggested that draft recommendation 244 should be limited to communications between the courts, but since it is presumably also relevant to communications between the courts and to communications between the courts and insolvency representatives, as permitted under draft recommendations 240 and 242, the word “involving” is suggested. An alternative would be to provide that “The insolvency law should specify that communication between courts or between courts and insolvency representatives should not imply”.

Draft recommendation 245

27. The references to “joint” hearings and to independence of the court have been deleted as requested by the Working Group (A/CN.9/686, para. 46). The phrase “their availability to other courts” has been revised to “their availability to a foreign court” for greater clarity.

C. Forms of cooperation involving insolvency representatives

1. Cooperation by insolvency representatives — draft recommendations 246-250

Draft recommendations 246 and 248

28. Draft recommendations 246 (previously numbered 241) concerning cooperation between and the insolvency representative and foreign courts and draft recommendation 248 (previously numbered 244) concerning communication between the insolvency representative and foreign courts or representatives and have been relocated from the section dealing with courts to this section dealing with the insolvency representative.

Draft recommendations 247 and 249

29. Draft recommendations 247 and 249 have been revised to clarify that the foreign representatives referred to were appointed to administer insolvency proceedings commenced in other States concerning members of the same enterprise group (A/CN.9/686, para. 50). The final sentence referring to the time at which communication might take place has been deleted from draft recommendation 249 in accordance with the request of the Working Group (A/CN.9/686, para. 51).

30. The Working Group may wish to consider whether, in draft recommendations 246-249, the reference to “that” enterprise group is sufficiently clear or whether the words “the same” should be substituted.

Draft recommendation 250

31. In the chapeau of draft recommendation 250, the cross-reference to draft recommendation 248 has been deleted in order to align this recommendation with draft recommendation 241, where the cross reference was also deleted at the request of the Working Group (A/CN.9/686, para. 27). The same revision has been made to draft recommendation 236, which also addresses the issue of cooperation to the maximum extent possible.

32. In accordance with the decisions of the Working Group at its thirty-seventh session with respect to draft recommendation 250 (A/CN.9/686, paras. 52 and 55):

(a) The chapeau now provides that cooperation “may” be implemented in accordance with the examples to align the wording with that of article 27 of the Model Law and draft recommendation 241;

(b) The references in paragraph (c) to the division of the exercise of powers and to one insolvency representative taking a leading role have been deleted.

33. The Working Group may wish to consider the following proposal. The wording in square brackets at the end of paragraph (d) of draft article 250 has been added to align it with draft recommendation 236. The reference to communication with and meetings of creditors has also been added to paragraph (d) for the same reasons as given above with respect to draft recommendation 236.

2. Appointment of a single or the same insolvency representative — purpose clause, draft recommendation 251

34. As requested by the Working Group at its thirty-seventh session (A/CN.9/686, paras. 58 and 60):

(a) The purpose clause has been expanded;

(b) The reference to the court making a determination “in the best interests of the insolvency proceedings” in draft recommendation 251 has been deleted. The Working Group may wish to note that those words are still used in the equivalent domestic recommendation, draft recommendation 232.

35. The Working Group may wish to note the choice of words in square brackets in draft recommendation 251, referring either to the insolvency law or the applicable law.

D. Use of cross-border agreements — draft recommendation 253

36. The words “to the extent permitted and in the manner required by the applicable law” have been deleted as requested by the Working Group (A/CN.9/686, para. 63).

E. Possible additional recommendations

37. At its last session, the Working Group agreed to add recommendation 239 concerning access to courts and recognition of foreign proceedings that would facilitate the insolvency representative of foreign proceedings seeking cooperation with local proceedings. These requests are sometimes referred to as “inbound requests”.

38. In addition to equipping the courts of the enacting State to deal with incoming requests for recognition, the Model Law also addresses “outbound requests”, permitting the court to seek assistance or information from foreign courts (article 25.2). The Model Law also addresses the “outward” powers of the insolvency representative of local proceedings, permitting them to seek recognition of and assistance for those proceedings in a foreign court (see the Guide to Enactment of the Model Law, paras. 26-27). Article 5 permits the insolvency representative to “act in a foreign State on behalf of the local proceedings, as permitted by the applicable foreign law”. While the draft recommendations address the outbound request with respect to the court (draft recommendation 242), they do not include the equivalent of article 5. The Working Group may wish to consider whether this issue should be addressed and if so, the appropriate solution. One approach might be to add a draft recommendation along the lines of article 5, as follows:

“The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member to act in a foreign State on behalf of those proceedings, as permitted by applicable foreign law.”

39. An alternative approach might be to follow the wording of article 25 and add the words “or to request information or assistance directly from” to draft recommendation 248, as follows:

“248. The insolvency law should permit an insolvency representative appointed to administer insolvency proceedings with respect to an enterprise group member, in the exercise of its functions and subject to the supervision of the court, to communicate directly with, or to request information or assistance directly from, foreign courts concerning those proceedings and insolvency proceedings commenced in other States with respect to members of that enterprise group.”

**E. Note by the Secretariat on possible on possible future work on
insolvency law, submitted to the Working Group on Insolvency
Law at its thirty-eighth session
(A/CN.9/WG.V/WP.93 and Add. 1-6)**

[Original: English]

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III. Future work

A. Introduction

1. At its thirty-seventh session in 2009, the Working Group had a preliminary exchange of views on possible topics for future work. The Report of that session (A/CN.9/686, paras. 127-130) noted that the Working Group had before it a proposal by the Union Internationale des Avocats (UIA) on a possible international convention in the field of international insolvency law, which might cover the following issues:

- (a) Granting of access to courts to foreign insolvency representatives;
 - (b) Recognition of foreign insolvency proceedings (with the effect of granting the foreign proceeding the rights of a national proceeding or triggering a secondary proceeding); and
 - (c) Cooperation and communication between insolvency representatives and courts.
2. If agreement on those issues seemed possible, the proposal suggested the international convention might also contain provisions on:
- (a) Direct competence (“convention double”);
 - (b) Applicable law (“convention triple”, could be part of a separate protocol).

3. Other topics proposed for consideration included: liability of directors and officers of enterprises in insolvency or in proximity to insolvency; insolvency of banks and financial institutions; the concept of centre of main interests (COMI) of an enterprise and the factors relevant to its determination, as well as issues of jurisdiction and recognition; the development of a Model Law based on the Legislative Guide or on some aspects of the Legislative Guide, including the recommendations currently being finalized on international aspects of the treatment

of enterprise groups; review of the enactment of the Model Law and promotion of its wider adoption; sovereign insolvency; and the insolvency of public or State-owned enterprises.

4. Preliminary support was expressed in favour of various proposals, noting that more detailed information would be required in order to facilitate discussion, possibly at the next session of the Working Group. It was suggested that the feasibility of some proposals would depend upon the scope of the work proposed and, in the case of the proposal for an international convention, upon support from Governments and cooperation with other international organizations with competence in related areas. Support was expressed in favour of the goal of developing an international convention, but there were reservations with respect to the feasibility of reaching agreement, particularly in view of the difficulties encountered in the past in the area of international insolvency law. With respect to other proposals, in particular the insolvency of banks and financial institutions, more information was required with respect to work currently being undertaken by other international organizations in order to consider whether there was any scope for work by UNCITRAL.

5. The purpose of this note is to provide background information with respect to some of the topics noted above to assist the Working Group in its deliberations at its thirty-eighth session. The Working Group may wish to note that much of the information is very preliminary in nature and is intended to provide only a brief introduction, with a particular focus on work being undertaken by other organizations or on reports identifying particular needs. In considering possible topics for future work and the desirability of making a recommendation to the Commission in that regard, the Working Group may also wish to consider the need for further information.

B. Background information on topics proposed for possible future work

1. Liability of directors and officers of enterprises in insolvency or in proximity to insolvency

6. At its thirty-eighth session in 2005, the Commission considered a proposal by the International Insolvency Institute (III) on directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases (A/CN.9/582/Add.6). That document will be made available for the information of the Working Group at its thirty-eighth session.

7. Having considered the proposal, the Commission concluded¹ that "while the topic was an important one, it might involve questions of criminal law that would be outside the mandate of the Commission or questions for which it might be difficult to find harmonized solutions. For those reasons, that topic might not be as susceptible as other topics to future work at that time."

¹ *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17 (A/60/17)*, paragraph 209.

8. If the Working Group is of the view that the topic merits further consideration at this time, it may wish to consider the focus and substance of the proposal in the light of the conclusions reached by the Commission.

2. Insolvency of banks and financial institutions

9. The Working Group may wish to note that for some years, work has been ongoing in several international organizations with respect to various aspects of the insolvency of banks and financial institutions and more particularly as a result of the global financial crisis. The Working Group may wish to note the following summary of the recent work of several organizations on this issue.

(a) International Monetary Fund and World Bank

10. In April, 2009, for example, the International Monetary Fund and the World Bank issued a study entitled “An Overview of the Legal, Institutional, and Regulatory Framework for Bank Insolvency.” The study provides an overview of the legal, institutional, and regulatory framework that countries should put in place to address cases of bank insolvency. It is primarily intended to inform the work of the staff of the International Monetary Fund (IMF) and World Bank, and to provide guidance to their member countries. The study deals exclusively with the legal, institutional, and regulatory frameworks for insolvent banks — that is, deposit-taking institutions; other types of financial institutions are not covered. Moreover, the focus is purely domestic; issues of cross-border bank insolvency are not addressed.

11. The study is part of a broader work agenda of IMF and World Bank staff on issues of financial sector stability. Several projects are currently underway in the IMF that will address issues that are not covered by the present study, including an examination of the legal and regulatory questions that arise in the insolvency of non-bank financial institutions, the treatment of complex financial instruments in insolvency proceedings, and the legal framework for information sharing among domestic financial sector supervisors, and supervisory oversight and intervention in a cross-border context.

12. The report acknowledges the important work being done by other international bodies on issues of financial sector stability — for example, the study currently underway in the Basel Committee on Banking Supervision on issues of cross-border bank resolution.

(b) Basel Committee on Banking Supervision

13. In September 2009, the Basel Committee on Banking Supervision issued a consultative document entitled “Report and Recommendations of the Cross-border Bank Resolution Group”, outlining a set of ten recommendations for implementation by national authorities to improve cross-border crisis management and resolutions. The consultation paper notes the significant connection between banking, insolvency and company law and, in the cross-border context, raises many of the issues discussed by Working Group V in its deliberations on enterprise groups. In particular, the paper suggests that:

“National authorities and policymakers should examine whether the recommendations which UNCITRAL is developing for judicial bankruptcy

proceedings governing groups of enterprises could inform the work underway to improve the coordination of resolution proceedings of financial groups and conglomerates.”²

(c) European Union

14. The European Union has issued a Communication on “A Bank Resolution Framework for the EU”, which presents an overview of the problems, the areas under examination related to early intervention measures and bank resolution and seeks views on the implementation of an EU framework for crisis resolution in the banking sector. It proposes policy objectives and an overall approach, but no specific detailed policy solutions at this stage. A broad range of issues is considered, from “early intervention”, when early remedial action by banking supervisors aims to correct irregularities at banks and help them return to normal course of business, to bank resolution measures entailing the reorganization of ailing banks with a view to safeguarding financial stability, the continuity of banking services and the revitalization of the bank and to insolvency frameworks under which failed banks are wound up. The Communication notes UNCITRAL’s work on enterprise groups, specifically those aspects dealing with facilitating the continuous operation of the business under reorganization or liquidation by securing continuous access to funds.

15. The Communication goes on to note the potential desirability of facilitating a more integrated treatment of enterprise groups, particularly banking groups, in insolvency:

“This might involve — in clearly specified circumstances — treating the group as a single enterprise in order to overcome the perceived inefficiency and unfairness of the traditional single entity approach. While techniques to achieve this are available under some national law, their application is necessarily restricted to entities within the same jurisdiction, and subject to the same insolvency regime. If similar measures were to be developed for use in insolvency proceedings for cross-border banking groups, the fact of different insolvency regimes — with different substantive rules on, for example, priority and avoidance powers — would need to be addressed.”³

3. The concept of centre of main interests (COMI) of an enterprise and the factors relevant to its determination, as well as issues of jurisdiction and recognition

16. A proposal has been received from the delegation of the United States of America, which is set forth in Add.1 to this Note. A background paper supporting that proposal is set forth in Add.2.

² Basel Committee on Banking Supervision, Report and Recommendations of the Cross-border Bank Resolution Group, para. 72, available from www.asbaweb.org/Consulta-Reporte.pdf.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the European Court of Justice and the European Central Bank: An EU Framework for Cross-Border Crisis Management in the Banking Sector, COM (2009) 561 final, Brussels, 20/10/2009, available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0561:FIN:EN:PDF>, pp. 15-16.

4. The development of a Model Law based on the Legislative Guide or on some aspects of the Legislative Guide, including on the international treatment of enterprise groups

17. The proposal received from the delegation of the United States of America, which is set forth in Add.1 to this Note, touches also upon this topic.

18. The Working Group may recall that, in its deliberations on international aspects of enterprise groups, some of the issues considered included how the solutions provided by the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) might apply to enterprise groups, particularly with respect to facilitating cross-border cooperation and resolving the question of the centre of main interests of an enterprise group (A/CN.9/647, paras. 85-96; A/CN.9/666, paras. 24-39; A/CN.9/671, paras. 16-55).

19. The Working Group may also recall it acknowledged, at its thirty-sixth session in 2009, that, “although the form of a Model Law might be desirable, it might not be realistic to pursue that type of text at this stage in view of the time that might be required for its negotiation, the current need for the provisions on enterprise groups in light of the global financial crisis and the question of whether there was the support necessary for its negotiation (A/CN.9/671, para. 55).” For those reasons, and because the content of the draft recommendations being considered addressed the content of domestic law, the Working Group agreed that the recommendations on international treatment of enterprise groups in insolvency should be added to part three of the Legislative Guide.

20. The Working Group may also wish to note paragraphs 5 and 6 of document A/CN.9/WG.V/WP.92/Add.1, which recall the discussion on centre of main interests in the context of enterprise groups and the challenge of reaching broad international agreement on that issue in order to achieve a consistently, widely applied and, possibly, binding solution that would deliver certainty and predictability to the cross-border insolvency of enterprise groups. It might also wish to recall that, at its thirty-seventh session in 2009, the issues of access to courts and recognition of proceedings were raised as possible pre-conditions to cross-border cooperation. A draft recommendation to the effect that insolvency laws should address those issues was added to the recommendations that will form part three of the Legislative Guide.

5. Review of the enactment of the Model Law and promotion of its wider adoption

21. The report of the thirtieth session of the Commission in 1997, on the occasion of adoption of the UNCITRAL Model Law on Cross-Border Insolvency, notes:⁴

“223. The Commission heard the proposal that, having completed the work on model legislation, it should prepare model provisions for an international treaty, bilateral or multilateral, on judicial cooperation and assistance in cross-border insolvency or a full-fledged treaty on those matters. It was recalled that such work had been mentioned as a possibility at the twentieth session of the Working Group on Insolvency Law (A/CN.9/433, paras. 16-20). In addition to that proposal, various other topics were mentioned with respect to which it might be worthwhile to explore the

⁴ *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17).*

desirability and feasibility of work at the international level; those were: legislative treatment of cross-border insolvency in the banking and financial services sector, preparation of model agreements or practices for cross-border cooperation in reorganizations of insolvent enterprises, conflict-of-laws solutions in cross-border insolvency cases, and the effects of insolvency proceedings on arbitration agreements and arbitral proceedings.

“224. After discussion, the Commission adopted the view that it would be preferable, before deciding whether to undertake work towards a treaty or to deal with any other topic mentioned, to evaluate the impact of, and the experience with, the Model Law and to await the results of similar work in other international forums, such as the European Union, and possibly the Organization of American States. In the meantime, the Secretariat was requested to monitor the developments in the field and to formulate suggestions for a future session of the Commission as to the desirability and feasibility of any such work.

“225. During the final considerations of the Model Law, it was proposed, and the Commission agreed with the proposal, that the Secretariat should collect information on the enactment of the Model Law in various States, and, in cooperation with relevant organizations that had the expertise in the area, to monitor the developing practices, experience and issues that would emerge from the use of national laws based on the Model Law. The holding of judicial colloquia, which had been convened during the preparatory work towards the Model Law, was mentioned as one possible method for such evaluation work.”

22. In 2005, the Secretariat prepared a short note covering, *inter alia*, developments with adoption of the Model Law, which included a short summary of the changes that had been adopted by the eight States enacting legislation based on the Model Law as at 15 April 2005 (A/CN.9/580).

23. The Working Group may wish to note the collection of case law on enactments of the Model Law (CLOUT issues 72, 73, 76 and 92 with further issues due for publication in 2010).⁵

24. The Working Group may also wish to note that the 8th Multinational Judicial Colloquium was held in Vancouver, Canada in May 2009. The 9th Colloquium is currently planned to be held in Singapore in 2011. A regular feature of those colloquia has been a review of developments with respect to adoption and use of the Model Law.

25. The Working Group may wish to consider what further information might be collected and made available with respect to enactment of the Model Law.

6. Sovereign insolvency

26. In the early 2000s, there was considerable interest in the topic of sovereign insolvency and the need to develop mechanisms to address the issues raised by it. Various mechanisms were proposed to address those issues, including by the IMF. Following the financial crisis of 2008, the need for such a mechanism was further discussed in various forums, including the United Nations. In considering this topic

⁵ Available from www.uncitral.org/uncitral/en/case_law/abstracts.html.

and the potential for future work by UNCITRAL, the Working Group may wish to note the following information, which provides a very brief indication of the current status of the development of such mechanisms.

27. The Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System of 21 September, 2009⁶ considers the mechanisms currently available to address sovereign debt default and restructuring and notes, *inter alia*, that:

63. The existing “system” (or really “non-system”) arose as piecemeal and mostly ad hoc intergovernmental responses to sovereign debt crises as they occurred over the past half-century or so. The fact that the solutions the current system provides take time to be adopted and provide inadequate relief implies that the system for addressing sovereign debtors is clearly inferior to that provided in many countries for corporations and sub-sovereign public entities by national bankruptcy regimes.”

28. In preliminary recommendations,⁷ the Commission recommended:

“71. There is an urgent need for renewed commitment to develop an equitable and generally acceptable Sovereign Debt Restructuring Mechanism, as well as an improved framework for handling cross-border bankruptcies. One way by which this might be done is through the creation of an independent structure, such as an International Bankruptcy Court. The United Nations Commission on International Trade Law provides a model that could be extended to the harmonization of national legislation on cross-border disputes dealing with trade in financial services.”

29. A 2009 Report by the Secretary-General “Towards a durable solution to the debt problems of developing countries,”⁸ concludes:

“63. A continued deterioration of economic conditions may push some countries with access to international capital markets towards sovereign default. It is thus lamentable that the design of a mechanism aimed at facilitating the resolution of sovereign insolvency has been marginalized in the international discussion. The outcome document of the Conference on the World Financial and Economic Crisis underlines the need of a more structured framework for international cooperation in this area (A/CONF.214/3, para. 34). In this context, it would also be desirable for the international community to discuss and promote responsible lending and borrowing.”

7. The insolvency of public or State-owned enterprises

30. With respect to this topic, the Working Group may wish to note the extent to which it was previously considered in formulating the Legislative Guide.

⁶ Available from www.un.org/esa/desa/desalert/2009/Nov/UNFinalReport.pdf, paras. 59-84.

⁷ Transmitted to the General Assembly by the President of the General Assembly on 19 March 2009, available from www.un.org/ga/president/63/letters/CommissionExperts200309.pdf.

⁸ A/64/167, 24 July 2009, submitted to the General Assembly pursuant to resolution A/63/206: External debt and development: towards a durable solution to the debt problems of developing countries.

31. In December 2000, UNCITRAL held an international colloquium to discuss the development of its future work on insolvency law. Amongst the issues discussed was the scope of that work, such as whether an insolvency law should include, for example, banks, insurance companies and state-owned enterprises (SOE). It was suggested that if SOEs were to be included in the scope of an insolvency framework, there might be important social considerations, including cultural sensitivities, issues of compatibility with the social fabric and the purposes and goals of insolvency law as they related to these types of debtor in different societies, that would need to be reviewed for their impact on eligibility criteria.

32. When the Legislative Guide was formulated, the view taken of SOEs was that the insolvency law could apply to such enterprises where they were engaged in economic activity and competed in the market place as distinct economic or business operations and had the same commercial and economic interests as privately-owned businesses. The Legislative Guide notes the advantages of subjecting such enterprises to the discipline of the insolvency law, but also the need to minimize conflicts of interest with respect to the role played by the State in those enterprises. It also notes that there may be a need for exceptions to a general policy of inclusion in a general insolvency law, such as where the treatment of SOEs is part of a large-scale privatization program, but does not consider those exceptions in any detail (Legislative Guide, part two, chap. I, paras. 8-10 and recommendation 8).

33. The Working Group might also wish to note that the World Bank Principles for Effective Insolvency and Creditor Rights Systems echo the approach of the Legislative Guide, providing, in principle C.3 that:

“The insolvency proceeding should apply to all enterprises or corporate entities, including state-owned enterprises. Exceptions should be limited, clearly defined, and should be dealt with through a separate law or through special provisions in the insolvency law.”

A/CN.9/WG.V/WP.93/Add.1 (Original: English)**Note by the Secretariat on possible on possible future work on insolvency law, submitted to the Working Group on Insolvency Law at its thirty-eighth session****ADDENDUM****Proposal by the delegation of the United States of America for preparation of a model law or model provisions on selected international insolvency law issues**

[Background for this proposal is set forth in A/CN.9/WG.V/WP.93/Add.2]

1. UNCITRAL has been a leader for over a decade in preparing and developing model laws and texts for insolvency law reform including the Model Law on Cross-Border Insolvency with a Guide to Enactment, the Legislative Guide on Insolvency and the Practice Guide on Cross-Border Agreements. In order to complement that body of work, our delegation would like to make a recommendation for future work for Working Group V to develop and prepare a model law or model provisions addressing selected international insolvency law issues.
2. In the past year, a number of requests have been made to bilateral and multilateral assistance bodies for a distillation of pertinent aspects of the UNCITRAL Model Law, the Guide, and the Practice Guide so as to facilitate their consideration in the context of the development of new laws on business insolvency matters, especially on a cross-border basis. That had led our delegation to recommend that we consider work on two possible topics. The first would be to address the lack of predictability in regard to the determination as to the location of the Centre of Main Interest (COMI), a term used by the UNCITRAL Model Law and elsewhere. A number of jurisdictions have not been consistent in decisions interpreting and applying the provisions of the Model Law on Cross-Border Insolvency and UNCITRAL could provide specific guidance on how selected aspects of the Model Law on Cross-Border Insolvency, including COMI and establishment, should be interpreted and applied. These are issues that need to be addressed.
3. As a second possible topic, we recommend Working Group V develop a model law or model provisions on cross-border insolvency issues affecting enterprise groups based upon part three of the Legislative Guide and the Practice Guide. We recognize that on some matters, there may not be only one approach that works well, and for that and other reasons it will be desirable to consider alternative approaches as needed, so that the model law or provisions will as appropriate include options. Among the topics that might be considered, we suggest jurisdiction, access and recognition.
4. We recommend that Working Group V discuss these proposals at its thirty-eighth session in April 2010 and that they be considered for adoption at the next plenary session in mid-2010. We also recommend that the Commission provide

sufficient flexibility so that the Working Group can assess which aspects of those topics merit attention.

5. We have arrived at these suggestions based on concerns that the current global crisis has substantially restricted trade and commerce among States. As UNCITRAL's mandate is to promote trade and commerce throughout the world, the question for UNCITRAL is what role it should play in addressing the current financial crisis in regard to insolvency law reform going forward.

6. The current economic crisis has been both global and one of the severest economic downturns in the last several decades, making it one of the most challenging. Hundreds of thousands of workers are unemployed as a result and many businesses have failed and many that might have been retained as going concerns have had instead to be liquidated or sold in a manner that precluded continued operation. The existence of effective modern insolvency laws and capacity for cross-border cooperation might have reduced this outcome. As a result of these circumstances, many States are reviewing and analysing the need to reform their insolvency law to address these issues and challenges in the modern world. Given the substantial expertise existing in Working Group V in regard to insolvency law both among the Member and observer States and the NGOs, along with the significant history and experience that the Working Group has in developing substantial and often complex products involving insolvency reform, the ability is in place to take on challenging and complex issues. We recognize that there are other regional efforts that may examine related issues, but we believe it is important for this global body with membership from all regions to pursue this effort.

7. Given the current global problems being experienced by many States, resources for individual States to retain the experts necessary to adequately address insolvency reform relating to international issues is limited. If States were able to utilize existing resources and model texts on insolvency in the consideration of insolvency law reforms, then States would be generally more inclined to revise and modernize their respective insolvency laws. The modernization and reform of existing insolvency laws by States should provide for an expansion of trade and commerce among States based in part on the predictability and transparency produced by such insolvency legislation.

8. This delegation therefore proposes that:

Working Group V consider recommending that the Commission consider this type of proposal at its next session with a view to approving a mandate for Working Group V to provide guidance on the interpretation and application of selected concepts of the Model Law, including COMI and establishment and to develop a model law or model provisions on insolvency law addressing selected international issues including jurisdiction, access and recognition.

9. We appreciate the consideration of the Working Group of this proposal.

A/CN.9/WG.V/WP.93/Add.2 (Original: English)**Note by the Secretariat on possible on possible future work on insolvency law, submitted to the Working Group on Insolvency Law at its thirty-eighth session****ADDENDUM****Proposal by the delegation of the United States of America: background paper**

[This paper has been prepared by the delegation of the United States of America in support of its proposal (see A/CN.9/WG.V/WP.93/Add.1) for Working Group V (Insolvency) to consider model law provisions or legislative guidance on selected International insolvency law issues relevant both to corporate group and other cross-border matters.]

1. We are proposing a narrow and selected range of issues so as to be achievable. It is expected that others may wish to add additional related issues, but we believe it advisable in expanding the scope of the work to avoid a broad effort. The format can be considered at a later stage as the content of possible recommendations or guidance becomes clearer. This proposal is based on the assumption that no changes to the UNCITRAL Model Law on Cross-border Insolvency (the “Model Law”) are required. Supplemental provisions or guidance to the Model Law, or supplemental recommendations or guidance to the Legislative Guide and/or the Practice Guide could be developed.

A. Overview

2. The current work of Working Group V has highlighted the need for clarification of cross-cutting issues which can serve to make implementation of the Commission’s prior legal texts more effective, including the Model Law, the Legislative Guide and the recent Practice Guide. These issues may be best focused via the Model Law. Clarification can be in the nature of separate model provisions, as a supplement to the Model Law, or in another format. The Model Law with Guide to Enactment was adopted by General Assembly Resolution 52/158 of 15 December 1997. Since the adoption by the United Nations General Assembly of the Model Law a number of States have adopted it. The current list of States that have adopted and incorporated the Model Law:

Australia (2008), British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), and United States of America (2005).

3. Other countries have drawn on the Model Law as the basis for consideration or enactment of insolvency law change, and precedent developed in such countries would also be taken into account.

The preamble to the Model Law sets forth its intended purpose. The preamble states:

“The purpose of this law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives: (a) cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency; (b) greater legal certainty for trade and investment; (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor; (d) protection and maximization of the value of the debtor’s assets; and (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.”

4. The ideals and principles set out as a basis for the Model Law remain as relevant and important today as they were when the Model Law was formulated.

5. In today’s global economy, States have experienced substantial financial stress based upon the current global economic conditions. To promote and develop trade and commerce among States (UNCITRAL’s primary goal) modern functional insolvency laws both on a domestic and an international basis are critical. This aspect is even more pronounced in emerging and developing States whose economies are more fragile. As a result, for these States, predictability and certainty are especially critical.

6. As legislation is promulgated, a number of court decisions interpret and highlight issues which arise in the implementation and interpretation of such legislation. The basic concepts and ideals of the Model Law still provide a fundamental base, but various issues which have arisen in these court decisions demonstrate the need for additional review and clarification.

7. While the majority of legal proceedings which have been implemented as a result of the Model Law have been undisputed as to the debtor’s centre of main interest (COMI) being the registered office of the debtor, which is the starting point as a presumption, a number of decisions have raised issues which need to be examined and clarified. One of these is the scope of what is permitted as a rebuttal of the presumption based on place of registration (or incorporation in certain country systems), whether challenge may be made to a decision by a given State accepting jurisdiction to commence an insolvency case or other similar decision, and what criteria may be employed to answer these questions. Harmonizing such criteria may be an important factor in raising predictability in this important area of the law, as the insights of the collaborative body that first negotiated the Model Law are likely to be persuasive in many jurisdictions.

8. In order to better understand the impact of these issues, it is necessary to look at several of the basic definitions from the Model Law. These definitions are as follows:

(a) “Foreign proceeding” means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) “Foreign main proceeding” means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) “Foreign non-main proceeding” means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

(d) “Foreign representative” means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding;

(e) “Foreign court” means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) “Establishment” means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

9. With these basic definitions in mind, the Model Law in Article 16 contains a presumption that sets forth the location of the COMI of a company. The presumption is as follows: (3) “In the absence of proof to the contrary, the debtor’s registered office, or habitual residence in the case of an individual, is presumed to be to the centre of the debtor’s main interests.”

10. The Model Law does not set out what evidentiary basis or criteria are necessary to overcome the presumption that the COMI of a company is its registered office.

11. In order to better understand the effect of various court decisions on interpretation and application of the Model Law, a review of a number of cases and decisions would be helpful. This review initially includes decisions from within the European Union, since the language relating to COMI is the same as that of the EU Regulation No. 1346/2000 on insolvency proceedings, (the “EU Insolvency Regulation”). Despite the common language, however, the trends in different jurisdictions have diverged, so that harmonization would be an important achievement. Precedent and legislation from other countries will also be drawn on at the initial stage if a study by the Secretariat is authorized.

B. Decisions under the EU Insolvency Regulation and the Model Law

12. The following cases address various issues in interpreting the EU Insolvency Regulation and the Model Law.

1. Decisions under the EU Insolvency Regulation

(a) DAISY TEK- ISA LTD Ors¹

13. Daisy Tek was a subsidiary of a United States corporation which filed a Chapter 11 reorganization proceeding in the United States on May 7, 2003. Daisy Tek was also itself a holding company for a number of European companies including three German companies and a French company. Daisy Tek was a processor for European resellers and wholesale distributors of electronic office

¹ Daisytek-ISA Ltd, Re [2003] B.C.C. 562 (Ch D (Leeds District Registry), May 16, 2003).

supplies. Its operations in the United Kingdom were centred in Bradford, England. The three German companies had their registered offices in Neuss, Germany but actually conducted business operations from Freilassing, Magdeburg and Mulhain, Germany. The French company had its registered office in France and operated from facilities in France.

14. Daisy Tek commenced insolvency proceedings in the United Kingdom in 2003. The two primary issues before the English court were determining what was Daisy Tek's COMI and whether the English court had jurisdiction to make administration orders in regard to the French and German companies. The determinations were made pursuant to the EU Insolvency Regulation under Recital (13) and Article 3(1). The English court ultimately determined that the COMI for both Daisy Tek and the French and German subsidiary companies was in the United Kingdom, and that the English court had jurisdiction to grant administration orders in regard to both the French and German companies. The court considered Recital (13) of the Regulation that the COMI corresponds to the place where the debtor conducts the administration of its business on a regular basis and is therefore ascertainable by third parties. The court further recognized under Article 3(1) that the company's place of its registered office was presumed to be its COMI in the absence of proof to the contrary. The court in its decision determined the majority of the administration of the German companies was conducted from the Bradford head office, financing of the German companies was organized in the Bradford head office and seventy percent (70%) of the goods supplied to the German companies were supplied under contracts made by the holding company in Bradford. The court further found the functions carried out in Bradford were very significant and important and by comparison the local function of the companies in Germany was limited. The court made similar determinations regarding the French company.

15. The administration orders made in respect to the French registered company by the English court were initially greeted with disbelief and overturned by the Tribunal de Commerce of Cergy-Pontoise, based on a conviction that the English court confused the notion of a separately incorporated subsidiary with a mere branch. On appeal however, the Court of Appeals of Versailles reversed the lower court decision, validating the opening of the main proceedings in England and the English court's determination as to the location of the COMI being in England. The French appeals court determined under European Union Law that once an insolvency proceeding is opened by a Member State of the European Union then all Member States must defer to the determination, a ruling which was later ratified by European Court of Justice in its ruling in Eurofoods as part of the Parmalat case.

(b) ROVER FRANCE SAS

16. In the case of Rover France SAS,² the Tribunal de Commerce of Nanterre in 2005 recognized the opening of foreign main proceedings by an English court for a French company found to be operating and having its COMI in Birmingham, England. This case also was appealed to the Court of Appeals in Versailles which upheld the recognition decision. The Court of Appeals found that it could not review how the first instance court had determined COMI as that factual finding had

² SAS Rover France, Re [2005] EWHC 874 (Ch).

already been made by another Member State, and that decision had to be respected in accordance with the European Regulation. Thus, the Court of Appeals ruled that the initial opening of an insolvency proceeding in another Member State and a finding of fact therein regarding COMI pre-empted any subsequent independent determination by the recognizing State as to whether COMI was properly determined by the Member State in which the insolvency proceeding was opened.

(c) **EUROFOODS³**

17. The determination of COMI by a Member State was again challenged in the Eurofoods proceedings. Parmalat was a conglomerate headquartered in Italy, which operated in over thirty countries and employed over thirty thousand employees throughout the world. After allegations of fraud were asserted against Parmalat, various directors and professionals related to Parmalat were imprisoned by the Italian Government. On December 23, 2003, the Italian Parliament enacted a law providing for the “extraordinary administration” of Parmalat and its related subsidiaries, and on December 24, 2003, the parent company of Parmalat was admitted to extraordinary administration proceedings in Italy and an administrator was appointed.

18. Eurofoods was an Irish company whose primary business activity was to provide financing facilities for companies in the Parmalat group. Eurofoods was incorporated in 1997 and had its registered office in Dublin, Ireland. On January 27, 2004, a winding up petition for Eurofoods was filed by Bank of America before the Irish High Court which in turn appointed a provisional liquidator for Eurofoods. Thereafter the provisional liquidator notified the Parmalat extraordinary administrator of the Irish filing and his appointment. Notwithstanding the appointment for the provisional liquidator by the Irish court, on February 9, 2004, the Italian Ministry appointed the extraordinary administrator of Parmalat as the extraordinary administrator of Eurofoods in Italy. During the process each court independently determined that Eurofood’s COMI was in each court’s respective jurisdiction.

19. The Irish court found COMI in Ireland since Eurofoods was incorporated and had its registered office in Dublin. This court further found that Eurofoods was subject to supervision by the Irish Minister of Finance and the taxing authorities of Ireland and its administration was conducted pursuant to a management agreement with Bank of America in Ireland, its annual accounts were prepared and audited in accordance with Irish law and accounting principles, its books of account were maintained in Dublin, its auditors were Irish, and Eurofoods had two Irish directors and two Italian directors and that both of the Italian directors resigned prior to the winding up petition being filed. The Italian court found COMI in Italy since, among other things, Eurofoods was a subsidiary of Parmalat, the directors of Eurofoods were mandated by Parmalat and all decisions regarding Eurofoods’ operation were conducted and determined in Italy by the parent company. The respective decisions were appealed to the highest courts in Ireland and Italy, both courts affirming the

³ Eurofood IFSC Ltd, Re (C-341/04) [2006] E.C.R. I-3813; Eurofood IFSC Ltd (No.1), Re [2004] B.C.C. 383 (HC (Irl)); *see also* The Aftermath of “Eurofood” — Benq Holding BV and the Deficiencies of the ECJ Decision, *Insol. Int.* 2007, 20(6), 85-87, Christoph G. Paulus.

determination of their lower courts that each respective country was the centre of Eurofoods' main interests.

20. The matter was then appealed to the European Court of Justice, which was created in coordination with the European Union as a commercial court to decide commercial disputes between Member States. The European Court of Justice had jurisdiction to render a final determination as to whether Eurofoods' COMI was in Italy or Ireland.

21. The European Court of Justice ruled that Eurofoods' COMI was in Ireland. The Court based its decision on several factors, including that insolvency proceedings were initiated and first opened in Ireland, Eurofoods' registered office was in Ireland and the presumption in the EU Insolvency Regulation that the COMI is where the registered office is located was not rebutted.

22. Although Parmalat consisted of a group of companies with global operations, the European Court of Justice centred on Eurofoods as a single and separate company in determining COMI, rather than determining COMI for the entire Parmalat group.

23. The Eurofoods decision by the European Court of Justice stands for the proposition that the court in which insolvency proceedings are initially opened controls the determination of the COMI of the debtor. The Eurofoods decision buttressed and supported the determinations made by the English courts in Daisy Tek and related cases.

(d) MPOTEC GmbH⁴

24. After the Eurofoods decision by the European Court of Justice, the Tribunal de Commerce of Nanterre issued its opinion that MPOTEC GmbH's COMI was in France and opened a proceeding as a main proceeding. Although MPOTEC GmbH was a German registered company, it was part of the French group of companies of EMTEC. The French Court found the COMI was in France on the basis the headquarter functions of MPOTEC GmbH were carried out in France. Factors considered in addressing the issue of COMI were that the place of the meeting of the board of directors was in France, the law governing the main contracts of the company was French law, business relations with clients were conducted from France, the commercial policy of the group was determined was in France, the authorization of the parent company to enter into financial arrangements was provided in France, the locations of the debtors primary bank was in France, and the centralized management of the purchasing policy, the staff, accounts payable and computers systems for the company were all located in France.

25. The concept of a determination as to "head office functions" followed the prior decisions in England and Germany to determine COMI.

(e) ENERGOTECH SARL, RE⁵

26. In this proceeding the Tribunal de Commerce of Lure opened main proceedings for a Polish company which was part of a French group of companies.

⁴ MPOTEC GmbH [2006] B.C.C. 681 (Trib Gde Inst (Nanterre)).

⁵ Energotech Sarl, Re [2007] B.C.C. 123 (Ch).

The same criteria used in the MPOTEC GmbH proceeding was utilized here as well. Although the Polish company had its registered office in Poland and business operations there, the French Court found the “head office functions” were proof to the contrary sufficient to rebut the presumption that its COMI was the company’s registered office.

27. These two decisions by the French courts use and rely on the concept of “head office functions” as a major determinant of COMI. Whether that is a proper standard for the determination of the COMI of a company by a Member State in the European Union remains open, as the issue has not yet been presented to the European Court of Justice.

(f) EUROTUNNEL FINANCE, LTD.⁶

28. The Paris Commercial Court in line with prior cases found COMI in France and opened main proceedings notwithstanding Eurotunnel Finance, Ltd was an English registered company with offices and operations in England.

29. The French Court found the location of the COMI of the company in France was ascertainable by third parties based on a number of factors. Those factors included that operational management of the Eurotunnel entities was exercised by a joint committee located in Paris, that the registered office of the two main French companies of the group, Eurotunnel SA and France Manche are located in France, that employees and assets are equally located in France, and that negotiations as to its debt restructuring were conducted in Paris.

(g) BEN Q HOLDING, BV AND BEN Q OHG⁷

30. In an unreported decision, Ben Q OHG filed a voluntary insolvency petition in Munich, Germany and a provisional administrator was appointed by the Munich Court. Ben Q Holding, BV was incorporated in the Netherlands and the majority of the Dutch corporation’s activities were carried out in Munich. Employees of Ben Q OHG spent as much as seventy percent (70%) of their time working for Ben Q Holding, BV in Germany. Ben Q Holding, BV also had employees in Amsterdam primarily doing work for other group member companies.

31. Ben Q OHG first filed a petition in Amsterdam then two days later a petition for insolvency was filed in Munich. Both insolvency courts in Amsterdam and Munich granted interim relief as requested. Neither court decided whether the proceedings in each respective jurisdiction would be main or non-main proceedings.

32. The German judge then called the Dutch judge and after a discussion between the courts, the German judge said that he would defer to the Dutch judge as to a decision of whether the Dutch proceeding should be a main or non-main proceeding. The Dutch judge elected to have the proceeding in the Netherlands be the main proceeding.

⁶ Eurotunnel Finance Ltd. (Paris Commercial Court, 2 August 2006).

⁷ BenQ Holding BV, Re (Unreported, February 2007) (Germany).

(h) MG PROBUD GDYNIA SP. Z O.O.

33. The European Court of Justice on January 21, 2010 issued an opinion following up on its Eurofoods decision. In MG Probud the Polish court opened insolvency proceedings based upon an application that was filed before it. MG Probud had additional operations in Germany and as a result of financial difficulties was not able to pay its workers and related operational expenses. An action was filed in Germany to attach assets in order to pay the wages of workers and operating expenses. A dispute arose between the Polish and German proceedings with the Polish liquidator taking the position that the Polish proceedings were prior in time and as a result all claims and entitlements by creditors of whatever style or nature would have to be determined under Polish law in the Polish proceeding. The German authorities wanted to retain assets sufficient to pay workers' wages and other related expenses and so balked at turning those assets over to the Polish administrator.

34. The European Court of Justice found that after a main insolvency proceeding has been opened in a Member State, the Member States of the European Union are required to recognize and enforce all judgments relating to the main insolvency proceedings and therefore may not entertain enforcement measures relating to the assets of the debtor in another proceeding contrary to the laws of the state in which the main insolvency proceeding has been opened. The European Court of Justice has thus expanded its Eurofoods decision, finding the laws of the State in which the main proceedings are opened control as to the liquidation of the firm's assets wherever situated, even though that law may be adverse or contrary to that of the Member State in which assets are located.

2. Decisions under the Model Law⁸

35. As noted above, seventeen countries have enacted the Model Law with other countries considering enactment. A body of case law interpreting the Model Law has been developed in the United States and other enacting States.

(a) IN RE TRADEX SWISS AG⁹

36. Tradex was a company whose registered office was in Switzerland, but which had an office in Boston, Massachusetts. Prior to the insolvency of Tradex, the operations of the company were transferred from Switzerland to Boston. The primary business operations of the debtor were conducted in Boston. Tradex was an interest-based foreign exchange trading company.

37. Prior to an insolvency filing, the Swiss Federal Banking Commission had appointed two examiners to investigate Tradex based upon allegations that Tradex was converting investor's deposits. An involuntary Chapter 7 proceeding was later filed by employees against Tradex in Boston. Tradex had at that time eighteen employees in Boston and two in Switzerland. The Swiss examiners objected to the filing of the Chapter 7 insolvency proceeding and requested

⁸ References in the following section to Chapters 7, 11 or 15 are to the relevant chapters of the United States Bankruptcy Code. Chapter 15 is the chapter enacting the UNCITRAL Model Law on Cross-Border Insolvency in the United States.

⁹ In re Tradex Swiss AG, 384 B.R. 34 (Bankr.D.Mass. 2008).

assistance under Chapter 15 maintaining that Tradex's COMI was in Switzerland. The U.S. Court agreed that the registered office of Tradex was in Switzerland but the presumption that a proceeding in Switzerland could be the main proceeding was overcome by evidence of the extensive operations of Tradex in Boston. The Court did find the proceeding in Switzerland was a non-main proceeding because Tradex conducted non-transitory economic activity in Switzerland, meaning that it had an establishment there.

(b) SPHINX MANAGED FUTURES FUND, LTD¹⁰

38. One of the initial cases under the Model Law as enacted in the U.S. was filed by Sphinx, Ltd. Its petition for recognition under Chapter 15 was filed on July 31, 2006 by the joint official liquidators of Sphinx Managed Futures Fund, STC acting under the supervision of the Grand Court of the Cayman Islands. After a contested hearing on August 16, 2006, the court granted the Chapter 15 petition in part, denied the petition in part, reserving some issues for a later written decision.

39. The court ruling found that the Cayman Islands proceeding in which the joint official liquidators were appointed qualified as a foreign proceeding but took under advisement whether the proceeding should be recognized as a foreign main proceeding or a foreign non-main proceeding. In its written decision, the court found that the Sphinx, Ltd. funds were hedge funds whose business consisted of buying and selling securities and commodities. Sphinx, Ltd.'s registered office was in the Cayman Islands. The court observed that Sphinx, Ltd. was incorporated as an excepted business under Cayman Island law and as a result Sphinx funds could not, under Cayman law, conduct any trade or business in the Cayman Islands. The court noted that the funds had no employees or physical offices in the Cayman Islands, and that Sphinx funds was a hedge fund conducted under a fully discretionary investment management contract with a Delaware corporation located in New York City. The court ruled that, although Chapter 15 replaced former section 304 of the Bankruptcy Code, Chapter 15 still retained the concept of comity from that former section. In some respects, said the court, Chapter 15 enhances the maximum flexibility standard that underlay former section 304 in light of the principles supporting a concept of COMI and the ability to respect the laws and judgments of other nations.

40. The court noted that the real dispute was whether the Cayman Islands proceedings should be recognized as a foreign main proceeding or a foreign non-main proceeding. On that point, the court acknowledged, that the Cayman Island proceedings are presumed under Article 16, paragraph 3 of Chapter 15, to be a foreign main proceeding because of the location of the funds' registered office. The Court found most persuasive the then recent opinion by the European Court of Justice in the Eurofoods case that one of the factors to be utilized in determining the COMI of a debtor is to determine the place where the debtor conducts the administration of his business on a regular basis and whether that location is ascertainable by third parties. Based on the evidence presented the court, it declined to find that the Cayman proceeding qualified as a foreign main proceeding, though it granted the Chapter 15 petition for recognition as a foreign non-main proceeding,

¹⁰ In re SPhinx, Ltd., 351 B.R. 103 (Bankr.S.D.N.Y. Sep 06, 2006).

despite the evidence that the funds did not have an “establishment” in the Cayman Islands, as that term is defined in the Model Law.

41. The decision by the court in *Sphinx, Ltd.* was highly criticized by many academics and practitioners for its utilization of comity as a basis for granting recognition as a foreign non-main proceeding despite the lack of evidence of an establishment. Criticism centred around the concept that the Model Law was developed to promote transparency and predictability and deviation from the statutory requirements frustrates that objective. Criticism also centred around the fact that the evidence was not sufficient to find *Sphinx, Ltd.* a foreign proceeding, a foreign main proceeding or a foreign non-main proceeding and therefore recognition should have been denied, as recognition must be upon a jurisdictional and statutory basis under the Model Law rather than on mere comity.

(c) TRI-CONTINENTAL EXCHANGE LTD¹¹

42. This proceeding involved a company formed under the laws of St. Vincent and the Grenadines. A petition was filed seeking recognition of the debtor insurance companies’ insolvency proceeding in St. Vincent and the Grenadines as a foreign non-main proceeding by a creditor.

43. Proceedings were filed in the Eastern Caribbean Supreme Court to wind up Tri-Continental Exchange Ltd and Alternative Exchange, Ltd and joint provisional liquidators were appointed. The debtor’s only offices were located in Kingston, St. Vincent. The debtors conducted an insurance scam and generated premiums from customers in the United States and Canada of over forty-five million dollars. The United States seized one million six hundred thousand dollars which the joint liquidators requested to be turned over in the Chapter 15 petition.

44. After contested hearings, the court granted recognition to the liquidators and found the St. Vincent proceedings were foreign main proceedings. The evidence before the court was the operations in St. Vincent were its only operations, and as a result granted turnover of funds to the liquidators but maintained jurisdiction in the United States for further determination as to distribution to creditors.

(d) BEAR STEARNS HIGH GRADE STRUCTURED CREDIT STRATEGIES MASTER FUNDS LTD¹²

45. The issues addressed in the *Sphinx, Ltd.* decision were revisited in the Bear Stearns proceeding. The joint provisional liquidators from the Cayman Islands filed a Chapter 15 petition for recognition of the Cayman Island proceedings of the Bear Stearns fund, either as a foreign main proceeding or a foreign non-main proceeding. The petition for recognition under Chapter 15 was not contested, and after an evidentiary hearing the court found that the evidence before it was not sufficient to establish recognition of the Cayman Islands proceedings either as a foreign main or foreign non-main proceeding. The request for recognition was denied.

¹¹ In re Tri-Continental, 349 B.R. 627 (Bankr.E.D.Cal. 2006).

¹² In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325 (Bankr.S.D.N.Y. May 27, 2008); in re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 374 B.R. 122 (Bankr.S.D.N.Y. Sep 5, 2007); *see also* Bear Stearns Appeal Decision, 17 J. Bankr. L. & Prac. 5 Art. 3, Glosband (August 2008).

46. The facts elicited were similar to those in the *Sphinx, Ltd.* proceeding in that Bear Stearns was an exempted company not allowed to conduct trade or business in the Cayman Islands. The court found the investment activities of Bear Stearns were conducted primarily in the United States in New York and that if a proceeding did not qualify as main or non-main, then recognition could not be granted. The lack of an establishment in the Cayman Islands prevented the Bear Stearns proceeding there from qualifying as a non-main proceeding under the Model Law. The decision was appealed to the United States District Court which affirmed. The official liquidators argued on appeal that the presumption under Section 1516, subparagraph C, of Chapter 15 provided that the COMI of the debtor should be the registered office and that evidence to the contrary was not provided. On appeal, the District Court, consistent with the bankruptcy judge's opinion, found that a judge has an independent duty of inquiry on any matter before that court and that evidence to the contrary was in fact in the record before the lower court.

47. In this case, this District Court found that the lower court correctly reviewed and analysed independently whether the evidentiary basis for recognition was established and whether the presumption had been rebutted. The District Court agreed with the lower court's findings that Bear Stearns did not have an office or employees in the Cayman Islands and did not conduct business activity in the Cayman Islands since it was an exempted company. Because non-transitory economic activity was not being (and could not be) conducted there, Bear Stearns did not have an establishment in the Caymans, so the insolvency proceeding there could not qualify as non-main under the statute. The court further found that the COMI of Bear Stearns was in fact not in the Cayman Islands, but in the United States, rebutting the presumption raised by the location of the funds' registration.

48. The decision by the District Court in Bear Stearns is recognized as having overturned the opinion in the *Sphinx, Ltd.* proceedings. The jurisprudence in the United States under Chapter 15 at this point in time supports the proposition that the statutory and jurisdiction requirements as to foreign main proceeding, foreign non-main proceeding and establishment must be clearly and affirmatively demonstrated before recognition can be granted.

(e) BASIS YIELD ALPHA MASTER¹³

49. In this Chapter 15 proceeding, joint provisional liquidators for a debtor whose registered office was in the Cayman Islands sought a determination that the Cayman Islands was the debtor's COMI. As such, the provisional liquidators asked the U.S. Court to determine the Cayman Islands proceeding was a foreign main proceeding.

50. Counsel for the provisional liquidator relied upon the statutory presumption that the registered office in the Cayman Islands was the COMI of the debtor. The court in its opinion stated that issues of material fact precluded a recognition order being granted. The court noted that the company was an exempted company and as a result could not conduct business on the island and that its business was conducted in other jurisdictions. Thus, the proceeding could not qualify as a non-main proceeding, because there was no establishment, and could not qualify as a main proceeding because the facts on the ground clearly rebutted the facial presumption that place of registration was the debtor's COMI. This opinion follows the rationale

¹³ In re Basis Yield Alpha Fund (Master), 381 B.R. 37 (Bankr.S.D.N.Y. 2008).

set forth in the Bear Stearns opinion as to both the criteria for recognition and the duty of the court to independently determine whether relief should be granted.

(f) IN RE ERNST & YOUNG, INC (KLYTIE'S)¹⁴

51. Klytie's involved both Canadian and U.S. companies. The eighty percent (80 per cent) owners of Klytie's business were Israeli citizens who had lived in Canada but at the time of the application lived in California. The other twenty percent (20 per cent) ownership of Klytie's resided in Colorado. Klytie's was accused of defrauding investors in a real estate investment fund business. After litigation was filed against Klytie's, the Canadian court appointed the firm of Ernst & Young as receivers of the Canadian company.

52. The receivers in turn filed a petition under Chapter 15 for recognition which was opposed by creditors from the United States. The creditors argued that because the administrative costs were higher in Canada, fewer funds would be received by creditors than if the main proceeding was conducted in the United States.

53. The United States court granted recognition and found the Canadian proceeding was the foreign main proceeding as the COMI of Klytie's was in Canada. The court based its opinion on evidence that the principals of the company directed affairs from Canada, the creditors recognized the company operated in Canada, the main assets of the company were in Canada and the cash management system was in Canada.

54. The court further relied on the statutory provisions of Chapter 15 stating that the goal of Chapter 15 was to facilitate cooperation between the U.S. courts and courts of foreign countries.

(g) ROBERT ALLEN STANFORD PROCEEDINGS IN ENGLAND AND CANADA¹⁵

55. Allen Stanford's business empire collapsed when the United States Securities and Exchange Commission ("SEC") filed a complaint against Allen Stanford and others alleging securities fraud and violation of securities laws. An SEC receiver was appointed over Stanford International Bank, Stanford Group Company and entities under the control of Allen Stanford and others. Meanwhile, in February of 2009 the Financial Services Regulatory Commission of Antigua and Barbuda ("FSRC") appointed interim receivers and managers of Stanford International Bank and Stanford Trust Company in Antigua. Thereafter the Antiguan court ordered a winding up of the company and appointed joint liquidators to effectuate the same.

56. Since initiation of proceedings against Stanford International Bank and related entities, Ralph Janvey, the ("SEC receiver") and Mr. Hamilton-Smith and Mr. Wastell as joint liquidators in the Antiguan proceeding (the "liquidators") have been waging a battle for recognition in many jurisdictions including the United Kingdom and Canada. At the High Court of Justice in London, the Honourable

¹⁴ In re Ernst & Young, Inc., 383 B.R. 773 (Bankr.D.Colo. 2008).

¹⁵ In Re Stanford International Bank Ltd (In Receivership), Re (Ch D (Companies Ct)) Chancery Division (Companies Court) 2009 WL 1949459, July 3, 2009; In Re Stanford International Bank Ltd., Re Superior Court of Quebec, 2009 CarswellQue 9216, September 11, 2009, and 2009 CarswellQue 9211.

Mr. Justice Lewison heard competing applications for recognition from both the SEC receiver and the liquidators, each requesting a determination of COMI in the US and in Antigua respectively, each striving to exercise control over the assets of Stanford International Bank and related entities in regard to assets of Stanford International Bank and related entities in the United Kingdom. Mr. Justice Lewison on July 3, 2009, issued a judgment recognizing the liquidators in a well-reasoned and comprehensive opinion.

57. Mr. Justice Lewison carefully reviewed the Cross-Border Insolvency Regulation of 2006 which give effect to the Model Law in Great Britain. The High Court recognized as a starting point that Stanford International Banks' registered office was in Antigua and, as a result, Antigua is presumed to be the location of its COMI. The High Court further recognized the test to be applied to the competing applications to be whether the court can be satisfied that the company's COMI is not in the state in which its registered office is located. The High Court reviewed the historical operations of Stanford International Bank in Antigua after its incorporation in December of 1990. The court found that Stanford International Bank in Antigua had an accounts department, human resources department, IT department, payroll department, and operating software. The High Court further found that Stanford International Bank accepted deposits from investors worldwide and in particular from North, Central and South America. Stanford International Bank issued certificates of deposit from Saint John's, Antigua.

58. The High Court noted that in the Bear Stearns opinion the factors to be considered were location of the debtor's headquarters, the location of those who actually managed the debtor, the location of the debtor's primary assets, the location of the majority of the debtor's creditors who would be affected by the case and the jurisdiction whose law would apply to most disputes. The High Court further noted that American jurisprudence is not qualified by a requirement that creditors be able to ascertain the COMI of the company. The High Court found that since the registered office of Stanford International Bank is in Antigua, the burden of rebutting the presumption lies on the SEC receiver and that presumption will only be rebutted by factors that are objective. Further objective factors will not count unless they are also ascertainable by third parties, are in the public domain and are what third parties would learn in the ordinary course of business with the company.

59. The High Court then had to address which of the parties to recognize as the foreign representative. The court found that the SEC proceeding did not qualify as a foreign proceeding so that the SEC receiver was not a foreign representative under the Cross-Border Insolvency Regulation. The High Court observed that the SEC proceeding was not an insolvency proceeding, was not for the benefit of creditors and was not based on a law relating to insolvency.

60. The court then turned to the question of whether the Antiguan liquidation was a foreign proceeding. The court determined that the Antiguan proceeding was a winding up proceeding, that the Antiguan judge was satisfied that Stanford International Bank was insolvent, that the liquidators were appointed pursuant to a law relating to the insolvency and, as a result, the liquidators were entitled to be recognized as foreign representatives of a foreign proceeding. The court then determined that the evidence presented by the SEC receiver was not sufficient to rebut the presumption of the COMI of Stanford International Bank being in Antigua. Thus Antigua was found to be the location of the COMI of Stanford International

Bank. The High Court granted recognition to the liquidators as foreign representatives of a foreign main proceeding, as those provisions are contained in the Cross-Border Regulation.

61. The next contest for recognition was in Canada. Both the SEC receiver and the liquidators filed applications in the Superior Court in the District of Montreal in the province of Quebec, requesting recognition as foreign representatives. The Honourable Justice Claude Auclair presided over the proceedings. The court initially addressed the proceedings in the United Kingdom by Justice Lewison noting the Antiguan proceeding had been recognized there as a main proceeding and the Liquidators as foreign representatives. Accordingly, in the English decision, the Antiguan liquidators were entitled to the funds of SIB in the United Kingdom. The Canadian court acknowledged that the English High Court had held the COMI of SIB was located in Antigua and the American receivership had been found inadmissible as a foreign proceeding because the appointment of the US Receiver was not based on an insolvency related law.

62. The Canadian court then proceeded with an historical analysis of Stanford International Bank and actions undertaken by the SEC receiver and the liquidators. The Canadian court in its opinion noted that Part 13 of the Bankruptcy and Insolvency Act of Canada permits an applicant to become qualified as a foreign representative by requesting authorization from the court, thus facilitating a coordination of procedures with regard to the “insolvency proceeding.” The court further stated that Section 268, subparagraph 6 of the Bankruptcy and Insolvency Act states that “this section does not require the court to make an order contrary to Canadian law or to give effect to orders issued by a foreign court.” The Court admitted that collaboration between different jurisdictions is important, but then added that the Court must safeguard the interests of the Canadian creditors and preserve the fundamentals of the Canadian judicial system. The Court noted that any person applying to the court for an exercise of the court’s judicial discretion must do so in good faith and with “clean hands.”

63. The Court found that the liquidators had filed a prior application for recognition and had failed to advise the SEC receiver of that application. The court further found that the Liquidators took possession of assets in Canada without prior authorization from the Canadian court and erased original electronic documents after having made copies and transported copies out of Canada. The Canadian court found further that investigation by government authorities in Canada was undertaken in regard to Stanford International Bank and that the liquidators had not provided information as requested and had entered into acts which were illegal as they were not authorized trustees under Canadian law. The court further found actions on the part of the Antiguan liquidators were flagrant and inexcusable. The Canadian court denied the application for recognition by the liquidators and instead recognized the application of the SEC receiver for recognition.

(h) GOLD & HONEY, LTD

64. A Chapter 15 was filed in the United States Bankruptcy Court for the Eastern District of New York in January of 2009. The Chapter 15 proceeding was filed by Israeli receivers in relation to an Israeli receivership proceeding. Previously the debtor had filed a Chapter 11 proceeding in the United States Bankruptcy Court for the Eastern District of New York. The United States Bankruptcy Court had issued an

order that all assets in the Chapter 11 proceeding were subject to the Bankruptcy Court's jurisdiction. Notwithstanding that order, the Israeli Court in which receivership proceedings were pending determined that it had jurisdiction and could proceed to liquidate the assets in Israel despite the order from the court in New York. The Chapter 15 petition for recognition was then filed by the Israeli receivers in order to have assets located in the New York proceedings transferred to Israel for application in Israeli proceedings.

65. The United States Bankruptcy Court denied recognition finding that the receivership proceeding was not an insolvency or collective proceeding and further concluding that since the receivers had violated the provisions of the automatic stay, the denial of recognition was appropriate based on the public policy exception in Chapter 15.

C. Possible issues to be considered by Working Group V in regard to the U.S. proposal for future work

66. As a result of the various court decisions, articles and discussions which have occurred since the formulation of the Model Law and the implementation of the EU Regulation where there is a common treatment of issues dealt with by the Model Law, a number of issues have emerged which need definition and clarification. Others may be suggested by the Secretariat or added by the Working Group.

67. The United States Delegation submits that Working Group V may wish to consider the following issues:

1. Criteria for a determination as to what constitutes an insolvency proceeding.

- (a) Is a receivership proceeding a collective proceeding that falls within the ambit of an "insolvency proceeding" as used in the Model Law, the Guide or the Practice Guide?

- (b) Should criteria be established to outline the fundamental provisions necessary for a collective proceeding to be considered an insolvency proceeding?

- (c) Should criteria be established to determine what is necessary to constitute an insolvency proceeding and what constitutes a collective proceeding?

- (d) If a proceeding is not a collective proceeding, should it still be eligible for recognition under the UNCITRAL Model Law?

2. A Court's jurisdiction is essential to being able to proceed and render determinations in regard to issues before it.

- (a) Should a court be satisfied that a proceeding under the Model Law is a foreign main proceeding or a foreign non-main proceeding, as a pre-condition of recognition?

- (b) What is the procedure that should be established to make this determination clear and definitive? Should a menu of options be established to

make this process clear and definitive so that it can be harmonized to the extent feasible?

3. Under what circumstances should the public policy exception set forth in Article 6 of the Model Law be implemented by a court addressing issues of recognition under the Model Law?

(a) If an applicant requesting relief under the Model Law has violated a country's established laws or established procedure, should such activity be a basis for denial of recognition under the public policy exception?

4. The Model Law clearly sets forth a presumption that the registered office of the debtor company is presumed to be its COMI.

(a) Should the criteria be clearly established as to what evidence is necessary to overcome the presumption that debtor's COMI is its registered office?

(b) Should specific factors, such as for example, the location of the "nerve centre" of the debtor, be developed for rebutting the presumption?

(c) Is the physical location of operations a factor to be considered?

(d) Should the location in which management decisions are made and from which the company is operated be utilized as a determinate?

(e) Should the location of the debtor be predictable and readily ascertainable by creditors?

5. Should the time period in which a company maintains its COMI in a jurisdiction be a factor in determining the COMI of a debtor?

(a) Should the COMI of a debtor be determined as at the date on which the company was actually transacting business and conducting business operations prior to insolvency or thereafter when the company is insolvent and under the direction of a liquidator?

(b) Should a location of a debtor business that is ascertainable by third parties be an important factor for overcoming the presumption of the debtor's COMI?

6. To address the above issues in the context of a group of companies both on a domestic and international basis.

7. To consider whether supplementary guidance on the Model Law is useful for corporate group cases in regard to the issues of recognition and enforcement.

D. Policy determinations

68. Determinations made previously by Working Group V with respect to any of the questions and issues raised above should be set forth and form the basis for any further policy determinations that are made. The policy determination that the registered office of a debtor company should be presumed to be the COMI of that

company is important and the background basis for that policy choice should be detailed in the current policy considerations of Working Group V.

69. In considering the questions raised above, the Working Group should set out the policy rationale for any conclusions it may reach that could form the basis of guidance to be provided on interpretation of the Model Law. Such an approach will facilitate courts and other users understanding that guidance and applying it on a sound basis. The same approach should be adopted with respect to any conclusions reached concerning enterprise groups as opposed to individual debtors.

70. Such policy determinations, background and detail can provide a helpful “legislative history” for a jurist or insolvency authority to understand the scope and meaning of the various provisions and any additional work product that is developed by the Working Group in regard to the above issues. Achieving these objectives can be an important factor for States to gain economic benefits and reduce systemic risk by modernizing their business insolvency law regimes. It will promote both cross-border trade as well as domestic capacity-building.

SUMMARY

71. This paper has been intended to detail some of the areas which the United States delegation is proposing should be considered by this Working Group. This list is not exhaustive and the Working Group will of course need to determine the extent of a proposal to be recommended to the Commission at its next Plenary Session. We recommend that the Commission’s approval be sought to authorize work as generally described, subject to refinement by the Working Group thereafter, and that the Secretariat be authorized to amplify this recommendation with further studies within available resources.

A/CN.9/WG.V/WP.93/Add.3 (Original: English)**Note by the Secretariat on possible on possible future work on insolvency law, submitted to the Working Group on Insolvency Law at its thirty-eighth session****ADDENDUM****Proposal by INSOL International: Directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases***

1. The efficient operation of insolvency proceedings relies on the timely commencement of such proceedings. This is true whether the nature of the insolvency proceedings is a liquidation of the debtor's assets or the commencement of reorganization proceedings aimed at restoring the debtor to solvency. Far too often, it is left to creditors to commence these proceedings because the directors have failed to act on a timely basis, notwithstanding that many insolvency laws purport to impose an obligation on the directors to commence insolvency proceedings within a certain period of the commencement of insolvency.
2. Obligations such as these are seldom enforced even though research may show that this is an obligation that is breached more often than acted in compliance with. There are several reasons for these obligations not being enforced but frequently it is necessary to prove that the director's actions were fraudulent. The absence of such theoretical obligations not being enforced is that there is a lack of credible threat obliging directors to commence proceedings on a timely basis.
3. The importance of commencing proceedings at an early stage cannot be overestimated. Financial decline typically occurs more rapidly than many parties would believe and as the financial position of an enterprise worsens, the options available for a viable restructuring also rapidly diminish. Therefore, while there has been an appropriate refocusing of insolvency laws in many countries to increase the options for restructuring and rescue of enterprises, there has not been the incentive on the directors and officers to use these procedures. For these reasons, the proportion of businesses for which liquidation is the only option continues to be far too high in many parts of the world. The result of this is that businesses are destroyed, jobs are lost, investments are wasted and the pace of economic recovery is slower than it needs to be.
4. This need not be a lost cause. In some jurisdictions the use of reorganization procedures has been encouraged by the expedient of replacing the old "fraudulent trading" test with a more modern "wrongful trading" test whereby directors are vulnerable to criticism and financial penalty if they continue trading beyond the point where they knew or should have known that the company would be unable to avoid insolvent liquidation.
5. In addition to encouraging the earlier commencement of insolvency proceedings, effective provisions for the roles and duties of directors and officers

* This document was submitted as soon as possible following receipt of the proposal.

will promote good corporate governance. In many countries, statutory provisions providing standards of duty of care and skill by directors do not exist although courts in some countries follow the common law rule of directors and officers duty of reasonable diligence in the discharge of the duties. Accountability provisions in law for negligence, default, misfeasance and breach of duty or trust are inadequate. Extensive research has been undertaken by INSOL international into the roles and duties of directors and officers in the period prior to financial collapse and this work could be made available to a working group of UNCITRAL.

6. A clear view on the liabilities of directors and officers could also lead to a more predictable legal position of such directors and thus limit risks for directors that insolvency practitioners will litigate against them. The more clearly the responsibilities are defined, the more predictable the legal position will be. In addition the more experienced managers, that may not want to participate in management of a company due to the risks related to that position in case of failure, will more likely be willing to participate in that management. Thus also the good captains will join the fleet.

A/CN.9/WG.V/WP.93/Add.4 (Original: English)**Note by the Secretariat on possible on possible future work on insolvency law, submitted to the Working Group on Insolvency Law at its thirty-eighth session****ADDENDUM****Proposal by the delegation of the United Kingdom for the development of guidelines on directors' and officers' responsibilities and liabilities in insolvency and pre-insolvency cases (including prior to entering formal insolvency proceedings, where the company is in the "the twilight zone")***

[Background for this proposal is set forth in the paper produced for the thirty-eighth session by the International Insolvency Institute (III) (A/CN.9/582/Add.6)]

1. With the development of the Model Law and the Legislative Guide, UNCITRAL has delivered a modern, harmonized and fair framework to address effectively cases of cross-border insolvency, while respecting the differences in national laws. In order to compliment further this work, the United Kingdom delegation recommends as future work for Working Group V the consideration and development of guidelines relating to the responsibilities and liabilities of directors and officers of companies in insolvency and pre-insolvency situations.
2. The Model Law is built upon a number of key principles including fair and efficient administration of cross-border insolvencies to protect the interests of all creditors and other interested persons, including the debtor, and protection and maximization of the value of debtors' assets. To help meet these principles the United Kingdom believes that it is important to set out in guidance the responsibilities of directors and officers where a company becomes insolvent or is approaching insolvency. Such guidelines would enhance the operation of the Model Law and Legislative Guide by setting out what should be the principles underlining director and officer duties, to whom such duties should be owed and the sanctions States might consider when these duties are not met by the director or officer in breach.
3. The United Kingdom recognizes that such guidelines would need to be both basic and broad in their construction. Officers and directors of companies will already be subject to wide-ranging domestic laws setting out their individual and collective duties and any guidelines on how the duties of directors or officers are affected when a company approaches insolvency will need to be complementary with pre-existing laws or policies on this subject. Equally, the guidelines should not impact negatively on the freedom of directors and officers to undertake their duties and exercise their judgement appropriately, nor discourage entrepreneurial activity. The guidelines should provide a balance between encouraging responsible

* This document was submitted as soon as possible following receipt of the proposal.

behaviour by directors and officers without discouraging reasonable risk taking or steps to re-finance or restructure companies facing insolvency.

I. Features of proposed guidelines

4. As presented in the III proposal (A/CN.9/582/Add.6) a set of such guidelines would need to contain guidance on various matters from which States could choose or modify to suit particular circumstances. Below is a list of areas which might be a useful starting point for Working Group V to consider, although this is not intended to be exhaustive.

A. Directors and officers

5. The definitions of a director and officer are important considerations in identifying the individuals or groups of individuals the guidance is intended to address. The guidelines should be wide enough to encompass the full variety of formal and non-appointed controlling individuals and entities of a company.

B. Director and officer duties and responsibilities

6. Many Member States will have, within their national laws or policies, some reference to standards or duties for directors and officers. For example, in the United Kingdom the general duties of directors are set out in the Companies Act 2006. They include a duty that a director should exercise reasonable care, skill and diligence. Common principles of fiduciary duty are the duty of care and the duty to act in good faith to promote the success of the company (in most cases for the benefit of its members). But under United Kingdom law, this duty has effect subject to any rules of law that directors must, in certain circumstances, consider, or act in, the interests of the creditors of the company. The overriding fiduciary duty of a director or officer of an insolvent company is to the creditors of that company. Where a company is approaching insolvency, the interests of its members become increasingly displaced by those of the creditors. In the United Kingdom this is further recognized by rendering unlawful certain actions by a director once a company is insolvent, for example the wrongful trading provisions of the Insolvency Act 1986. The United Kingdom believes that the provision of guidelines on fiduciary duties will be of great benefit to States.

C. The period approaching and insolvency

1. The twilight zone

7. As discussed above, the duties of a director or officer of a company are affected by the insolvency of a company or its impending insolvency. INSOL International has produced reports on this subject where this period is described as “the twilight zone”. It is in the context of this period in the life of the company that the guidelines should address the behaviour and actions of a director or officer and the guidelines might usefully consider when this period begins.

8. Defining when this period begins is subject to a great many variables — including the nature and circumstances of the company and the skills and knowledge of its directors and officers. A basic approach might be the point at which a director or officer knew, or ought to have known, that the company was insolvent or was likely to become insolvent. Beyond this, is the question of when does a company actually become insolvent? In United Kingdom law, insolvency has been viewed as the point in time when a company becomes unable to pay its debts as and when they fall due, or the point in time when a company's liabilities exceeds the value of its assets. Both bases are subjective and require wider consideration of circumstances and context.

2. Formal insolvency

9. It is easier to determine when the twilight zone ends and formal insolvency commences. This is already dealt with in the Legislative Guide.

10. Furthermore, the Guide addresses the obligations of directors and officers of companies in insolvency within recommendations 108-114, by reference to the obligations of the debtor (110) to cooperate and assist the insolvency representative along with the application of sanctions where they fail to do so (114).

D. Director and officer misconduct

11. The guidelines might usefully consider the types of misconduct most commonly associated with directors or officers of insolvent companies. By detailing these types of misconduct, the guidelines could effectively provide a set of standards against which director or officer conduct could be judged. The World Bank report "Principles for Effective Insolvency and Creditor Rights Systems" recommends that "at a minimum, standards should address conduct based on knowledge of or reckless disregard for the adverse consequences to creditors".

12. We suggest, as a starting position, that Working Group V might wish to consider the following matters in developing guidelines:

(a) Fraudulent trading — where a director or officer has been dishonest or reckless in the running of a business which has become insolvent, to the extent that the purpose of the business has been carried on with the intent to defraud creditors or for a fraudulent purpose;

(b) Transactions defrauding creditors — where a director or officer of a company has fraudulently caused the transfer or disposal of company property;

(c) Wrongful trading — where a director or officer ought to have known that insolvency was unavoidable and the director or officer has failed to take reasonable steps to minimize losses to creditors;

(d) Breach of duty/misfeasance — where a director or officer has misapplied or retained money or property of the company or where a misfeasance or breach of duty, fiduciary or otherwise, has caused the misapplication of assets or a loss to the company;

(e) Misconduct involving company money or property — where a director or officer causes or allows a preference or a transaction at an undervalue to the detriment of creditors;

(f) Failure by a director or officer to comply with statutory obligations;

(g) Misconduct involving company records — falsification, failure to preserve or failure to deliver up company records;

(h) Failure to pay taxes.

13. Additionally, matters relating to conduct after the insolvency might include:

(i) Re-use of company name — where a director or officer of company that is insolvent re-uses the company name without permission or exemption to do so;

(j) Acting when prohibited to act as a director or officer of a company.

E. Criminality, personal liability and disqualification

14. Where a director or officer of a company that is insolvent or approaching insolvency has committed an act of fraud or fraudulent trading, it is likely that the domestic laws of the State will have adequate provisions to deal with such criminal acts. In the United Kingdom, in some areas of insolvency law, the insolvency office holder has a statutory duty to bring such matters to the attention of a prosecuting authority. With this may come a personal liability for the director or officer responsible and there is often an overlap between proven criminality and personal liability for the director or officer. Likewise where a director or officer has failed to take reasonable steps to limit losses to creditors, they may be ordered to make a contribution to the assets of the insolvent company. Any guidelines on personal liability of directors and officers should, however, consider the need for balance. Companies facing insolvency need robust management, often there are difficult decisions and judgements to be made. Directors afraid of the possible financial repercussions of making such business decisions may prematurely close down a company rather than seek to trade out of difficulties. The guidelines might seek to give guidance to States on the circumstances which could lead to personal liability, while at the same time recognizing the pitfalls and threats to entrepreneurship which may result from rules which are too draconian.

15. The Working Group might also consider the subject of director disqualification, where protection from the rogue director may be achieved by imposing a period of disqualification from being a director or taking part in the running of a company. In the United Kingdom, the Company Directors Disqualification Act 1986 enables disqualifications between 2 and 15 years where the individual is evidenced as being “unfit” to act as a director. Disqualification may sit alongside other sanctions and personal liability as described above, or may be brought independently where the overall conduct of the individual as a director or officer merits such a sanction. It may also be appropriate, as part of this work, for the group to consider the question of recognition of disqualification sanctions across the jurisdictions of States, such as already exists under Australian law.

II. Proposal

16. This delegation therefore proposes that:

Working Group V consider recommending that the Commission considers this type of proposal at its next session with a view to approving a mandate for Working Group V to provide guidelines on directors' and officers' responsibilities and liabilities in insolvency, including prior to entering formal insolvency proceedings.

17. We appreciate the consideration by the Working Group of this proposal.
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A/CN.9/WG.V/WP.93/Add.5 (Original: English)**Note by the Secretariat on possible on possible future work on insolvency law, submitted to the Working Group on Insolvency Law at its thirty-eighth session****ADDENDUM****Proposal by the delegation of Switzerland for preparation of a study on the feasibility of an instrument regarding the cross-border resolution of large and complex financial institutions***

1. The financial crisis, in particular the insolvency of Lehman Brothers on 15 September 2008, has made it painfully clear that certain financial institutions are “too big” or “too interconnected to fail”. They cannot be wound down in an orderly fashion without exposing the financial system to unacceptably high risks. This state of play implies a great deal of moral hazard and imposes potentially huge costs on taxpayers. Establishing a legal framework which permits the winding down of a large and complex financial institution without putting the stability of the financial system at large at risk therefore is a priority for Switzerland.
2. In the case of large and complex financial institutions with major cross-border activities, an orderly resolution cannot be achieved without coordination among relevant jurisdictions. In the absence of a coordinated approach, reorganization and/or liquidation measures will be of limited effect, resulting almost inevitably in a disorderly dismantling of the institution or the group. Coordination across borders, therefore, is a necessary, albeit not sufficient, condition for an orderly winding down of large and complex financial institutions with major cross-border activities.
3. The need for improved cross-border coordination of resolution proceedings has been acknowledged by leading international organizations and specialized bodies. In particular, recommendation 4 of the Cross-border Bank Resolution Group (CBRG), a subcommittee of the Basel Committee on Bank Supervision, advocates that “further work toward more effective recognition of foreign crisis management and resolution proceedings should be undertaken at the bilateral, regional or international level”.¹ The CBRG specifically refers to the work undertaken by UNCITRAL regarding the treatment of domestic enterprise groups, suggesting that the relevant concepts developed in the Legislative Guide may provide guidance in view of the establishment of such a framework.
4. We therefore recommend that Working Group V prepare a study on the feasibility of an international instrument regarding cross-border resolution of large and complex financial institutions. Such a study should outline the options available to improve cross-border coordination, including (i) the recognition of measures taken by the home-state authority in host states; (ii) the coordination through parallel proceedings in home and host states; (iii) coordination by means of cross-border insolvency agreements; (iv) other methods to improve coordination.

* This document was submitted as soon as possible following receipt of the proposal.

¹ See Report and recommendations of the Cross-border Bank Resolution Group — final paper (March 2010), www.bis.org/publ/bcbs169.htm (accessed April 15, 2010).

The study would also have to take into consideration cross-border effects of resolution tools generally used in the resolution of financial institutions, like e.g., the transfer of assets to a bridge bank, a temporary stay of default clauses in financial contracts, and the conversion of debt into equity. A particular focus should finally be put on problems of groups of enterprises including financial and non-financial firms.

5. Insolvency of banks and other financial institutions has been excluded so far from the scope of insolvency-related work undertaken by UNCITRAL.² The reason for these exclusions are typically that banks and other financial institutions are subject to special resolution regimes in many jurisdictions and that the winding down of financial institutions raises important public policy issues, especially if the institution is of systemic relevance. The resolution of large financial institutions differs also in other respects from the winding down of other commercial undertakings, e.g. with respect to the time available and the size and the composition of the estate.

6. This proposal is suggested for consideration by this Working Group, since it is obvious that UNCITRAL is better suited than any other international organization to tackle this kind of issue. First, a resolution is primarily a highly technical process requiring special skills and knowledge, whether or not the firm is a financial institution. Second, many tools used in national resolution regimes can also be found in corporate bankruptcy, like e.g., the transfer of assets to a new corporation or the conversion of debt into equity. Switzerland therefore is convinced that UNCITRAL is better suited than any other organization to undertake the proposed study.

7. Switzerland attaches great importance to the coordination of the substantive works undertaken in the various international forums in which certain or all UNCITRAL member and observer states participate. We are grateful to the Secretariat for the overview given over the work in progress within the EU, the International Monetary Fund, the World Bank and the Basel Committee on Bank Supervision (A/CN.9/WG.V/WP.93, paras. 9-15). We would like to emphasize that this proposal in all respects intends to be complementary to the activity of the aforementioned bodies and that continuous attention must be given to the avoidance of substantive overlaps as the work progresses. Also, closely liaising with financial market regulators and supervisors and with central banks will be crucial for the success of this work.

² See Legislative Guide on Insolvency Law, p. 40 (2005); UNCITRAL Model Law on Cross-Border Insolvency, Art. 1(2) (1997).

A/CN.9/WG.V/WP.93/Add.6 (Original: English)

**Note by the Secretariat on possible on possible future work on
insolvency law, submitted to the Working Group on Insolvency
Law at its thirty-eighth session**

ADDENDUM

**Comments by the International Bar Association respecting
proposals to consider an international convention and/or Model
Law on Cross-border Enterprise Group Insolvency***

1. At the 37th session of the United Nations Commission on International Trade Law Working Group V (Vienna, 2009), the Working Group agreed to discuss at its next session certain proposals for the Working Group's future deliberations,¹ including the following questions:

(a) Should UNCITRAL direct Working Group V to formulate an International Convention on Cross-Border Insolvency Proceedings (the "Convention")?²

(b) Should UNCITRAL direct Working Group V to formulate a Model Law on Enterprise Group Insolvency Proceedings (the "Enterprise Group Model Law")?³

2. The International Bar Association Section on Insolvency, Restructuring and Creditors' Rights submits the following summary comments in support of a conditional affirmative response to the foregoing questions.

A. Convention on Cross-Border Insolvency Proceedings

Working Group V should recommend provisions for a Convention on Cross-Border Insolvency Proceedings, covering topics treated in the recommendations of the draft part three of the Legislative Guide, chapter II

* This document was submitted as soon as possible following receipt of the comments.

¹ Working Group V has devoted several sessions to formulating recommendations for a Legislative Guide Annex addressing an array of procedural and substantive legal issues arising in domestic and international contexts in cross-border enterprise group insolvency cases. Working Group V's earlier work product culminated in the UNCITRAL Model Law on Cross-Border Insolvency and current Legislative Guide, which addressed insolvency cases of single entity debtors. Part three of the Legislative Guide is a first step toward harmonizing legal rules governing insolvency proceedings of cross-border enterprise groups.

² At Working Group V's 37th Session, the Union Internationale des Avocats ("UIA") submitted CRP.3, proposing a Convention on international insolvency law, addressing: granting access to foreign representatives; recognition of foreign insolvency proceedings; cooperation & communication between insolvency representatives & courts; and other potential issues such as "direct competence" ("convention double") and applicable Law. [See also document A/CN.9/WG.V/WP.93, paras. 1, 4 and 5.]

³ [See the proposal by the delegation of the United States of America for preparation of a model law or model provisions on selected international insolvency law issues contained in document A/CN.9/WG.V/WP.93/Add.1 and the background for that proposal contained in document A/CN.9/WG.V/WP.93/Add.2.]

(International). A convention enforceable on the basis of reciprocity would establish a reliable international framework affording coordinated, consistent administration of cross-border insolvency proceedings, especially those of enterprise groups.

3. The absence of enforceable, reliable, consistent international rules affording coordination, cooperation and communication among courts and between those administering cross-border multi-national enterprise group insolvency proceedings has led to jurisdictional conflicts, wasteful litigation and competition for assets and control by national courts and insolvency administrators. Courts of some nations have bridged the procedural gap by approving ad hoc cross-border protocols.⁴

4. Courts of other nations have been unwilling to do so. A convention on international (procedural) aspects of cross-border insolvency proceedings would address these issues. A chief objective of a convention would be to establish a more consistent, reliable framework than a model law for coordination, cooperation and communication among courts, insolvency administrators and professionals, as well as facilitating joint administration, in cross-border enterprise group insolvency proceedings, which often have a far-reaching impact on the global economy.

1. Comparative Advantages of a Convention

5. The UNCITRAL Model Law on Cross-border Insolvency's limited adoption to date threatens a similar fate for Working Group V's recommendations on enterprise group insolvency in the international context, and merits reconsideration of whether those recommendations should be further incorporated into a convention or model law.⁵ Model laws are generally thought to have a better chance of adoption than conventions, because national legislatures may make modifications when enacting the former, but not the latter.⁶ It is possible, however, that a convention would fare at least as well as a model law regulating international aspects of cross-border enterprise group insolvency proceedings.

6. Working Group V has discussed significant differences in various nations' substantive insolvency laws and procedural rules impeding even limited cross-border cooperation and communication in enterprise group cases.⁷ Although the UNCITRAL Legislative Guide and Model Law are known to courts and practitioners in many countries, their provisions have not been adopted as often as desired. One reason is that nations hesitate to modify legal rules, cede jurisdiction or grant privileges in a manner, or to an extent, that might not be reciprocated by

⁴ UNCITRAL in July, 2009 adopted Working Group V's Practice Guide on Cross-Border Insolvency Cooperation, which describes in great detail accomplishments to date in international insolvency case protocols.

⁵ Before beginning to draft a new Model Law or Convention, the Working Group should undertake a detailed examination of why so few states have enacted the UNCITRAL Model Law on Cross-Border Insolvency. This could provide the Working Group useful information on whether it would be fruitful to propose a Model Law on Enterprise Group Insolvency (or a Convention on international aspects of cross-border insolvency proceedings), and, if so, how to increase the probability that these instruments would be widely embraced and enacted/ratified.

⁶ Nations may, however, file reservations to certain provisions of conventions. This once-disfavoured practice has become more commonly accepted in recent decades.

⁷ These differences contribute to the reluctance of many states to promulgate the UNCITRAL Model Law on Cross-border Insolvency.

other nations — and Model Laws do not carry a promise of (nor are their application conditioned on) reciprocity.

7. A Convention binding and effective only between contracting states would address that objection. For example, nations may be unwilling to enact a general principle of insolvency law recognizing foreign insolvency proceedings “on an equal footing” with those of the home jurisdiction for fear that other nations would not do the same. Those states would probably be more willing to grant such recognition in the context of a Convention promising reciprocal action by courts of other contracting nations.

8. A Convention on Cross-Border Insolvency Proceedings should therefore be binding and effective on the basis of reciprocity⁸ and should be limited to the international context (i.e., in the enterprise group context, topics treated by part three of the Legislative Guide, chapter II, International).⁹ While a convention addressing the domestic recommendations of part three of the Legislative Guide, chapter I is not feasible,¹⁰ a convention limited to matters within the ambit of Part II is realistically achievable and would avoid many of the pitfalls encountered to date in implementing more ambitious, substantively comprehensive regional insolvency conventions.

9. Model laws are enacted as an integral part of a nation’s laws — in this case, insolvency law. Some Model Law provisions cannot be enacted because they differ too fundamentally from a legal system’s basic norms to be integrated into a nation’s substantive law.¹¹ By contrast, international conventions, while fully binding under,

⁸ Such reciprocity provisions are set forth in several widely-ratified Conventions. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), Art. 1, par.3 (“When...acceding to this Convention...any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.”)

⁹ Part three of the Legislative Guide, chapter II (International) is limited to aspects of cross-border enterprise group cases more procedural than substantive, in that they do not provide rights or remedies in adjustment of debts, claims or interests in the debtor-creditor relationship. Those provisions, which would be appropriately treated by an international convention, relate to access to courts and recognition of foreign proceedings, cooperation and communication among and between courts and insolvency representatives, direct communication between courts, foreign courts and insolvency representatives, coordination of hearings, appointment of a single or the same insolvency representative by courts of different national jurisdictions, and authority to enter into — and approval/implementation of — cross-border insolvency agreements.

¹⁰ Because the recommendations of Legislative Guide Annex Part I concern rights and remedies fundamental to the adjustment of the creditor-debtor relationship, they raise questions of domestic policy which could, in many cases, involve significant revision of a nation’s insolvency law(s). Many Working Group V delegations have contended that there is not sufficient consensus for a convention on these substantive domestic law provisions to be successful.

¹¹ Model law provisions varying jurisdictional standards or commonly accepted norms of judicial conduct are often contentious. Types of provisions that might be difficult to promulgate as unilateral national law include, for example, those calling for supra-national judicial communication, recognition of foreign insolvency proceedings on an equal footing with domestic proceedings, appointment of the same insolvency representative in different nations’ proceedings.

and technically a part of, national law, often create limited exceptions to otherwise applicable national laws (and judicial traditions) as a matter of state contract to address a discrete need for international cooperation. Some inconsistency with otherwise applicable principles of national law is often more acceptable in the context of an international convention calling for compromise by all nations parties when necessary to achieve common objectives.

10. In summary, a Convention binding on the basis of reciprocity would incentivize nations to: (a) bridge differences on access to foreign courts, recognition of foreign proceedings, as well as communication, coordination and cooperation among and between courts, insolvency administrators and practitioners in cross-border insolvency proceedings, including those of enterprise groups; (b) overcome mistrust, including suspicion that foreign courts will unfairly discriminate against nationals of other nations; and (c) compromise jurisdictional and other standards in the knowledge that doing so will yield beneficial compromises in proceedings before courts of foreign states parties to the Convention. This, in turn, would promote wider acceptance of the principles set forth in the Convention.

*Working Group V should consider collaborating with the Hague Conference on Private International Law to jointly deliberate upon and propose a Convention on Cross-Border Insolvency Proceedings.*¹²

11. A collaboration between UNCITRAL (through Working Group V) and The Hague Conference on Private International Law would unite UNCITRAL's extensive expertise in international trade law (and the benefit of decades of international dialogue and study concerning cross-border insolvency law) with the Hague Conference's expertise drafting private international law conventions.¹³ This collaboration might involve a joint drafting team composed of secretariats and experts from both organizations. The UNCITRAL Secretariat's guidance on the feasibility of such a joint effort would be essential, considering the Secretariat's prior experience coordinating with The Hague Conference in the context of the UNCITRAL Legislative Guide on Insolvency Law.

B. A Model Law on Enterprise Group Insolvency

12. In addition to its work on a Convention for Cross-Border Insolvency Proceedings, Working Group V should draft a Model Law on Cross-Border Enterprise Group Insolvency.¹⁴ If UNCITRAL proposes a convention on international aspects of enterprise group insolvency proceedings, a model law would still be needed to address issues arising in the domestic context (i.e., those matters

¹² UNCITRAL previously sought assistance of the Hague Conference in drafting commentary and legislative provisions for the UNCITRAL Legislative Guide on Insolvency Law.

¹³ Working Group V should not underestimate the need for UNCITRAL's contribution to such a Convention. UNCITRAL's Working Group V has singular cross-border insolvency expertise that would be helpful to the convention drafting and consensus-building process necessary for widespread ratification.

¹⁴ While it would be very helpful for Working Group V to produce a list of factors relevant to determining an enterprise group's Centre of Main Interests ("COMI"), this might be more appropriately a subject for the Legislative Guide Annex than a Model Law.

treated by part three of the Legislative Guide, chapter I (Domestic Issues)).¹⁵ If UNCITRAL does not propose such a convention, a model law should also contain provisions on matters arising in the international context (i.e., Legislative Guide, part three, chapter II (International)).

13. Governmental commissions and insolvency practitioners have noted the need for greater uniformity in laws governing enterprise group insolvencies. Disparities in national laws governing these proceedings frustrate shared economic and policy objectives of insolvency laws. Key provisions of part three of the Legislative Guide are sufficiently developed to suggest that consensus could be reached on provisions of an Enterprise Group Model Law. UNCITRAL's approval of such a Model Law would itself promote, in the enterprise group context, widely shared rehabilitative and equitable distributive policies undergirding insolvency laws. Enactment of uniform standards governing enterprise group insolvencies in the domestic context will create efficiencies in cross-border proceedings and lead to greater predictability in international financial and commercial transactions and in international corporate governance.

14. Unlike a Convention, a Model Law does not require ratification by a minimum number of states to come into force, and may be modified by national legislatures to address realities of local interest group politics. Political flexibility is necessary to encourage widespread adoption of the recommendations of the Enterprise Group Legislative Guide, part three, chapter I (Domestic Context).

15. As noted above, reciprocity concerns make it unclear whether many nations would unilaterally enact a model law's provisions addressing the international context. Nonetheless, part three of the Legislative Guide, chapter II will help national legislatures "fill the gap" until a Convention comes into force. Even short of widespread enactment, those provisions would stand with the UNCITRAL Practice Guide as a useful source of guidance for ad hoc protocols.

¹⁵ Part II of the Legislative Guide Annex would provide nations not ratifying a Convention useful guidance on legislation to harmonize international aspects of cross-border enterprise group insolvency proceedings.

IV. PROCUREMENT

A. Report of the Working Group on Procurement on the work of its seventeenth session (Vienna, 7-11 December 2009) (A/CN.9/687)

[Original: English]

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the “Commission”) entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”, A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh to thirteenth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006,

New York, 21-25 May 2007, Vienna, 3-7 September 2007, and New York, 7-11 April 2008, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640 and A/CN.9/648), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions (ERAs), including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered, and their procedural aspects.

3. At its seventh, eighth and tenth to twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders (ALTs), including their early identification in the procurement process and the prevention of negative consequences of such tenders.

4. At its thirteenth and fourteenth (Vienna, 8-12 September 2008) sessions, the Working Group held an in-depth consideration of the issue of framework agreements on the basis of drafting materials contained in notes by the Secretariat. At its thirteenth session, the Working Group also discussed the issue of suppliers' lists and decided that the topic would not be addressed in the revised Model Law, for reasons that would be set out in the Guide to Enactment. At its fourteenth session, the Working Group also held an in-depth consideration of the issue of remedies and enforcement and addressed the topic of conflicts of interest.

5. At its fifteenth session (New York, 2-6 February 2009), the Working Group completed the first reading of the draft revised Model Law and although a number of issues were outstanding, including the entire chapter IV, the conceptual framework was agreed upon. It also noted that further research was required for some provisions in particular in order to ensure that they were compliant with the relevant international instruments.

6. At its sixteenth session (New York, 26-29 May 2009), the Working Group considered proposals for article 40 of the revised Model Law, dealing with a proposed new procurement method — competitive dialogue. The Working Group agreed on the principles on which the provisions should be based and on much of the draft text, and requested the Secretariat to review the provisions in order to align the text with the rest of the draft revised Model Law. The Secretariat was also entrusted with revising the draft provisions for chapter I.

7. At its thirty-eighth to forty-first sessions, in 2005 to 2008, respectively, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the revised Model Law (A/60/17, para. 172, A/61/17, para. 192, A/62/17 (Part one), para. 170, and A/63/17, para. 299). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be

warranted in the revised Model Law (A/61/17, para. 192). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part one), para. 170). Pursuant to that recommendation, the Working Group, adopted the timeline for its deliberations at its twelfth and thirteenth sessions (A/CN.9/640 and A/CN.9/648, annex), and agreed to bring an updated timeline to the attention of the Commission on a regular basis. At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time (A/63/17, para. 307).

8. At its forty-second session, in 2009, the Commission considered chapter I of the draft revised Model Law and noted that most provisions of that chapter had been agreed upon, although some issues remained outstanding. The Commission noted that the draft revised Model Law was not ready for adoption at that session of the Commission. It entrusted the Secretariat to prepare drafting suggestions for consideration by the Working Group to address those outstanding issues. At that session, the importance of completing the revised Model Law as soon as reasonably possible was highlighted (A/64/17, paras. 283-285).

II. Organization of the session

9. The Working Group, which was composed of all States members of the Commission, held its seventeenth session in Vienna, from 7 to 11 December 2009. The session was attended by representatives of the following States members of the Working Group: Algeria, Armenia, Belarus, Bolivia (Plurinational State of), Bulgaria, Canada, China, Colombia, Czech Republic, Egypt, El Salvador, France, Germany, Iran (Islamic Republic of), Lebanon, Mexico, Morocco, Namibia, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela (Bolivarian Republic of).

10. The session was attended by observers from the following States: Albania, Argentina, Belgium, Côte d'Ivoire, Croatia, Democratic Republic of the Congo, Iraq, Kuwait, Libya, Oman, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Slovakia, Sweden, Turkey, and Uruguay.

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

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: African Development Bank, European Bank for Reconstruction and Development, European Space Agency, European Union, International Development Law Organization (IDLO) and Organization for Economic Cooperation and Development/Support for Improvement in Governance and Management (SIGMA);

(c) *International non-governmental organizations invited by the Working Group*: American Bar Association (ABA), European Law Students' Association (ELSA) and International Federation of Consulting Engineers (FIDIC).

12. The Working Group elected the following officers:
Chairman: Mr. Tore WIWEN-NILSSON (Sweden)¹
Rapporteur: Mr. Duncan MUHUMUZA LAKI (Uganda)
13. The Working Group had before it the following documents:
 - (a) Annotated provisional agenda (A/CN.9/WG.I/WP. 70);
 - (b) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law (A/CN.9/WG.I/WP.71 and Add.1-8).
14. 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

15. At its seventeenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

16. The understanding in the Working Group was that, unless comments were made with respect to any text in square brackets in the draft revised Model Law contained in document A/CN.9/WG.I/WP.71/Add.1-8 (hereinafter referred to as the “draft revised Model Law”), the text would remain as proposed in the draft revised Model Law, without square brackets.

A. Chapter I. General provisions (A/CN.9/WG.I/WP.71, paras. 8-10, 24, 25, 28, 30-31 and 32 (a), (d) and (e), and A/CN.9/WG.I/WP.71/Add.1 and 2)

Title and preamble (also A/CN.9/WG.I/WP.71, para. 32 (a))

17. The suggestion was made that an inconsistency between the title (which referred to “public procurement”) and the rest of the draft revised Model Law

¹ Elected in his personal capacity.

(which referred to “procurement”) should be clarified. The Secretariat was requested to amend article 1 or 2 (f) accordingly, as appropriate.

Article 1. Scope of application (also A/CN.9/WG.I/WP.71, paras. 30-31)

18. No comments were made with respect to the article.

Article 2. Definitions (also A/CN.9/WG.I/WP.71, paras. 8, 24, 25 and 32 (d) and (e))

19. The Working Group noted proposed changes in the draft article, in particular the addition of a number of new definitions and that the definitions were set out in alphabetical order. It was agreed that the definitions should not include substantive provisions.

20. It was agreed to replace the word “decides” with the word “establishes” in the definition of “domestic procurement”. Subsequently, it was agreed that the substantive point made after the cross-reference to article 8 would be removed to that article. The understanding was that consequential changes would be made to article 8 to ensure that it covered all cases justifying recourse to domestic procurement, including the case of low-value procurement (see further paragraph 42 below).

21. It was suggested that the words “subsequently become a party” in the definition of “closed framework agreement” should be replaced with the words “compete for the procurement contract pursuant to the framework agreement”. Reservations were expressed about this suggestion, as the objective was to define the parties to the framework agreement and because a second-stage competition would not necessarily take place. An alternative suggestion was that the suggested text, as raising a substantive issue, should be included in the provisions regulating framework agreements or in the Guide but not in the definition. It was agreed that the issue should be deferred until after the provisions on framework agreements had been considered.

22. It was agreed that the definition of “material change” would be amended to replace the word “includes” with the words “may include”, and the words “and that” with the words “or that”. The point was made that the second sentence was not intended to be exhaustive, but sought to clarify the first sentence and perhaps should state that it was an illustrative list. The alternative suggestion, which eventually prevailed, was to move the second sentence to the Guide. It was also agreed that the words “or the ranking of their submissions” be added after the words “with regard to their qualification”. It was the understanding in the Working Group that since the phrase “terms and conditions of the procurement” was not defined in the Model Law, that phrase should be explained in the Guide, in particular in relation to the sources where the terms and conditions of the procurement could be found, such as in the solicitation documents.

23. It was agreed that the definition of “electronic reverse auction” should be retained.

24. It was suggested that in the definition of “socioeconomic factors” the word “includes” should replace the word “means”. Doubts were expressed regarding that suggestion. The prevailing view was to retain the word “means”, which was considered to be more accurate in conjunction with the reference to “other

considerations” in the definition. It was also agreed that the words “in setting the description of the subject matter of the procurement and the terms and conditions of the procurement contract or the framework agreement” should be added after the words “comparing submissions”.

25. A query was raised as to whether the definition of “socioeconomic factors” intended to define “socioeconomic” as an adjective rather than “socioeconomic factors” as a term, in the light of frequent use in the draft revised Model Law of the related term “socioeconomic policies”. It was agreed that reference to “socioeconomic” before “policies” should be deleted.

26. With reference to footnote 13, support was expressed for setting out an illustrative list of examples of “socioeconomic factors” in the Guide to allow flexibility in defining them at the national level.

27. It was agreed to replace the phrase “solicitation from a restricted number” with the phrase “solicitation from one or a restricted number” in the definition of “direct solicitation”.

28. It was agreed that the Secretariat should consider rephrasing the notion of “intended decision” in the definition of “standstill period”.

29. The need for the definition of “successful submission” was questioned. The issue remained open.

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

30. No comments were made with respect to the article.

Article 4. Procurement regulations

Paragraph (2)

31. The Working Group was invited to consider whether it was appropriate to address issues pertaining to a code of conduct of procurement officers in the article on procurement regulations. It was noted that in some jurisdictions those issues were regulated at the level of statutory law.

32. The Working Group entrusted the Secretariat with redrafting the provisions so that different approaches to regulating these issues in various jurisdictions could be appropriately accommodated.

Paragraph (3)

33. The Working Group noted that paragraph (3) was new and was proposed to be added by the Secretariat in the light of the new definition of “socioeconomic factors” in article 2.

34. The Working Group agreed to delete the paragraph on the understanding that the definition of “socioeconomic factors” alone was sufficient.

Article 5. Publication of legal texts

35. No comments were made with respect to the article.

Article 6. Information on possible forthcoming procurement

36. The Working Group noted that the article was revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 80-87).

37. The suggestion was made to shorten the article by deleting paragraphs (1) and (2) and reflecting their content in paragraph (3). Reservations were expressed about that suggestion, because to do so would weaken the article as a whole. It was agreed that the provisions should be retained. It was the understanding that the Guide would explain the media where this type of information was usually published.

Article 7. Communications in procurement

38. The Working Group noted that the article was revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 121-143).

39. Concern was raised about the use of the term "classified information" in the provisions of this article and elsewhere in the draft in the light of difficulty with translating that term in other languages of the United Nations (see further paragraph 74 below). No other comments were made with respect to the article.

Article 8. Participation by suppliers or contractors (also A/CN.9/WG.I/WP.71, paras. 24 and 25)

40. The Working Group noted that the article had been revised further to consultations with experts, so that it allowed the procuring entity to limit participation in procurement proceedings on the basis of nationality on socioeconomic grounds, and for other reasons, such as set-aside programmes for minorities, small and medium enterprises or indigenous groups.

41. It was agreed that consistency should be ensured between paragraphs (1) and (4), and that paragraphs (4) and (5) should be merged and the resulting merged provisions should specify the media where the referred information was to be published (or alternatively should be accompanied by Guide text to such effect). The suggestion was also made that the Model Law should require the procuring entity to notify suppliers or contractors, promptly upon request, of the reasons justifying the procuring entity's decision to have recourse to domestic procurement, to ensure effective review of that decision.

42. In the light of the amendments agreed to be made to the definition of "domestic procurement" (see paragraph 20 above), the Secretariat was requested to amend article 8 to include a reference to low-value procurement as a reason justifying recourse to domestic procurement.

Article 9. Qualifications of suppliers and contractors

43. A concern was expressed about the use of the term "possess" in paragraph (2) (i), when referring to "ethical standards" and to personnel, and the Secretariat was requested to rephrase the requirement.

44. It was added that the same paragraph or supporting Guide text should make it clear that the procuring entity should be entitled to satisfy itself that suppliers or

contractors had all the required insurances, and to impose security clearances where necessary. The Secretariat was entrusted with drafting appropriate provisions.

45. In the context of the same paragraph, it was also noted that the provisions, by imposing the requirement that suppliers or contractor must possess the “necessary equipment and other physical facilities”, might inadvertently restrict participation of small and medium enterprises in public procurement. It was noted that often such enterprises would not themselves possess the required equipment and other physical facilities but rather ensure through their subcontractors that the required equipment and facilities were available for the implementation of the procurement contract. It was the understanding in the Working Group that the Guide would explain that no such restriction was intended.

46. Concern was expressed that the requirement on suppliers or contractors to present references might restrict market access, in that newcomers might not be able to present such references. It was also noted that the provisions were subjective. It was therefore proposed that the word “references” should be deleted. In response, it was stated that the right of the procuring entity to request references was essential and should be retained, and that only references that were objectively justifiable and proportionate to the subject matter of the procurement were permitted under paragraph (6) of the article. To emphasize this latter point, the suggestion was made that the chapeau provisions of paragraph (2) should be amended to read “appropriate and relevant”.

47. It was recalled that the word “references” replaced the word “reputation” used earlier in that context. The point was made that if the word were deleted, the Guide or the Model Law itself should ensure that self-declaration as regards the past positive experience would not be sufficient and suppliers or contractors would be required to demonstrate the evidence to the satisfaction of the procuring entity. In this regard, a distinction was drawn between the terms “reputation” and “references” in relation to the involvement of third parties. It was also noted that the term “references” would be understood differently in different jurisdictions, and that the use of references to demonstrate qualifications would be normal practice in the construction sector. A preference was expressed for retaining the term insofar as it meant to check the “credibility” of suppliers or contractors.

48. The prevailing view was that the word “references” should be deleted in paragraph (2) (i) in the light of paragraph (3) of the article that allowed the procuring entity to call for documentary evidence to verify suppliers’ compliance with requirements as to qualifications. It was agreed that the Guide text to paragraph (3) should explain the interaction between these paragraphs.

49. In response to concerns that no explicit reference to environmental considerations was made in the provisions, it was explained that the provisions in fact envisaged the possibility of considering environmental aspects in ascertainment of the qualifications. Reference in this context was made to the definition of “socioeconomic factors”, article 8 and a cross-reference to article 8 in paragraph (6) of article 9. The Secretariat was entrusted with redrafting the provisions to make reference to environmental standards more explicit.

50. It was suggested that the Guide text to paragraph (2) (v) should refer to the World Bank’s guidelines on suspension procedures. It was also suggested that, in the light of repetitive use of the term “prequalification documents”, article 2 could

include the definition of that term along the following lines: “‘Prequalification documents’ means all documents for the selection of suppliers or contractors to whom the solicitation documents were to be issued”.

Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement

51. The suggestion was made that paragraph (3) of the article should be redrafted by replacing “may” with “shall as a minimum include” and by referring in the latter context only to the items that would have to be always included in the description of the subject matter of the procurement as opposed from those that would be included depending on the procurement. It was also proposed that article 10 should more explicitly regulate the way the socioeconomic factors were to be taken into account in setting out the description of the subject matter of the procurement and the terms and conditions of the procurement contract or a framework agreement.

52. The alternative view was that these issues proved to be difficult to regulate in a law and might therefore be better addressed in the Guide.

*Article 11. Rules concerning evaluation criteria and procedures
(also A/CN.9/WG.I/WP.71, paras. 24-25)*

53. The Working Group noted that the article had been revised pursuant to the consideration at the Commission’s forty-second session (A/64/17, paras. 149-174) and in the light of the Secretariat’s informal consultations with experts and the new definition of “socioeconomic factors” in draft article 2.

54. The suggestion was made and supported that the opening phrase of paragraph (1) (a) should be redrafted to refer to all exceptions envisaged in paragraph (2).

55. A query was raised as regards the chapeau provisions of paragraph (1) (b): whether it should read “it shall include only”, “it may include only”, “it shall include” or “it may include”. The latter two formulations were preferred on the ground that it would be fruitless to attempt to draft any exhaustive list of evaluation criteria, even if such a list contained generic references. Support was expressed for the phrase “it shall include” as indicating that the evaluation criteria listed in the paragraph might be expanded by any additional criteria that complied with the requirement of paragraph (1) (a). In the subsequent discussion, support was expressed for the phrase “it may include” to avoid ambiguity. It was considered that the general requirement in paragraph (1) (a) that the evaluation criteria ought to relate to the subject matter of the procurement set out sufficient safeguards against any abuses.

56. The Working Group was invited to consider whether “performances in environmental protection” in paragraph (1) (b) (iv) should be retained as a separate evaluation criterion or it would be sufficient to address environmental considerations as part of socioeconomic factors under paragraph (2) (a) of the draft article. It was noted in this context that the definition of “socioeconomic factors” in draft article 2 already made reference to environmental considerations. It was explained that removing reference to environmental considerations from the definition of “socioeconomic factors” in article 2 would have implications on consideration of environmental considerations under articles 8 (in conjunction with

e.g., set-aside projects/qualifications) and 10 (in conjunction with the assessment of responsiveness of submissions). It was further noted that if “performance in environmental protection” would stay as a separate evaluation criterion, it would mean that “performances in environmental protection” would always relate to the subject matter of the procurement. It was also noted that if the issue of environmental considerations were to be addressed only in paragraph (2) (i.e., as part of socioeconomic factors), environmental considerations could be considered in the evaluation of submissions only if the requirements in the chapeau of paragraph (2) were met (i.e., they had to be authorized by procurement regulations and applied subject to approval by a designated organ).

57. In the light of the developments in the area of environment protection, including in the international arena, and evolution towards green procurement worldwide, the prevailing view was that the procuring entities should be allowed to consider environmental factors in the evaluation of submissions even if such factors had not been authorized by procurement regulations or approved by a designated organ. It was therefore proposed either to retain paragraph (1) (b) (iv) as drafted or reflect otherwise its content in paragraph (1) (b). It was explained that retaining reference to environmental considerations only in paragraph (2) in the context of the definition of “socioeconomic factors” would imply that considering such considerations was an exceptional measure, when in reality it was increasingly being done as a matter of practice. Subsequently, it was agreed to delete paragraph (1) (b) (iv) and instead refer to environmental characteristics in paragraph (1) (b) (ii).

58. It was recognized at the same time that environmental considerations would not necessarily have to be always considered in the evaluation of the submissions. It was noted that the proposed redrafting of paragraph (1) (b), chapeau provisions (see paragraph 55 above), would provide for sufficient flexibility in this respect.

59. It was also recognized that not all environmental considerations would be linked to the subject matter of the procurement. The point was made that when they were not so linked, they could still be considered but under the conditions of paragraph (2) of the article as part of other socioeconomic factors. As regards the conditions imposed under paragraph (2), the preference was expressed for the redraft along the following words: “If authorized by procurement regulations or ... (the enacting State designates an organ to issue the approval)”.

60. It was emphasized that since paragraph (2) referred to general policies of the State, there might be no discretion on the part of the procuring entity in deciding whether or not to consider the factors listed in the paragraph. It was therefore proposed and agreed that the chapeau provisions of paragraph (2) should be redrafted to encompass not only discretionary but also mandatory consideration of the factors listed in that paragraph.

61. The Working Group was invited to consider whether reference to “national defence and security considerations” in paragraph (2) (c) remained appropriate. The preference was either for deleting paragraph (2) (c) or replacing them with the appropriate general principles. In this regard, the decision of the Working Group to draft provisions of a revised Model Law not on the basis of what or in which sector was procured but on the complexity of the procurement was recalled. Concern was also expressed that the current wording did not refer to sensitive procurement in

general so that encompass for example public safety considerations. The Working Group agreed to delete paragraph (2) (c) on the understanding that the draft revised Model Law already provided for other means to accommodate “national defence and security considerations”, such as through the selection of an appropriate procurement method.

62. A link between provisions of articles 10 and 11 was underscored. It was proposed that reference to article 10, in particular to the requirement of compliance with the terms and conditions of the procurement contract or framework agreement, should be added in the end of article 11.

Article 12. Rules concerning estimation of the value of procurement

63. The Working Group noted that the draft article was new and had been proposed by the Secretariat in the light of its consultations with experts. It was recalled that the provisions of the draft article were based on the equivalent provisions of the Governmental Procurement Agreement of the World Trade Organization (the “WTO GPA”) (article II.2 and 3 of the 1994 version and article II.6 of the 2006 version). It was explained that the provisions were relevant in the context of low-value procurement and thresholds envisaged by the draft revised Model Law for recourse to domestic procurement, restricted tendering or request for quotations proceedings.

64. As regards paragraph (1), the suggestions were made to add in the end of paragraph (1) the following words “or otherwise avoiding obligations under this Law” and to replace the words “with the intention” with “with the result [or with the effect]”. Doubts were expressed as regards the latter suggestion.

65. A suggestion to refer to the options to renew or extend contracts in paragraph (2) did not gain support, being outside the scope of the Model Law (i.e., relating to contractual implementation). It was suggested instead that the wording from the WTO GPA addressing this issue, reading “where the procurement provides for the possibility of option clauses, the estimated maximum total value of the procurement, inclusive of optional purchases”, should be included in the Guide.

66. In response to a query as to whether these provisions were useful in that there were relatively few thresholds in the Model Law as compared with other instruments, the preference stated was to retain the provisions as drafted to avoid anti-competitive behaviour, whether by artificially reducing or increasing contract size.

Article 13. Rules concerning the language of documents

67. No comments were made with respect to the article.

Article 14. Clarifications and modifications of solicitation documents

68. The Working Group noted that the proposed article had been moved from the chapter on Tendering in the 1994 Model Law. The Working Group was invited to consider establishing limits to the extent of modification permitted under paragraph (2) of the article, drawing for example on the concept of a “material change”, as defined in article 2 of the draft revised Model Law. The view was

expressed that no such limits should be established in the light of the other provisions of the Model Law that already set out sufficient safeguards against abuse.

69. The suggestion was made that the Guide text accompanying paragraph (2) of the article should cross-refer to the provisions of article 34 of the draft revised Model Law on the need to extend the deadline for presentation of submissions where the solicitation documents were modified.

70. A concern was raised in response to a suggestion that the words in paragraph (3) “at the meeting” should be replaced with the words “at or before the meeting”, in that this suggested wording would change the scope of the article. It was suggested, for that reason, that the substance of the suggestion should be reflected in the Guide or elsewhere in the text.

Article 15. Submission securities

71. No comments were made with respect to the article.

Article 16. Prequalification proceedings

72. The Working Group was invited to reconsider its earlier decision to use the term “modalities” as a technologically neutral substitute for the term “place”. The Working Group noted and expressed its agreement with concerns of experts conveyed through the Secretariat that the new term would make the text more difficult to understand. The Working Group agreed that the original term “place” should be restated in this and other relevant provisions.

73. The need for the additional wording proposed in paragraph (9) to accommodate procurement involving classified information and in similar provisions elsewhere was questioned, in the light of the provisions of article 23 (4). Concern was expressed that the provisions might allow the procuring entity not to follow a court decision ordering public disclosure under article 23 (4), though it was agreed that no such consequence was intended. In response, the utility of the proposed provisions in paragraph (9) and elsewhere was emphasized, as they would give guidance to enacting States as to which provisions of the revised Model Law might require exemptions to the public disclosure requirements. The Working Group entrusted the Secretariat to reconsider the proposed wording in the light of the suggestions made.

74. The Working Group recalled that concern had been raised about difficulties in conveying the meaning of the term “classified information” into all languages of the United Nations (see paragraph 39 above), as the term might not be self-explanatory in other languages. It was therefore proposed that the revised Model Law might draw on any definition used in the United Nations or in the European Union directives. The need for consistency in the use of the term throughout the Model Law and in all languages was underscored.

75. With respect to paragraph (4), and in response to a query as to whether the changes to the 1994 text might indicate that higher costs than previously permitted could be charged, it was agreed that the Guide should make it clear that development costs (including consultancy fees and advertising costs) were not to be recovered through this provision. It was elaborated that the costs should be limited

to the minimal charges of providing the documents (and printing them, where appropriate).

76. It was agreed that in paragraph (10) the words “upon request” should be deleted.

Article 17. Cancellation of the procurement

77. The Working Group noted that the article had been revised pursuant to the consideration at the Commission’s forty-second session (A/64/17, paras. 183-208). It also noted a number of issues raised by experts consulted by the Secretariat in connection with the provisions, such as adding the following text to paragraph (1): “[, provided that the circumstances giving rise to the cancellation [were not foreseeable by] [did not arise as a consequence of irresponsible or dilatory conduct on the part of] the procuring entity]”. It was explained that the consultations also indicated that, even in such circumstances, the public interest might be better served if the procurement were cancelled, but that such cancellation should entail consequences (such as compensation for the costs of tendering). The Working Group was invited thus to consider whether the suggested wording should be included in paragraph (1) or in paragraph (3) in conjunction with the issue of liability. The Working Group was invited in addition to consider whether cancellation might give rise to liability only towards suppliers or contractors whose submissions had been opened. It was noted in this regard that, according to the experts consulted by the Secretariat, it had always been recognized that suppliers or contractors presented their submissions at their own risk, and bore the related expenses, but that this position changed once submissions had been opened.

78. It was agreed that paragraph (1) would be retained without change; the words “upon request” would be deleted in paragraph (2); the content of footnote 14 would be reflected in the Model Law though without giving the impression that any explicit or implicit pre-condition for invoking paragraph (1) was imposed; and the content of footnote 16 would be reflected in the Guide. In addition, it was agreed that the article would not address issues of damages and other remedies, although it was recognized that the article as redrafted would have implications for the review provisions of the Model Law.

79. As regards paragraph (3), three issues were identified: whether there should be an ability to cancel the procurement before and after bids were opened (which was answered in the affirmative); whether there should be a justification at either of those stages, and if so, what justification would be required; and what liability might arise as a question of contract law or otherwise. The view was expressed that the issues of liability were outside the scope of the Model Law, and so should not be addressed in the article. The preference was for the Guide to explain that the procuring entity might face liability for cancelling the procurement under other branches of law.

80. After discussion, it was proposed that in paragraph (3) the suggested text in square brackets would be deleted and instead an opening phrase would be added reading “unless the cancellation of the procurement was a consequence of irresponsible or dilatory conduct on the part of the procuring entity”. It was noted that the proposed wording also addressed unforeseeable events and that liability would arise in exceptional circumstances.

81. The purpose of the article was seen to draw the right balance between the discretion of the procuring entity to cancel the procurement at any stage of the procurement process covered by the Model Law and the need to accord appropriate protection to the market against irresponsible acts by the procuring entities. It was noted that some procuring entities did in practice abuse discretion to cancel procurements to investigate market conditions. It was agreed that the Guide to this article would address these issues.

Article 18. Rejection of abnormally low submissions

82. No comments were made with respect to the article.

Article 19. Rejection of a submission on the grounds of inducements from suppliers or contractors, an unfair competitive advantage or conflicts of interest

83. The Working Group noted that paragraph (1) of the article had been revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 214-222).

84. The suggestion was made to delete the words "as an inducement" in paragraph (1) (a), to encompass bribes and gratuities as those terms were understood in some jurisdictions, and to ensure consistency with article 8 of the United Nations Convention against Corruption² (which covered broadly all corrupt acts). While some support was expressed for deletion of this phrase, concern was expressed that the proposed amendment would on the one hand have the opposite effect of excluding the application of the provisions to bribes, and on the other hand would allow rejection of submissions for gratuities of insignificant value, which could not influence the behaviour of the procuring entity.

85. In response to those concerns, the point was made that the provisions of the article should be made subject to other branches of law where the issues of anti-corruption were regulated and that this point should be reflected in the Guide. The relevance of article 3 was emphasized in this regard. It was felt that regulating the issues addressed in article 19 without cross-referring to other appropriate branches of the law might create unnecessary confusion, inconsistencies and wrong perceptions about anti-corruption policies of an enacting State. Caution was expressed however that such cross-referencing should not inadvertently convey the erroneous meaning that a criminal conviction would be a pre-requisite for rejection of a submission.

86. The preference was for the wording contained in the French and Spanish texts, to reflect the "influence" that the gratuity produced on the behaviour of the procuring entity. Another suggestion was to refer to "improper inducement".

87. The prevailing view was that the words "as an inducement with respect to" should be replaced with the words "so as to influence".

88. The suggestion was made that paragraph (1) (b) should refer to the "established" unfair competitive advantage in order to avoid excluding suppliers or contractors still under investigation. It was felt however that the point was relevant to all cases listed in the paragraph and was implicit in all situations in the article.

² United Nations, *Treaty Series*, vol. 2349, No. 42146.

89. In response to a query raised about the content of footnote 19, it was agreed that the Guide would address issues of unjustified rejection and the establishment of a process including a dialogue to discuss potential conflicts of interest, drawing on the provisions of article 18 regulating procedures for investigating abnormally low submissions.

90. Suggestions were made that the accompanying provisions of the Guide should address, for example: (i) applicable standards (e.g., consultants involved in drafting the solicitation documents should be prohibited from participating in the procurement proceedings where those documents were used); (ii) difficulties with establishing the fact of corruption as opposed to a bribe as the former might consist of a chain of actions over time rather than a single action; (iii) that combining provisions on conflicts of interest (which referred to a situation) and corruption (which was a wrongdoing) might lead to confusion, and should be avoided; and (iv) how the situation of a subsidiary would be treated.

Article 20. Acceptance of the successful submission and entry into force of the procurement contract (also A/CN.9/WG.I/WP.71, para. 28)

91. It was noted that greater simplification and standardization would be achieved by consolidating all provisions on restrictions on disclosure of information, such as those contained in paragraph (2) (b), in a single article (see further paragraph 102 below). For the same purpose, all provisions referring to information to be included in the record of procurement proceedings, such as those in paragraph (3), should be reflected only in article 23 on the documentary record of procurement proceedings, with the Guide text to the relevant provisions cross-referring to the content of article 23.

92. The Working Group noted that paragraph (2) (c) had been revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 230 and 237). The suggestion was made, and supported, that the paragraph should be further redrafted to refer to a standstill period of reasonable duration reflecting the conditions of the particular procurement, rather than setting any specific duration.

93. The Working Group considered the issue of debriefing generally under the draft revised Model Law and in the specific context of paragraph (2) and footnote 25. The suggestion made at the Commission's forty-second session, that the issues of debriefing of unsuccessful suppliers or contractors might be usefully addressed in the Guide rather than regulated in the Model Law (A/64/17, para. 240), was recalled and reiterated. It was explained that debriefing procedures varied significantly not only from jurisdiction to jurisdiction but also from procurement to procurement, and that provisions on debriefing were not easily enforceable. The Working Group agreed that the Guide only would address the issue of debriefing.

94. In response to a concern expressed that the article implied that there would be always only one successful submission, the point was made that the issue would be addressed through the definition of the successful submission (as had been done with respect to the "procurement contract").

95. In the context of paragraphs (3) and (11) and footnote 31, the Working Group considered whether the article as a whole or only some of its provisions should apply to framework agreements and if so to which type and at which stage. The Working Group noted that, at the Commission's forty-second session, the

consideration of paragraphs (3) and (11) of the article in the context of framework agreements was deferred (A/64/17, paras. 242, 243 and 247). The Working Group recalled that views had so far varied as regards the advisability of providing for a standstill period at the stage of the award of procurement contracts under framework agreements (A/CN.9/668, paras. 141-144). The Working Group was invited to consider an option to provide for a short standstill period, which might alleviate the concerns expressed regarding the speed of award appropriate for framework agreements, and which, given the more limited concerns that the award of a procurement contract thereunder might pose, might also provide sufficient time for suppliers. It was noted that in electronic framework agreements, the period could be very short and in an open framework agreement no standstill period might be needed.

96. After discussion, it was agreed that competitive stages of framework agreements procedures, i.e. the award of closed framework agreements, and the award of procurement contracts following second-stage competition under all framework agreements, would be subject to an appropriate standstill period. Where the second stage might not involve the real competition but rather the selection of the best price from the available list of offers, the standstill provisions would not apply, and the Guide would make appropriate reference.

97. The suggestion was also made that standstill provisions in the context of framework agreements should be dealt with in chapter VII, so as to accommodate the different types of framework agreement. The Working Group's understanding was that these issues would have to be considered again in detail when the provisions on framework agreements were considered.

98. The Secretariat was requested to clarify the reasons for including references to the requesting ministry in paragraph (6) and to delete them if no justification for those references in the drafting history of the provisions were found.

Article 21. Public notice of awards of procurement contract and framework agreement

99. The Working Group noted that the article had been revised pursuant to the consideration at the Commission's forty-second session (A/64/17, para. 265) and the Secretariat's consultations with experts.

100. The preference was for retaining in paragraph (3) the word "periodic" as allowing for more flexibility to enacting States, and deleting reference to quarterly notices, but that the Guide should stress that "periodic" should not be interpreted as allowing unreasonably long periods. The suggestion was made that the Guide should state that the notices under paragraph (2) (a) should be published at least once a year.

Article 22. Confidentiality

101. The Working Group noted that the article had been revised pursuant to the consideration at the Commission's forty-second session (A/64/17, paras. 248-266) and the Secretariat's consultations with experts. The Working Group also noted that reference to "the review body or a competent court" should be considered in conjunction with article 23 (4) where the same issue was outstanding.

102. The Working Group recalled the suggestion made earlier at the session that all provisions referring to disclosure of information, including restrictions on disclosure of classified information, should be consolidated in a single article (see paragraph 91 above). Support was expressed for that suggestion. The Working Group entrusted the Secretariat with drafting such a consolidated article.

103. With reference to “the review body or a competent court”, the point was made that in all provisions where the issue appeared, reference should always be made to the competent court and in addition to any other competent body as designated by the enacting State. It was proposed that the Guide would indicate such other possible bodies, including those referred to in chapter VIII of the draft revised Model Law. The alternative view was that the Model Law, not the Guide, should list the options from which the enacting State would choose.

Article 23. Documentary record of procurement proceedings

104. It was agreed that in the opening sentence of paragraph (1) the words “that includes” should be used instead of “containing, at a minimum”. Reservation was expressed about deleting the words “at a minimum” since this would eliminate flexibility and would require the provisions to be exhaustive. In response, it was observed that the suggested wording did not imply that the provisions would be exhaustive.

105. It was agreed that in paragraph (1) (r), the word “claim” should be replaced with the word “complaint”, since the latter term was used in chapter VIII.

106. The Working Group noted that the proposed paragraph (5) was new and was added at the suggestion of experts during consultations with the Secretariat, and reflected the relevant requirements of the United Nations Convention against Corruption. It was suggested that the Guide to the article could explain the need for preservation of documents, and cross-refer to any applicable rules on documentary records and archiving. It was further noted that, if the enacting State considered that applicable internal rules and guidance should also be stored with the documents for a particular procurement, it could include a requirement to such effect in the regulations.

B. Chapter II. Methods of procurement and their conditions for use (A/CN.9/WG.I/WP.71, paras. 9 and 11-14, and A/CN.9/WG.I/WP.71/Add.2)

Article 24. Methods of procurement

107. It was recalled that the Working Group had decided to provide in the revised Model Law a toolbox of procurement methods to accommodate various types of procurement. It was recognized that in the light of a variety of types of procurement in practice, the list of available procurement methods was extensive. The suggestion to shorten the list by eliminating some procurement methods or grouping them following the approach in the WTO GPA did not gain support.

108. Concern was expressed that the draft revised Model Law introduced concepts not found in the 1994 Model Law, such as open tendering. In response, it was noted that the term “open tendering” was the same as “tendering” under the 1994 text, but

the adjective “open” had been added both to harmonize with other procurement texts and to contrast the method with restricted tendering.

109. It was observed that all procurement methods envisaged under the draft revised Model Law should be listed in paragraph (1), and that for ease of reading, the last words of that paragraph “under the conditions of articles 25 to 27” should be moved to the chapeau provisions of paragraph (1).

Article 25. General rules applicable to the selection of a procurement method

110. Concern was expressed that paragraph (1) altered the content of article 18 (1) of the 1994 Model Law, which mandated tendering for the procurement of construction and goods, but not for the procurement of services, though it was recalled that the Working Group had decided to delete the distinction between the procurement of goods, construction and services. In response, it was noted that the reasons for the current formulation included that the 1994 methods for goods and services were procedurally similar, and the differences between them arose mainly in terms of degree of precision in specifications and the degree of flexibility permitted as regards evaluation criteria. It was explained that, as these issues were addressed in the articles on description of the subject matter of the procurement and evaluation criteria (articles 10 and 11) of the draft revised Model Law, as a matter of general principle, the procedures and choice among them could accordingly be streamlined in the manner suggested in the draft revised Model Law.

111. The suggestion was made that paragraph (1) of the article could alternatively apply to procurement in which specifications could be drafted at the outset of the procurement. At the same time, it was recognized that the draft revised Model Law preserved the general thrust of article 18 in signalling that the recourse to open tendering was the best way to ensure competition and transparency.

112. The Secretariat was requested to revise the article to provide a recognition in the text that the use of open tendering in the procurement of non-quantifiable advisory or intellectual services would not be appropriate.

Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)

113. As regards paragraph (2), a preference was expressed for the use of the phrase “economy and efficiency”, taken from the preamble of the Model Law. A further query was raised about the value of referring to “economy and efficiency” at all in the article, because these considerations applied to all procurement. Other suggestions were to delete the proviso referring to “economy and efficiency”, replacing it with the phrase “where necessary for reasons of economy and efficiency” as it appeared in the 1994 Model Law, and to include the reference to economy and efficiency in article 25 (2). It was noted that the result of so doing would be that the phrase would apply to all procurement methods. Reservations were expressed about whether implying that economy and efficiency were the primary considerations in the selection of procurement methods under articles 27 to 29.

114. Concern was also expressed that retaining a reference to economy and efficiency introduced two layers of conditions in paragraph (2), which were not

necessarily consistent with each other. It was noted that the first layer of conditions was contained in subparagraphs (a) and (b) of that paragraph, while the second was in the requirement to maximize economy and efficiency. The point was made that whereas the conditions listed in subparagraph (b) reflected the notion of maximizing economy and efficiency, the conditions listed in subparagraph (a) were not in reality connected to maximizing economy and efficiency. A further comment was made that the implications of referring to economy and efficiency only in this article might either imply that other methods were considered less economical and efficient, or that, in the choice of restricted tendering, these objectives were considered the primary ones.

115. The view prevailed that the reference to economy and efficiency should be removed from the provisions of paragraph (2).

116. As regards paragraph (3), it was suggested that a reference to all applicable financial thresholds for the choice of a procurement method or type of solicitation under the draft revised Model Law should be set out in article 24.

117. As regards paragraph (4), it was confirmed that provisions were intended to permit the procurement of simple quantifiable services, where awards were made on the basis of the lowest priced responsive submission, in some cases within a fixed budget (see further paragraph 177 below). Concern was expressed, however, that no specific conditions for use were specified for recourse to this method (see further paragraph 174 below).

118. With reference to a query raised in footnote 58, preference was expressed for the use of the term “financial”, rather than “commercial” or “price”, so as to encompass life cycle costs, operational costs and financing terms as well as the price itself. However, it was queried whether this approach would be consistent with the provisions of article 41. It was agreed that the drafting of these latter provisions and article 26 (4) should be harmonized.

119. Another view was that reference to “price” only should be retained in the light of the provisions of article 41 (8) (a) and practices in some jurisdictions to consider in two-envelope systems just the price following the evaluation of technical aspects of the submissions. The view prevailed that the term “financial” should be used. (See further paragraph 176 below; for the subsequent discussion of chapter IV procurement methods, see paragraphs 159-181 below.)

Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, and competitive negotiations)

120. A general question was raised as to the grouping of procurement methods under articles 26 and 27. For example, two-stage tendering was considered to be a variant of open tendering and, it was said therefore, would more appropriately be located within article 26 than in article 27. A further view expressed was that this grouping indicated a different approach to selection of procurement methods from that set out in article 19 (1) (a) of the 1994 text.

121. In response, it was stated that the main division between the procurement methods described in articles 26 and 27 was whether or not an adequate description could be drafted at the outset of the proceedings. However, it was acknowledged

that whether or not it was feasible for the procuring entity to draft specifications in a comprehensive manner was not the defining criterion for all the circumstances envisaged in article 27. In this regard, it was observed that the need for the procuring entity to engage in dialogue or negotiations with suppliers could arise either as a consequence of the fact that the procuring entity was unable to draft its specifications, or because negotiations or dialogue were otherwise needed to conduct the procurement under article 27 (1) (b) to (d) and article 27 (2).

122. It was noted that article 26 (1) referred to a “detailed” description of the subject matter of the procurement, whereas article 27 (1) (a) referred to a “sufficiently comprehensive” description, and the point was made that the references should be conformed. (For a further amendment agreed to be made in article 27 (1) (a) as a result of the subsequent discussion of chapter V procurement methods, see paragraph 193 below.)

123. After discussion, in which the experiences of procurement involving dialogue and negotiations were shared, it was agreed that the broad division between articles 26 and 27 in the text before the Working Group would be preserved, and that this distinction indeed reflected the approach set out in article 19 (1) (a) of the 1994 text.

124. It was stressed that the procurement methods listed in article 27 were presented as a part of the toolbox approach. Views differed as to the appropriate manner in providing for this approach: some considered that the broad variety of factual situations that would be encountered in practice indicated that all the tools envisaged by the article should be available in a flexible manner; others considered that article 27 in its current formulation should differentiate between the various procurement methods addressed and should provide for conditions for use for each of them, among other things to avoid abuse.

125. In this regard, it was queried whether sufficient guidance was provided in the draft text: norms and standards were in place to assist in choosing among other procurement methods, but were not provided when making such a choice under article 27. It was also observed that the conditions for use could not entirely address the considerations raised by the selection of the procurement method, and indeed that it might not be appropriate for them to do so. It was added that the selection might in practice not be amenable to challenge, and the main issue should be to enable structured decision-making on the part of the procuring entity and to manage the risks that such decisions might entail. It was agreed that these questions would be considered when or after the Working Group addressed the procedures for each method concerned. It was also agreed that detailed commentary in the Guide addressing the issues in selecting among the methods in article 27 would be necessary, from the perspective both of legislators and of procuring entities. In addition, the guidance should address the elements of that choice that could not be addressed in a legislative text and should draw on real-life examples.

126. The Working Group was urged to preserve continuity of law to the extent commensurate with enhancing the text through reform, so as to minimize difficulties in and to bear in mind the costs of implementing the reforms, and to avoid misuse and confusion in those States that had enacted the 1994 text, particularly as regards the introduction of new procurement methods.

127. As regards the procurement methods described in article 27, the following issues were raised: two-stage tendering would normally involve a process to define

the procuring entity's needs before the commencement of the procurement, perhaps involving consultant experts. The method would normally, but need not, involve a dialogue during the first stage to develop the specifications for the second stage. As regards the request for proposals with dialogue, part of the design and the development stages might be conducted within the procurement itself, using dialogue with the market. It was observed that this latter approach had been developed largely since the 1994 text was issued, and that it could usefully be accommodated within the draft revised text with the aim of enhancing economy and efficiency. It was added that the procedures for these two procurement methods were similar, with one significant difference being that two-stage tendering would ultimately involve one technical solution, while request for proposals with dialogue would lead to proposals that might have different solutions.

128. The issue was raised as to whether all the methods envisaged in the article should be retained, and whether some should be reserved for particular types of procurement, such as advisory or consultancy services. The Working Group agreed to address this issue when considering the procedures for each procurement method, and in conjunction with the appropriate conditions for use of each method, but confirmed its understanding that in principle all procurement methods were available for all types of procurement. In addition, the Working Group agreed to consider at a later stage whether competitive negotiations should be available for some or all the circumstances identified in article 27, particularly in the light of its unstructured and unregulated procedure.

129. It was recalled that competitive negotiations were available for urgent procurement under article 27 (2), as was single-source procurement under article 29 (b). It was agreed that the appropriate selection between these methods should reflect the degree of urgency confronting the procuring entity, and the Secretariat was requested to reflect this point in the text. (For the subsequent discussion of chapter V procurement methods, see paragraphs 182-210 below.)

Article 28. Conditions for use of an electronic reverse auction

130. Some inconsistency between certain language versions and the English version of the text was noted, in particular as regards the reference to the feasibility of formulating a description of the subject matter of the procurement. The Secretariat was requested to ensure that all language versions were consistent.

Article 29. Conditions for use of single-source procurement

131. It was agreed that the conjunction "or" should be added after paragraph (d). It was also recalled that it was agreed that article 29 (b) should refer to a higher degree of urgency than article 27 (2) (see paragraph 129 above).

C. Chapter III. Open tendering (A/CN.9/WG.I/WP.71/Add.3)

Article 30. Procedures for soliciting tenders

132. It was agreed that the number of the paragraph should be deleted and that the text should begin with the phrase "unless prequalification was involved", which would replace the current reference to article 16.

Article 31. Contents of invitation to tender

133. The Working Group recalled its decision as regards the phrase “at a minimum” in the context of article 23 (1) (see paragraph 104 above). The understanding was that the same change would be made in article 31 and elsewhere in the same context.

Article 32. Provision of solicitation documents

134. The Working Group recalled its decision as regards the Guide text that would elaborate on the costs of providing documents to suppliers or contractors (see paragraph 75 above). It was agreed that the same discussion should appear in the guide text to article 32.

Article 33. Contents of solicitation documents

135. It was the understanding that the change agreed to be made earlier in the session as regards the words “at a minimum” should also be made in article 33 (see paragraph 104 above).

136. It was agreed that in paragraph (d), the words “ordered” and “performed” should be replaced with the word “procured” and a reference to the location where the goods to be delivered should be added. The suggestion was made to reinstate the wording from the 1994 Model Law, which referred to the nature and required technical and quality characteristics of the goods, construction or services, and which had been replaced with the defined term “the description of the subject matter of the procurement” combined with a cross-reference to article 10. A concern was raised regarding the phrase the “quantity of services”.

137. With reference to the “quantity of goods”, a query was raised as to whether the provisions intended to convey that the quantity of goods was always to be fixed in the solicitation documents, which would prevent the procuring entity from envisaging options for the purchase of additional quantity of goods. A distinction was drawn between this common practice and the cases specified in article 29 (c). It was recalled that the draft revised Model Law required certainty as regards quantities, with the exception of its provisions on framework agreements, which would mean that the solicitation documents should set out at least the maximum quantity of the goods envisaged to be procured under all options.

138. In response to a query about the phrase “the desired or required time, if any”, it was confirmed that the provisions indeed envisaged that the procuring entity would have flexibility in defining the time for delivery of the subject matter of the procurement, to reflect its needs.

139. It was recalled that changes would need to be made in paragraphs (n) and (q) as regards the word “modalities” (see paragraph 72 above). The Secretariat was also requested to redraft paragraph (v) to improve clarity.

Article 34. Presentation of tenders

140. A reservation was expressed about the suggestion to add in paragraph (4) after the word “promptly” the words “at the same time”. The understanding was that the word “promptly” would address the meaning intended to be conveyed by the suggested phrase.

141. Concern was expressed that the provisions of paragraph (6) were rigid. The drafting history of the provisions and the accompanying Guide text were recalled, which indicated that the provisions were drafted in this manner to provide for necessary safeguards against abuse.

Article 35. Period of effectiveness of tenders; modification and withdrawal of tenders

142. The Working Group recalled that at its fifteenth session it had deferred the consideration of the article, which was based on article 31 of the 1994 Model Law, in the light of divergent views expressed regarding the suggestion to delete the second sentence in paragraph (2) (a) (A/CN.9/668, paras. 175-176).

143. The point was made that, although the provisions proposed to be deleted were technically superfluous, they were found in some procurement laws and there might be value in retaining them as an indication to enacting States of the consequences arising if suppliers or contractors refused a procuring entity's request to extend the period of effectiveness of their tenders. The view prevailed that the part of the sentence starting with the words "and the effectiveness" until the end should be deleted, and the content of the deleted part should be reflected in the Guide.

144. The suggestion was made that the term "submission security", not "tender security", should be consistently used throughout the revised Model Law. The view was expressed that the Working Group should defer the issue of terminology to a later stage.

Article 36. Opening of tenders

145. The common understanding was that it was good practice, for the reasons explained in the Guide to article 33 of the 1994 Model Law, not to allow any time to elapse between the deadline for presenting tenders and the time for their opening. The additional benefits of this provision were also noted, in particular that it would enable suppliers to keep control of their tenders prior to the opening, and so would encourage participation and presence at the opening.

146. It was observed that paragraph (1) did not necessarily reflect practice. It was also noted that risks of improprieties after the deadline for presenting tenders were lower than those before the deadline. It was therefore suggested that the provisions should be redrafted. One suggestion was that the provisions should state only that: "Tenders shall be opened at the time specified in the solicitation documents". Another suggestion was to redraft paragraph (1) along the following lines: "Tenders shall be opened at the time specified in the solicitation documents. The solicitation documents shall specify the time, date, place, manner and procedures for opening the tenders."

147. Another suggestion was to replace the words "at the time" with the words "promptly after the time". In explanation of this suggestion, it was stated that the current wording of paragraph (1) was inaccurate, as it referred to the opening of tenders at the deadline, rather than the time immediately thereafter.

148. Objections were expressed to the proposed amendments to the 1994 wording, which was viewed as a key requirement in procurement that encouraged the procuring entity to exercise greater diligence in setting the deadline for presenting submissions, keeping in mind that this deadline would also be the time for opening

tenders. It was emphasized that it was essential to provide for certainty by establishing in the solicitation documents the precise moment for the opening of tenders, which should coincide with the deadline for presenting tenders.

149. It was considered that the suggested alternatives would weaken the 1994 requirement. Specifically as regards the proposed words “promptly after the time”, it was stated that the phrase was subjective and might be interpreted too broadly. A query was raised whether the alternative wording “promptly at the time” would be preferable. Another suggestion was that the provisions could start with: “The opening of tenders shall start at the time”.

150. It was agreed that the 1994 wording would be retained. The understanding was that the Guide would explain risks of departing from the requirements of the Model Law and practical considerations that should be taken into account in implementing that requirement.

Article 37. Examination, evaluation and comparison of tenders

151. Support was expressed for reinstating the 1994 wording of paragraph (1) (b) and deleting the proposed paragraph (3) (b). In the subsequent discussion, it was decided also to reinstate the 1994 wording of paragraph (3) (b). In the context of these paragraphs, the suggestion was made that the Guide should explain the rules and principles applicable to the correction by the procuring entity of arithmetical errors. A query was raised as to whether it might be useful to require the solicitation documents to specify the manner in which arithmetical errors would be corrected.

152. With respect to paragraph (2) (a), support was expressed for deleting the word “only” and retaining the word “shall” (for the reasons explained in footnote 32) and the text “to all requirements set forth in the solicitation documents in accordance with article 11 of this Law”.

153. Suggestions were made and agreed to delete in paragraph (4) (b) (i) the reference to margins of preference, and to accommodate the situation in paragraph (4) (b) (ii), also deleting the words “if the procuring entity has so stipulated in the solicitation documents” in that paragraph. A reservation was expressed as to the suggestion to replace the term the “lowest evaluated tender” with the term the “most advantageous tender”. The term the “lowest evaluated tender” was considered to be the least ambiguous and had been used in the 1994 text among other things to emphasize the importance of price in tendering proceedings. It was proposed that the Guide might explain that in some countries other terms might be used that intended to convey the same meaning.

154. There was no disagreement that the current term and proposed alternatives intended to convey the meaning that the procuring entity sought best value for money. The current term was considered by most delegations to be confusing in this respect. It was confirmed that in many jurisdictions the terms “most economically advantageous tender” or “most advantageous tender” were used, or the law described the best value for money concept by listing the considerations to be taken into account by the procuring entity in the evaluation process and by specifying the way those considerations should be taken into account.

155. The view prevailed that the current term should be replaced with the term “most advantageous tender” or a similar term. In support of that view, it was explained that the proposed change would highlight evolution in procurement practices since 1994, in particular that the procuring entity was expected to obtain the best and not necessarily the cheapest solution. It was the understanding that the Guide would elaborate on these evolutions.

156. The opposition of two delegations to introducing any alternative to the term “lowest evaluated tender” in the revised Model Law was noted. It was suggested that such a change would go beyond the mandate given to the Working Group by the Commission, and the alternative terms proposed could be presented in the Guide. It was also observed that any such change would have a negative and costly impact on States that had already enacted their laws and that had built capacity on the basis of the 1994 version.

157. With respect to paragraph (5), it was suggested that the provisions should refer to the exchange rate at the date of the opening of tenders to reflect that rates fluctuated. The alternative view was that the solicitation documents should specify the applicable date. Concern was also raised that the provisions did not address the currency to be used in evaluating the tenders. The attention of the Working Group was drawn to article 33 (s), where these issues were addressed. The Secretariat was entrusted with redrafting provisions of articles 37 (5) and 33 (s) as necessary to take into account the views expressed at the current session.

Article 38. Prohibition of negotiations with suppliers or contractors

158. The point was made that, while the principle in the context of tendering was not challenged, its application in the context of other procurement methods would be analysed in due course.

D. Chapter IV. Procurement methods not involving negotiations (Restricted tendering, Request for quotations and Request for proposals without negotiation) (A/CN.9/WG.I/WP.71, paras. 15-20 and 28, and A/CN.9/WG.I/WP.71/Add.4)

Article 39. Restricted tendering

159. The Working Group’s attention was drawn to document A/CN.9/WG.I/WP.69/Add.3, which set out the three options for the article previously considered by the Working Group. It was noted that the draft revised Model Law set out only one option, which reflected the Secretariat’s consultations with experts, the draft submitted to the Secretariat by the informal drafting party in July 2009, and the provisions on conditions for use of restricted tendering set out in article 26 of chapter II of the draft revised Model Law.

160. The circumstances addressed in paragraphs 1 (a) and (b) were considered. The point was made that paragraph (1) (b) when read together with paragraph (2) would in fact be a procedure comprising open tendering with prequalification. The point was also made that subparagraph (b) read together with paragraph (3) would not achieve the desired objective of saving time and cost. Another view was that paragraph (1) (a) should be deleted, because of subjectivity in the identification of the suppliers to be invited to participate and in the light of the increasing use of

e-commerce techniques. The prevailing view was that both paragraphs should be retained, but that the Guide might provide examples of the exceptional cases in which the first ground would apply.

161. A clarification was sought about paragraph (2), which referred both to prequalification and pre-selection. The point was made that these terms should not be used interchangeably and that therefore a cross-reference to article 16 on prequalification was misleading. A reservation was expressed about introducing the concept of “pre-selection” and pre-selection procedures in the revised Model Law, noting that the intended result of limiting a number of pre-qualified suppliers could be achieved through the prequalification procedures if the prequalification requirements were sufficiently demanding.

162. The alternative view was that it was useful to introduce pre-selection in this procurement method; and that no confusion with prequalification should arise, as pre-selection would operate as an optional final stage of prequalification. As a result, the reference in paragraph 2 (b) to “completion of the pre-selection proceedings” should be to “completion of prequalification proceedings”. In this respect, the provisions of subparagraphs (a) to (c) that addressed issues specific to the pre-selection procedure, and a cross-reference to the procedures in article 16 were considered appropriate. The point was made that paragraph (2) (a) to (c) set out procedures to implement the principle in paragraph 1 (b) that any limited number of suppliers or contractors should be selected in a non-discriminatory manner. The lack of guidance in the 1994 Model Law on this principle, which gave much discretion to the procuring entity in selecting a limited number of suppliers or contractors, was noted. It was agreed that the final sentence of paragraph 2 (b) was superfluous and could be deleted.

163. In response to a query as to how the pre-selected suppliers would be identified, it was noted that this selection could be done through ranking, or through raising the threshold for prequalification, examples taken from practice. It was observed that the text did not set standards to ensure that the selection was undertaken in an appropriate manner, and it was agreed that this aspect should be provided for. Other points made were that the paragraph should not prescribe pre-selection in all cases of restricted tendering and its procedures should not be prescriptive. Although pre-selection might be justifiable in cases stipulated in paragraph (1) (b), it was noted that the procedure might defeat the goal of avoiding disproportionate time and costs in those cases. An additional observation was that paragraph (2) (a) (iii) alone would provide the appropriate flexibility.

164. In response to these concerns, it was agreed that paragraph (2) should not describe complex pre-selection procedures. The suggestion was made that the chapeau provisions of paragraph (2) might be redrafted along the following lines: “the procuring entity may engage in pre-selection as appropriate in the circumstances of any given procurement” with the deletion of the rest of the text in subparagraphs (a) to (c). It was suggested that the content of the deleted text would be reflected elsewhere in the text or in the Guide, which might also provide examples of various manners of conducting pre-selection. It was added that the standards set out in prequalification proceedings should apply to pre-selection proceedings, and that at a minimum, pre-selected suppliers should be notified of their pre-selection.

165. The point was made that some of these provisions, such as those in paragraph (2) (a) and (c), contained essential transparency requirements, and that they should be retained in the Model Law. In response, it was observed that transparency might be ensured through other provisions of the Model Law, such as paragraph (3) of the article or article 23 on the documentary record of procurement proceedings.

166. After the subsequent discussion, the Secretariat was entrusted with redrafting the provisions of paragraph (2), taking into account the need to preserve flexibility and transparency in regulating pre-selection.

167. As regards paragraph (3), which was based on the 1994 wording, it was clarified that the provisions intended to refer to an advance notice rather than the notice of contract awards dealt with in article 21 of the draft revised Model Law, or an invitation to tender.

168. The benefits of advance notices were considered, but some delegations supported restricting the application of paragraph (3) to the cases specified in paragraph (1) (a). Other delegations were of the view that the 1994 approach of applying the requirement of an advance public notice to situations referred to in both subparagraphs (a) and (b) should be retained. This requirement was considered to be essential in the fight against corruption and as a means to achieve transparency. It was also pointed out that different public notice regimes in the same article might create unnecessary confusion.

169. The view prevailed that the provisions of paragraph (3) should be retained unchanged. The suggestion was made that it could be moved to the beginning of the article to make it clear that it applied to both situations covered under paragraph (1).

Article 40. Request for quotations

170. It was agreed to add the words “as set out in the request for quotations” at the end of paragraph (3).

171. With reference to footnote 6, the Working Group was invited to consider whether a notice of the request for quotations proceedings should be required to be published and whether the article should therefore contain provisions similar to the ones in the proposed article 39 (3) and (4). The Working Group considered that it would not be appropriate to require publishing an advance notice of the request of quotations in the light of the nature and low value of the subject matter of the procurement addressed by the article.

172. A query was raised on whether the provisions should include the wording similar to that contained in article 39 (referring to the need to ensure transparency, non-discrimination and competition in the proceedings). The view was expressed that the provisions of the preamble of the Model Law, the nature of the subject matter of this type of procurement and modern techniques of requesting quotations already provided sufficient safeguards. The point was made that the Guide to the article might address those issues.

Article 41. Request for proposals without negotiation

173. The Working Group recalled that the draft article was based on article 42 of the 1994 Model Law, which was limited to the procurement of services. It was also

recalled that the provisions had been presented at the earlier session of the Working Group as two-envelope tendering. A query was raised whether the procurement method covered by the article as amended was intended to be a variant of tendering or a request for proposals procedures. If the latter, it was queried whether it would be advisable to include it in chapter IV, since a request for proposals presupposed that it was not possible to define specifications.

174. In response to concerns that conditions for use of this procurement method were not clear, it was explained that the conditions were those specified in article 26 (1) and (4). It was agreed that the word “will” in article 26 (4) should be replaced with the words “needs to” to convey the meaning that the procuring entity would need to follow that approach in some type of procurement, such as that operating under a fixed budget.

175. The suggestion was that paragraph (1) should be removed to chapter II or elsewhere in the revised Model Law and consolidated with similar provisions of other articles of the draft revised Model Law as appropriate. Concern was raised that the reference to direct solicitation in paragraph (1) (b) would be difficult to reconcile in the context of request for proposals without negotiation. In the context of paragraph 1 (c) and footnote 8, the Working Group was invited to consider whether, as a general rule, the procuring entity shall be required to publish a notice of procurement (similar to the one required under draft article 39 (3)), even in the case of direct solicitation (subject to the exemption envisaged in draft article 39 (4)). It was agreed that this question would apply to all cases of direct solicitation, and would be considered in the context of general provisions on open and direct solicitation.

176. The Working Group was invited to consider which of the suggested terms in square brackets was the most appropriate in the context of paragraph 2 (d) and subsequent paragraphs where the same terms appeared. The Working Group recalled that the 1994 Model Law referred in the same context only to “price”. The agreement was that the term “financial” should be used throughout the text in preference to “price” or “commercial”.

177. In the context of paragraphs 2 (b) and (8) and footnote 9, the Working Group was invited to consider whether a reference to maximum price should be included, to accommodate procurement within a fixed budget. The prevailing view that it would not be appropriate for the Model Law to encourage or require including such reference in the solicitation documents. The dangers of doing so were highlighted, in particular difficulties with obtaining best value for money. Recognizing that there might be specific circumstances justifying including reference in the solicitation documents to the maximum price that the procuring entity could afford to pay, the Working Group agreed to address the matter in the Guide with possible examples, emphasizing that in such cases competition was on quality, and the price was not the determining factor. The point was made that this procedure was commonly used for well-defined services that were neither complex nor costly, such as the development of curricula. These services, it was added, were usually outsourced because procuring entities generally lacked the internal capacity to undertake this type of work.

178. It was agreed to retain in paragraph (5) the provisions requiring reasons for rejection to be provided, which would be an example of good practice and would set the background for any debriefing.

179. Some support was expressed for a suggestion to delete paragraph (8) (a). It was explained that paragraph (8) (b), together with the requirement that the solicitation documents would establish the manner of combining the results of the evaluation of technical aspects with price, would be sufficient to cover all the situations referred to in paragraph (8): i.e. both where the award was made on the basis of the lowest price and where it was based on the combination of price and other criteria. It was further explained that the provisions were misleading, as they highlighted only one possible way of combining price with other criteria, and they highlighted price in this procurement method, when it was not normally the primary concern. The Guide, it was continued, could refer to the manner of evaluation envisaged in paragraph (8) (a) as an example of one way of evaluating proposals, and with the explanation that it could be used only if the solicitation documents specifically provided for it.

180. The view prevailed that paragraph (8) (a) that was based on the 1994 wording should be retained in the revised Model Law, in the light of the considerations listed in the 1994 Guide accompanying those provisions, existing practices in some jurisdictions and the value of providing various options from which the procuring entity would be able to choose. The Working Group requested the Secretariat to reverse the order of listing subparagraphs (a) and (b), in order to emphasize that in the procurement method covered by the article quality and technical characteristics prevailed over price considerations. It was also emphasized that the accompanying provisions of the Guide should be significantly strengthened by highlighting that the procuring entity could award on the basis of the lowest price only if it indeed satisfied itself with the quality and technical characteristics of the proposals by setting the relevant threshold sufficiently high.

181. A query was raised whether paragraph (8) (b) should be redrafted in the light of the decision made earlier at the session to use the term the “most advantageous tender”. Opposition was expressed to redrafting paragraph (8) (b) in the light of that decision since the latter concept was not relevant to the provisions. It was agreed to retain the wording as it appeared in the 1994 Model Law.

E. Chapter V. Procurement methods involving negotiations (A/CN.9/WG.I/WP.71, paras. 21-23, and A/CN.9/WG.I/WP.71/Add.5)

Article 42. Two-stage tendering

182. It was recalled that the article was based on article 46 of the Model Law. It was recognized that some jurisdictions used this procurement method and caution therefore was expressed as regards suggestions to remove it from the revised Model Law or to substantially modify it. The point was made that variants of this method were used, and it was noted that these variants could be set out in the Guide, but the article would focus on the essential characteristics of this method that would accommodate all these variants.

183. As regards paragraph (3), it was noted that the provisions should not require negotiations since the latter were not always necessary. The understanding was however that when the procuring entity decided to engage in negotiations, it must extend an equal opportunity to negotiate to all suppliers or contractors concerned.

184. With reference to the term used for the interaction between the procuring entity and suppliers in paragraph (3), the view was expressed that a neutral term (such as “contacts”) should be used. After discussion, the Working Group agreed to use the term “discussions” in preference to “negotiations” or “dialogue”, in order to reflect the iterative nature of the process but at the same time distinguish this method from those in the following articles where price was also part of negotiations and/or where real bargaining was involved. The view was expressed that the discussions in two-stage tendering should not be limited to any particular aspect of the procurement (but that the discussions would not involve price).

185. The Secretariat was requested to ensure that the cross-references in paragraph (3) were appropriate and accurate. In particular, the view was expressed that a cross-reference to the article on abnormally low submissions should be deleted, because price was unknown at that stage.

186. As regards paragraph (4), the extent of permissible modifications to the technical or quality characteristics and to the evaluation criteria was questioned. It was recalled that the modifications could be amendments, additions or deletions. It was also recalled that the aim of this procedure was to refine and finalize the specifications set out in the initial notice, i.e. to enhance precision and to narrow down the possible options that would meet its needs. Reference was made to the Guide text addressing the equivalent 1994 provisions, which made this intention clear and should guide the extent of permissible modifications. Concerns were also expressed that unfettered discretion to modify both characteristics and evaluation criteria would be risky and inappropriate, because some suppliers would already have been excluded, and might involve an entirely new specification being presented at the second stage. In this regard, it was noted that a change to the fundamental characteristics should indicate a new procurement. In support of these concerns, it was noted that, at a minimum, the Guide should explain the relevant risks, in particular high risk of collusion, posed by this procurement method.

187. It was agreed that the concerns raised by permitting modifications to the characteristics of the subject matter of the procurement and those to the evaluation criteria were different. The discussion first considered modifications to the characteristics of the subject matter, and whether modifications that could make non-responsive tenders responsive and vice versa should be permitted. Recalling that the Model Law permitted tenders that presented alternatives to the technical characteristics as a general matter, it was agreed that the permissible modifications to the subject matter should not be limited, because the changes as to whether tenders were responsive or not might be perfectly appropriate. Suggestions to permit changes to the characteristics (but not additions or deletions) and to add text to indicate that the aim of the changes was to enhance precision were not taken up, but it was agreed that a discussion of this aim should be included in the Guide.

188. As regards the permissible modifications to evaluation criteria, a request was made for examples of the discussions and modifications in practice to be provided. The concern raised by these modifications was that they might facilitate abuse by

allowing a particular supplier to be favoured, and did not encourage best practice. The following options as regards these modifications were discussed: (i) to restrict changes to evaluation criteria to those that would not constitute a material change; (ii) not to allow changes to evaluation criteria (by deleting a part of the second sentence of paragraph (4) starting with the words “and any criterion” to the end); and (iii) to allow only those changes to the evaluation criteria that were strictly necessary as a result of changes to technical or quality characteristics. A proposal was made to implement the third option by adding the words “insofar as they relate to the changes in technical or quality characteristics” after the words “ascertaining the successful tender” in paragraph (4). Concern was expressed about that proposal, which did not envisage deleting the latter part of the sentence reading “and may add new characteristics or criteria that conform with this Law”, which conferred much discretion on the procuring entity as regards permitted modifications to the evaluation criteria. The preference was expressed instead for a wording such as “any related criteria” or “any criteria [strictly related to] [strictly needed as a result of deletion, modification or addition of] the technical and quality characteristics of the subject matter of the procurement” to replace the part of the second sentence of paragraph (4) addressed in the first proposal for the second option above.

189. The first option did not gain support. As regards the second option, it was stated that modifications to the characteristics would arise in the procedure, but that modifications to evaluation criteria should not be necessary. Further, any fundamental modifications should lead to a new first stage, it was said, because the suppliers would have submitted their initial tenders on the basis of the stated evaluation criteria, and they should be permitted to resubmit them. In addition, it was observed, this approach would have the benefit of simplicity and would discipline the procuring entity at the outset. On the other hand, and in support of the third option, it was stated that technical or quality characteristics changes would necessarily require changes to the evaluation criteria, as otherwise the evaluation criteria at the second stage would not reflect the applicable technical and quality criteria.

190. It was agreed that paragraph (4) would permit additions, modifications or deletions to or from the technical and quality characteristics, but that the changes in evaluation criteria should be restricted to those necessary to implement the additions, modifications or deletions to or from the characteristics, and the Secretariat was requested to draft appropriate provisions. The Guide should clarify the policy considerations, it was said, so as to enable procuring entities to tailor this process to their needs.

191. It was also observed that this solution would enable modifications to the terms and conditions of the procurement that were not of a financial character (which could have a bearing on responsiveness) and those that were not material, so that there would be no effect on the evaluation of the tenders themselves.

Article 43. Request for proposals with dialogue

192. Specific concerns were highlighted about this proposed procurement method. It was noted that in countries that might be the main users of the revised Model Law, very often the procuring entity did not possess skills or tools to match those of their counterparts in dialogue, and therefore they were in a disadvantaged bargaining position. The other major concern about the proposed method was that it

presupposed that supply side of the market, not the procuring entity, would take a lead in defining the needs of the procuring entity.

193. In response to those concerns, it was suggested and agreed that article 27 (1) (a) should be redrafted by replacing the words “in order” with the following text “after an assessment that the dialogue or negotiation is needed”. The view was expressed that the amendment improved the text and should be coupled with a discussion in the Guide about the risks and benefits of the method. The suggestion was made that article 27 (1) should also envisage approval by a higher-level authority, but it was agreed that this point should be made in the Guide alone, as an option for the enacting State to consider.

194. In response to a query, differences between articles 42 and 43 were clarified. The first difference related to the issue of pre-selection. The importance of holding pre-selection under article 43 was highlighted, since it was widely recognized that holding dialogue with a high number of suppliers made the process unmanageable and time-consuming. Although it was acknowledged that pre-selection usually took place in the procurement method under article 43, it was considered undesirable for the Model Law to require it. The agreement was therefore to retain the provisions of paragraph (3) as an option. It was also observed that numbers could be limited by selecting suppliers on the basis of whether the contents of the initial proposals were responsive. In this regard, the Working Group’s attention was drawn to article 43 of the 1994 Model Law that allowed the procuring entity to negotiate with any supplier that presented acceptable proposals, but did not regulate how acceptable proposals would be identified.

195. The other differences highlighted related to the scope of discussions and as to whether it was feasible or desirable to seek to draft a single set of specifications. As regards the former, it was noted that first-stage discussions in article 42 focused on technical aspects only, while in dialogue under article 43 price would also be addressed in the negotiations/dialogue. The aim of the discussions under article 42 would be to arrive at a single set of specifications in the end of the discussions, against which tenders would be submitted. On the other hand, under article 43, various technical solutions would exist at the end of the dialogue and would be presented by suppliers in their best and final offers (BAFOs). It was stated that the latter distinction should be made clearer in the draft. A query was raised whether the latter distinction was in fact accurate since through the dialogue some minimum technical requirements would be established, against which BAFOs would be eventually presented and evaluated. Assuming that even a minimum set of specifications could not be formulated by the procuring entity after the dialogue phase, it was said, would substantiate the concern that the method would be used as a simple way to shift the responsibility of defining the procuring entity’s needs to the market.

196. Finally, it was recognized that article 43 provided less flexibility to the procuring entity to modify its requirements than the 1994 version of the article on two-stage tendering. It was recalled that this would change in the light of the Working Group’s relevant decisions on article 42 (see paragraphs 186-191 above).

197. The Working Group also noted differences between the procurement methods in articles 43 and 44. Concern was expressed that conditions for the selection of one method over the other were not clear. It was stated that the procedural and

substantive differences between these two methods should guide a procuring entity in the selection. The understanding was that the Guide would elaborate on those differences.

198. The Working Group proceeded with the consideration of provisions of article 43. The proposal was made that the term “dialogue”, not “discussions”, should be used throughout the article.

199. It was agreed that paragraph (1) should be redrafted to make it clearer that pre-selection, not prequalification, was relevant in the context of this procurement method, that the pre-selection phase was optional, and that the procedure would always commence with a public notice.

200. As regards paragraph (2), it was queried whether the provisions should require the procuring entity to establish minimum requirements, rather than simply allowing it to do so. It was agreed to make the provisions mandatory. The suggestion was made that the opening phrases should be removed to the end of the provisions, and the Secretariat was requested to revise the paragraph accordingly.

201. As regards paragraph (3), it was agreed that the substance of the second sentence of paragraph (8) as amended at the current session (see paragraph 205 below) should be inserted at the end of the first sentence of paragraph (3), as a precondition for engaging in pre-selection procedures. The point was made that the idea reflected in paragraphs (3) (a) and (6) (c), of a possible maximum number of pre-selected suppliers and a possible maximum number of suppliers to be invited to a dialogue, should be retained. It was noted that a possible minimum number was also relevant in the latter context.

202. The Working Group recalled its consideration of pre-selection and prequalification in the context of article 39 on restricted tendering (see paragraphs 161-166 above). In response to queries, it was explained that the intention was to use pre-selection the same way as prequalification — before the solicitation of proposals. Concerns and open issues about the use of pre-selection as highlighted in the footnotes accompanying the relevant provisions were recognized. It was agreed that provisions of paragraph (3) (b) should be amended by deleting the reference to exceeding minimum requirements as being superfluous.

203. A query was raised as to whether paragraph (3) should be consistent with article 39 (2) as amended by the Working Group at the current session (see paragraphs 161-166 above). The understanding was that regulating pre-selection procedures in greater detail was appropriate in article 43.

204. As regards the manner of pre-selection, the suggestion was made that article 43 (3) should be replaced with the substance of article 39 (2), the latter as proposed by the Secretariat in document A/CN.9/WG.I/WP.71/Add.4, and that the paragraph should reflect the discussion at the current session in the context of article 43. Whether to retain an express minimum number of “5” suppliers in article 39 (2) (a) (ii) was questioned. The Working Group considered whether the Model Law should specify the number, or require the enacting State to specify it in its national law or should not require that the law specified the number. Support was expressed for deleting the words “which shall be at least [five]” on the understanding that the issue of the minimum number would have to be considered in the light of the specific procurement. The other suggestion was to retain the wording

but delete reference to “five”, the understanding being that the specific number would be filled in by the enacting State itself depending on the conditions in the local market. The Secretariat was requested to revise the subparagraph to the latter effect.

205. It was agreed that paragraph (6) (i) should be deleted and that the second sentence of paragraph (8) should be redrafted to refer “to ensure effective competition”.

206. The point was made that the article should not require that all suppliers that were invited to dialogue would then be invited to submit BAFOs. In response, it was noted that the conclusion of the experts consulted by the Secretariat had been that the risks of abuse in allowing for such additional reduction in participants would outweigh the benefits of the flexibility.

207. The following wording was proposed to replace paragraph (10): “during the course of the dialogue, the procuring entity shall not modify the subject matter of the procurement, nor any qualification, or evaluation criterion, nor any element of the procurement that is not subject to the dialogue as notified in the request for proposals”. Support was expressed for this wording and the Working Group agreed to proceed with the consideration of the provisions on the basis of that text. A reservation was expressed about this proposed wording, in that it would not allow sufficient flexibility to the procuring entity and might defeat the purpose of the procedure.

208. Recalling that it would be critical that the provisions be easily understood to avoid problems with varied interpretations and implementation, it was noted that the deliberations indicated that this procedure was not as yet sufficiently clearly defined. Another concern was that the draft revised Model Law proposed too many methods involving negotiations, which might inadvertently indicate that negotiations in public procurement were a matter of usual practice rather than something exceptional to be permitted only in very exceptional cases. Preference was therefore expressed by one delegation for limiting procurement methods in chapter V to two: two-stage tendering and one other more flexible method involving negotiations. The Working Group decided to take up these issues once it had considered the procedural aspects of all procurement methods in chapter V.

Article 44. Request for proposals with consecutive negotiations

209. The efficacy of the procedure was questioned, in that the highest-ranked supplier might be unwilling to negotiate, particularly as regards price, because it would be aware of its preferred status. In response, it was observed that this method had proved effective in practice, and the discipline on the supplier would be that failure to negotiate would lead to the permanent exclusion of that supplier. The procedure was contrasted with simultaneous negotiations, in which suppliers were not excluded during the negotiations. The concern was raised that the procedure contemplated in article 44 would allow the rejection of the proposal that might turn out to be the best for the procuring entity, and it was said that this possibility might compromise the objectives of the Model Law. In response, it was observed that a risk of rejecting of what in fact could be the best proposal would discipline the procuring entity during the process.

210. Experience in using this method in various systems was shared, in particular for design, engineering, architectural and advisory services, and it was stressed that all aspects of the proposals would be included in the negotiations. Safeguards applied to the negotiations in some cases were also shared, such as that fundamental changes to the terms of reference or to key personnel proposed by the supplier would not be permitted.

**B. Note by the Secretariat on possible revisions to the
UNCITRAL Model Law on Procurement of Goods, Construction
and Services — a revised text of the Model Law, submitted to the
Working Group on Procurement at its seventeenth session
(A/CN.9/WG.I/WP.71 and Add.1-8)**

[Original: English]

I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 8 to 90 of document A/CN.9/WG.I/WP.70, which is before the Working Group at its seventeenth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments in public procurement.
2. At its sixteenth session, the Working Group considered proposals for a new procurement method, proposed to be called “Request for proposals with competitive dialogue”. The Working Group agreed on the principles on which the provisions should be based and on much of the text, and requested the Secretariat to review the provisions in order to align the text with the rest of the Model Law. The Working Group also requested the Secretariat to make amendments throughout the draft revised Model Law, in particular to provisions in chapter I addressing the record of procurement proceedings, confidentiality, evaluation criteria, public notice of procurement contract awards, clarifications and modifications of solicitation documents, on requests for expression of interest and cancellation of the procurement, for consideration at a later stage (A/CN.9/672, para. 13).
3. At its forty-second session, the Commission considered the draft revised Model Law prepared after the Working Group’s sixteenth session, and noted that the revised Model Law was not yet ready for adoption at that session. As regards chapter I of the revised Model Law, it noted that most issues had been agreed, though others remained outstanding. The Commission did not have sufficient time to consider the other chapters of the draft revised Model Law. It requested the Secretariat to prepare drafting suggestions to address outstanding issues for consideration by the Working Group. The Commission also supported intersessional informal consultations, which it urged to be inclusive and with as wide a geographical representation of participants as possible, to assist in the preparation of those materials (A/64/17, paras. 281 and 283).
4. To this end, the Secretariat invited views in writing as widely as possible, and held a series of meetings with experts in various regions.
5. The present note is submitted pursuant to the Commission’s and the Working Group’s requests at their recent sessions. It summarizes the results of the intersessional informal consultations, and presents the draft revised Model Law to reflect the Commission’s and Working Group’s deliberations, and, where consensus among those consulted was achieved, the results of the consultations for consideration by the Working Group.

6. In accordance with the agreement reached at the Working Group's fifteenth session (A/CN.9/668, para. 280), the documents for the sixteenth session of the Working Group are posted on the UNCITRAL website upon their availability in various language versions.

II. The results of intersessional consultations

7. The intersessional consultations focussed on the following issues or sections of the draft revised Model Law: chapter I (addressing general principles) of the text before the Commission at its forty-second session (the July 2009 draft); the use of procurement methods other than tendering, including the proposal for a new procurement method using negotiations or dialogue (see paragraph 2 above); the use of socioeconomic factors as evaluation or qualification criteria and restriction to domestic suppliers for reasons of public policy; and chapters V-VII of the July 2009 draft (addressing electronic reverse auctions, framework agreements, and review and remedies, respectively). The consultations also briefly considered questions arising from the decision in principle to include defence procurement within the scope of the revised Model Law. The results of those consultations are presented to the Working Group for its consideration.

A. Chapter I

8. As regards chapter I, the consultations considered the Commission's mandate to simplify and standardize the Model Law where possible, which might have a significant impact on those States that had enacted legislation based on the 1994 text. It was generally agreed that restructuring aimed at enhancing user-friendliness and promoting best practice would be of great assistance to users of the text, but that such restructuring should not go beyond what was necessary. For example, chapter I should address those principles that were in reality of a general nature but principles that apply to one method only would normally be best located in the provisions addressing that method. In addition, it was noted that settling terminology issues would be important to ensure that the revised text was understood and could be implemented and used as intended, and that a table or similar presentation of the changes to the 1994 text would be a vital support for those implementing its revised version.

9. In this regard, it was agreed by all those consulted that the provisions of article 7 in the July 2009 draft (governing the choice of procurement method) were insufficiently prominent in the text and the 1994 organization of the text, in which chapter II was entirely devoted to this topic, might be more easily understood. This suggestion has been followed in the revised text presented to the Working Group at this session (draft chapter II, set out in A/CN.9/WG.I/WP.71/Add.2).

10. Other suggestions that reflected the consensus view of those consulted have been made in articles 2, 6, 8, 10-12, 16, 17, and 20-23 (the main changes are highlighted in the accompanying footnotes).

B. Chapter II

11. As regards the use of procurement methods other than tendering, the consensus view was that the drafting should be crafted to support the toolbox approach agreed by the Working Group, i.e. by continuing the 1994 approach of requiring justification for the use of methods other than tendering in the proposed chapter II. Caution was urged against making advice and procedures overly prescriptive, so that procuring entities could exercise appropriate discretion in the choice of procurement methods. It was also agreed that the choice should be linked to achieving the objectives of the procurement system, as set out in the preamble to the Model Law. These suggestions have been reflected in the proposed chapter II, set out in A/CN.9/WG.I/WP.71/Add.2. The importance of ensuring adequate capacity for the use of various procurement methods was stressed (a matter for discussion in the Guide).

12. It was also suggested that, while the Model Law provisions would be presented on the basis of individual procurement methods, the Guide to Enactment (whose commentary would be vital to support the toolbox approach) could discuss the choice on the basis of common situations (normal, complex, simple and low-value procurement and normal, urgent or emergency situations).

13. Transparency in the decision-making process was underscored and it was consequently suggested that the decision on the procurement method to be used could be recorded in the notice of any procurement. This formulation would also assist in ensuring that any challenge to the decision concerned could be made early in the procedure when its disruptive effect would be minimized. This suggestion was made towards the end of the consultation process and so was not considered by a majority of those consulted. It is therefore not reflected in the draft text before the Working Group, but is presented to the Working Group for its consideration.

14. The number of procurement methods in the Model Law was discussed, and it was suggested that there would be some overlap among the available methods, and some methods might be considered optional. Consequently, the Guide should assist enacting States when drafting domestic legislation regarding the policy considerations applying to the choice of procurement methods, by reference to the conditions for use of the various methods. The Guide could also assist enacting States in drafting internal guidance for the use of the methods. On the other hand, superfluous methods should be eliminated.

C. Chapter IV

15. The consultations also revealed many views on the use of restricted tendering (three options for which were before the Working Group at its sixteenth session and before the Commission at its forty-second session (see article 34, in A/CN.9/WG.I/WP.69/Add.3, which contained two variants of restricted tendering and tendering with pre-selection)). Aside from the view that pre-selection should not be a mandatory step in any procurement method, the view of those consulted was that a pre-selection process in open tendering would not be consistent with the open nature of this procedure envisaged in the Model Law. Accordingly, the method

should be crafted as an alternative to open tendering, i.e. restricted tendering. This approach has been followed in draft chapter IV of the revised text (set out in A/CN.9/WG.I/WP.71/Add.4).

16. The question of a notice before engaging in restricted tendering was discussed at length, by reference to the 1994 conditions for use, and to the usefulness of the notices themselves.¹ It was agreed that the consequences of the notice needed to be clear. Where the notice had no clear legal consequence, for example because the decision at issue could effectively not be challenged, it might also have little value. Some considered that notices without legal consequences would be onerous for procuring entities that were not conducting electronic procurement; but others considered that their retention would allow scrutiny of the procurement, would permit effective challenge to the use of restricted tendering on the second ground, might enable poor practices within a procuring entity to be reviewed as part of a political challenge before a contract was awarded, and would enable the creation of a paper trail for audit purposes.

17. Yet others considered that the issue was not in reality one of notices but that the second ground for using restricted tendering should be removed from the text.

18. The draft revised Model Law before the Working Group therefore follows the 1994 formulation, requiring a notice before the commencement of the restricted tendering procedure, pending any further decision of the Working Group.

19. It was also observed that the value of notices had been similarly queried in the second competitive stage of framework agreements and in some other procurement methods. Some of those consulted considered that oversight might be adequately served by contract award notices where notices at the beginning of a procedure might be without real legal consequence, but others considered that post-award notices were too late. It was agreed among those consulted that a consistent approach would be appropriate, so that the draft revised text provides for notices before all procurement, other than where special considerations such as the protection of classified information or emergency procurement dictate otherwise, and this position has been reflected in the draft revised text, other than as regards the request for quotations procedure. As regards the latter, there was no consensus on a notice provision in this method.

20. It was agreed by all those consulted that the proposal in the July 2009 draft for a method called “Two envelope tendering” as set out in article 35 of A/CN.9/WG.I/WP.69/Add.3 should be deleted. Although it was noted that the method was based on article 42 of the 1994 Model Law (and that the substance of that article had been retained), it was considered the provisions of other procurement methods (such as request for proposals) would accommodate the separate assessment of technical and financial assessment that the method envisaged. This suggestion has been reflected in the draft revised text.

¹ Those conditions are: either that the subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors; or that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

D. Chapter V

21. As regards procurement using negotiations or dialogue, the consultations led to many drafting suggestions, which are reflected in chapter V of the draft revised text, set out in A/CN.9/WG.I/WP.71/Add.5. The Working Group's attention is drawn, in particular, to the introductory comments to that chapter, which highlight outstanding issues and the question of consistency in regulating: (i) some procedural aspects in all request for proposals proceedings (request for proposals with dialogue, with consecutive negotiations, and without negotiations); (ii) the extent to which evaluation criteria and descriptions (including specifications) could be modified in two-stage tendering, and request for proposals with and without dialogue and negotiations; and (iii) pre-selection procedures in request for proposals proceedings and restricted tendering. **The extent to which evaluation criteria and descriptions (including specifications) could be modified in various procurement methods was one area where the consultations yielded significant differences of opinion.**

22. Another issue upon which there were differences of opinion was the interaction between the dialogue-based methods and procurement planning. Some considered that these methods should not be used as an alternative to effective planning, including conducting market research and feasibility studies; others considered that interaction with the market might be part of an "advisory multi-step process", the reason for which was to encourage suppliers to participate in giving information that would facilitate the drafting of an outline description of the intended procurement. It was suggested that these views reflected a difference in the way that practitioners might use the method, and the advantages and concerns should be discussed in the accompanying Guide to Enactment.

23. In addition, the consultations concluded that the Guide should stress that sufficient capacity to operate these methods would be critical for their successful use; that the interaction with conflicts of interest provisions should be addressed; that enacting States should consider carefully which methods within chapters IV and V of the draft revised text should be enacted by reference to local circumstances, particularly given the overlapping conditions for use of those methods; and that the implications of a pre-selection procedure, which might have the effect of excluding innovative but small suppliers, should be set out.

E. Socioeconomic policy goals

24. As regards the interaction of socioeconomic policy goals and procurement, the sensitivity of the topic was recognized, and the conclusions of the Commission on the matter recalled (A/64/17, paras. 45, 48, 106-166 and 267(b)). It was suggested that enacting States should be accorded the flexibility in the 1994 text to apply socioeconomic factors (subject to regional and international constraints on such use), and that individual goals could arise as reasons to limit the procurement to domestic suppliers, as qualification criteria, as elements of responsiveness or as evaluation criteria. It was agreed that the approach of the Model Law should be to require transparency, while according this flexibility, so that potential participants in the process would understand how the socioeconomic factors would be applied: this was not a novel suggestion, but the simple application of the general objectives of the Model Law (and would also be required by the United Nations Convention

Against Corruption — the Working Group having agreed that the Model Law should be consistent with the obligations of this Convention). These suggestions, which were agreed by all those consulted, have been applied in articles 8-11 and 16 of the revised text (set out in A/CN.9/WG.I/WP.71/Add.1 and Add.2).

25. It was also agreed that accompanying Guide to Enactment text should stress the effects of the use of these factors on achieving value for money in procurement, and the requirement to address the factors in detail in regulations or other bodies of law. The background to the use of the factors such as the desire to avoid proliferation of monopoly-based industrial development and the fact that large-scale procurement in developing countries tends to favour overseas suppliers from developed countries should also be discussed, together with the use of such factors and the achievement of a socioeconomic goal such as development or capacity-building. Further guidance on the application of these factors should be given, including the consequences of categorizing an evaluation criterion as a socioeconomic criterion, the use of set-asides, local experts and joint-venture partners, the splitting of contracts, sub-contractual requirements and so forth.

F. Chapter VIII

26. As regards the proposed revisions to the remedies system, several suggestions were made for the text, which have been reflected in the revised draft (chapter VIII, set out in A/CN.9/WG.I/WP.71/Add.8). It was queried whether the scope of the remedies, limited to non-compliance with the provisions of the Model Law, was sufficient, and that failure to afford a fair opportunity to compete should give justification for a complaint. The difference between the request to a procuring entity to review a decision should be separated from a debriefing procedure; and the difference between an initial 7 day suspension period (while a complaint would be assessed to see whether it should go ahead or was frivolous) and the time needed to hear the complaint needs to be made clearer. The provisions should set out who should determine whether a complaint is frivolous, and a cross-reference to article 65 in draft article 66 should be made, so as to ensure that any declaration from procuring entity/administrative review body that urgent public considerations mean procurement should go ahead will not bind a court. **These comments were not considered by a majority of those consulted, because of time constraints, and so only the final comment has been reflected in the draft text before the Working Group. The remainder is presented to the Working Group for its consideration as notes to the draft provisions.**

27. The Guide should explain that the provisions of article 65 address suspensions and not the standstill period, and should be supported by a requirement that the procuring entity must provide prompt response to requests for information during standstill period. The Guide should also discuss the advantages and concerns of administrative review and judicial review systems, particularly given the urgency of requests for review in the procurement context, and the importance of specialized personnel with appropriate experience.

G. Debriefing

28. Enabling debriefing was considered to be part of an effective remedies system, and it was suggested that the Working Group consider whether to include provisions on debriefing in the Model Law. It was recalled that the Working Group discussed the importance of facilitating effective debriefing (in the context of prequalification, see para. 107 of A/CN.9/668) but has not formulated its position on the question generally.

H. Electronic reverse auctions and framework agreements

29. Some of the consultations considered the draft provisions on electronic reverse auctions and framework agreements. Enabling legislation and supporting guidance was requested to be made available as soon as possible, particularly for the benefit of developing countries, but it was also commented that the draft provisions are lengthy and complex. Suggestions included that some should be redrafted as regulations, with a greater emphasis on principle in the text, and that the complexity should be removed with more discussion in the Guide.

I. Defence procurement

30. As regards defence procurement, there was insufficient time to address the issue in detail. It was noted that the draft revised text would implement the instructions of the Commission (to bring defence procurement within the scope of the revised model law, noting that recourse to direct solicitation and procurement methods alternative to tendering should be allowed, special measures for protecting classified information should be drafted and reflected in the contents of the mandatory record of procurement proceedings and access to the record, and repetitions should be avoided in the draft wherever possible (A/64/17, para. 265)). A further suggestion was made that the Guide could state that the Model Law intends to cover defence procurement in its entirety, and could acknowledge that the procurement in this sector often involves classified information, that the Model Law therefore envisages exceptions to public disclosure requirements in procurement involving classified information, which often but not exclusively takes place in the defence sector procurement. It was also suggested that these exceptions would be addressed in more detail in the procurement regulations to be enacted in accordance with article 4 of the Model Law, though some experts considered that exceptions should always receive parliamentary scrutiny and should not be permitted through regulation.

31. Another suggestion was that, as future work, a separate chapter for defence procurement could be crafted, taking account of other issues raised by the topic, such as security of supply, the maintenance of defence industry and capacity in enacting States and other issues that would be identified through consultation with experts in defence procurement. The alternative suggestion considered, which had been put before the Commission, was to include non-sensitive defence procurement within the Model Law's normal provisions, but to exclude sensitive defence procurement entirely or within its own chapter. No conclusions were reached in the consultation time available before the production of this note. It was agreed,

however, that care was needed to prevent the abuse or misuse of any special provisions relating to defence procurement through the classification of normal procurement as defence procurement so as to take advantage of the special provisions.

J. Other issues

32. Other issues that were raised during the consultations were:

(a) **To include in the preamble a new objective that would refer to “the promotion of sustainable development”**, perhaps in conjunction with provisions on “sustainable procurement” in the text of the Model Law. Views were divided on this question, notably as regards whether these goals were appropriate for a procurement system;

(b) **To include provisions on procurement planning, contents of codes of conduct and professionalism in procurement in the Model Law text.** These matters were discussed in the Guide accompanying the 1994 text. The Working Group has provided in article 4(2) of the revised draft text that the procurement regulations must include a code of conduct.² Some considered that lack of provision in the text would hamper effective procurement; others that a procurement law was not the right place for these issues to be addressed.³ A further suggestion was that UNCITRAL could consider these matters as possible future work in procurement;

(c) **To consider whether the selection procedures in the UNCITRAL PFIPS instruments UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects⁴ should be conformed with those under the Model Law**, though again it was suggested that UNCITRAL could consider these matters as possible future work in procurement;

² The code of conduct would be subject to mandatory publication in accordance with article 5 (1). See, further, the discussions on the topic following the Working Group’s deliberations on conflicts of interest, notably in A/CN.9/664, paras. 17 and 116, and A/CN.9/668, para. 22.

³ The Working Group has not considered professionalism in procurement as a specific topic, though it has noted that the Guide addresses training of procurement personnel and related matters (see Guide to Enactment, *Proper administrative structure for implementation of the Model Law*, paragraph 37). As regards procurement planning, the Working Group considered the issue by reference to the extent to which future procurement should be subject to publication requirements under article 5 of the draft revised text (at its seventh, eighth, ninth, tenth, twelfth and fifteenth sessions), and summarized its position as follows: “Specifically in the context of procurement planning, it was pointed out that the Working Group had already touched upon one of the issues related to the procurement planning stage, the publication of information on forthcoming procurement opportunities. Support was expressed that the Guide should encourage the publication of this information in enacting States as conducive to proper procurement management, good governance and transparency. Caution was expressed as regards the inclusion in the Model Law of anything beyond general principles that should govern procurement planning since otherwise the flexibility necessary in that stage would be eliminated. Suggestion was made that the Guide or other tools that could be developed to assist States with enacting and implementing the Model Law was an appropriate place to discuss details about procurement planning and some good practices to be encouraged.” (A/CN.9/595, para. 83).

⁴ The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000) and the Model Legislative Provisions on Privately Financed Infrastructure Projects (2003).

(d) **To include definitions of corruption (fraudulent, corruptive, collusive and coercive practices, drawing on multilateral development bank definitions).**⁵

Some considered that these would be helpful in addressing the situations in which submissions should be rejected, but others considered that as there was no universally agreed definition of corruption and its various forms, reflected in the lack of definitions of corruption in the United Nations Convention Against Corruption, the Model Law should not introduce such definitions;

(e) To reconsider the description of the successful submission, being the lowest price tender, the lowest evaluated tender, the proposal with the lowest price, the proposal with the best combined evaluation in terms of the criteria other than price and the price, the lowest-priced quotation meeting the needs of the procuring entity, the proposal best meeting the needs of the procuring entity, and the best and final offer. Following deliberations at the forty-second session of the Commission, the issue remained outstanding. A related question is the definition of the successful submission in article 2, or, as alternatively proposed, of the “most advantageous tender or other successful submission”.⁶

(f) **To include a further procurement method, or further procurement methods, exclusively for the procurement of advisory services,** or to restrict one or more of the proposed procurement methods to the procurement of such services.

It was said that the need for a specialised procurement method arose from the fact that the procurement of advisory services did not lead to a measurable physical output and that a very broad discretion on the part of the procuring entity was both desirable and inevitable when identifying the winner. Thus the qualitative evaluation criteria would be more important than price (indeed, price need not be a determining factor) and would reflect the procuring entity’s assessment of how its needs could be best served, and would reflect such matters as experience in the type of advice at issue, quality of methodology proposed, qualifications of staff for the assignment and transfer of knowledge.

It was agreed among those consulted that the procedural requirements for a specialised procurement method would follow those set out in request for proposals with dialogue and consecutive negotiations, articles 43 and 44 of chapter V (set out in A/CN.9/WG.I/WP.71/Add.5), or in article 41 of chapter IV (set out in A/CN.9/WG.I/WP.71/Add.4). Alternatively, a request for proposals procedure with simultaneous negotiations (based on either article 43 or article 48 of the 1994 Model Law) could be provided for, to give greater flexibility in the negotiations themselves.

⁵ See, for example, commentary on harmonized definitions from the Asian Development Bank, available at www.adb.org/Documents/Policies/Anticorruption/definitions-update.pdf.

⁶ This issue has been the subject of deliberation at the Working Group’s sessions: see A/CN.9/668, paras. 180 (c), 181 and 220, and the discussion of the drafting history of the 1994 provisions in A/CN.9/WG.I/WP.68, section II. B (paras. 17-38). For a summary of the Commission’s deliberations on the issue, see A/64/17, paras. 169-173. Views were divided on whether to retain the term “lowest evaluated tender” in the revised Model Law, some supporting its retention, others expressing concern that the term implied that the supplier with the lowest rating at the end of the evaluation process would be the winner. Alternative terms such as “most advantageous tender”, used in the WTO Agreement on Government Procurement (GPA), “most economical tender”, or “best evaluated tender” were also suggested.

Some considered that the flexibility required for procurement of this type of advisory services was provided for in the chapter IV and V methods noted above, notably in article 43 of the draft revised text, which was intended by its proponents to replace article 48 of the 1994 Model Law. It was noted that this method was not reserved for any particular category of procurement, and that the particular features of procurement of this type of advisory services could be handled through regulations (addressing quality-based and cost-based selection, and the question of operating within budgeted amounts, where appropriate). Others considered that many States that had enacted legislation based on the 1994 text had included a special procurement method (drawn from the Guidelines: Selection and Employment of Consultants by World Bank Borrowers), and harmonization would be served by following this approach in the Model Law.

33. The Working Group may wish to recall the comments made in the forty-second Commission session when deciding which of the experts' suggestions to include in the draft revised Model Law. In the Commission "the importance of completing the revised model law as soon as reasonably possible was highlighted. It was emphasized that the revised model law would have considerable impact on ongoing procurement law reforms at the local and regional levels. Guidance from UNCITRAL in the procurement field was in particular sought on such issues as electronic reverse auctions, framework agreements, e-procurement in general, competitive dialogue and procurement in the defence sector," (A/64/17, para. 285).

A/CN.9/WG.I/WP.71/Add.1 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its seventeenth session****ADDENDUM**

This note sets out a proposal for the Preamble and articles 1-13 of chapter I (General provisions) of the revised Model Law.

The Secretariat's comments are set out in the accompanying footnotes.

UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT**Preamble**

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement so as to promote the objectives of:

- (a) Maximizing economy and efficiency in procurement;
- (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;
- (d) Providing for the fair and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of, and fairness and public confidence in, the procurement process;
- (f) Achieving transparency in the procedures relating to procurement;

Be it therefore enacted as follows.

CHAPTER I. GENERAL PROVISIONS**Article 1. Scope of application¹**

This Law applies to all procurement by procuring entities.

¹ The Guide to this article will point out that States in situations of economic and financial crisis might exempt the application of the Model Law through legislative measures (which would themselves receive the scrutiny of the legislature) (A/CN.9/668, para. 63).

Article 2. Definitions²

For the purposes of this Law:

(a) “Currency” includes monetary unit of account;

(b) [“Domestic procurement” means procurement limited to domestic suppliers or contractors pursuant to article 8 or where the procuring entity decides that in view of the low value of the subject matter of the procurement (the relevant threshold is to be established in the procurement regulations), that only domestic suppliers or contractors are likely to be interested in presenting submissions;]³

(c) [“Electronic reverse auction” means an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves presentation by suppliers or contractors of successively lowered bids during a scheduled period of time];⁴

[(d) “Framework agreement procedure” means a procurement conducted in two stages: a first stage to select supplier(s) or contractor(s) to be the party or parties to a framework agreement with a procuring entity, and a second stage to award a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement;

(i) “Framework agreement” means an agreement or agreements between the procuring entity and the selected supplier(s) or contractor(s) concluded upon completion of the first stage of the framework agreement procedure;

(ii) “Closed framework agreement” means a framework agreement to which no supplier or contractor who is not initially a party to the framework agreement may subsequently become a party;

(iii) “Open framework agreement” means a framework agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties;

(iv) “Framework agreement procedure with second stage competition” means a procedure under an open framework agreement or a closed framework agreement in which certain terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded are to be established or refined through the second stage competition;

(v) “Framework agreement procedure without second stage competition” means a procedure under a closed framework agreement in which all terms and

² Further to the suggestion at the Commission’s forty-second session (A/64/17, para. 52), the definitions were set out in an alphabetical order. The article will be supplemented in the revised Guide to Enactment by a more comprehensive glossary of terms used in the Model Law.

³ Pursuant to the request at the Commission’s forty-second session (A/64/17, para. 74), the Secretariat proposes adding this new definition in the light of frequent references to this term in the Model Law. It is based on articles 17 and 23 of the 1994 Model Law.

⁴ Added pursuant to the suggestion at the Commission’s forty-second session (A/64/17, paras. 72-73).

conditions of the procurement are established when the framework agreement is concluded.^{5]}

(e) [“Material change” means a change to the terms and conditions of the procurement, as established by the procuring entity when first soliciting the participation of suppliers or contractors in procurement that would make previously responsive submissions non-responsive, that would render previously non-responsive submissions responsive, and that would change the status of suppliers or contractors with regard to their qualification. For avoidance of doubt, material change includes a change in the description of the subject matter of the procurement, in the criteria and procedures for examining, evaluating and comparing submissions and ascertaining the successful submission and in the relative weight of the evaluation criteria;]⁶

(f) “Procurement” means the acquisition by any means of goods, construction or services (“subject matter of the procurement”);⁷

(g) “Procurement contract” means a contract [or contracts]⁸ between the procuring entity and a supplier or contractor resulting from the procurement proceedings;

(h) [“Procurement involving classified⁹ information” means procurement in which the procuring entity may be authorized by the procurement regulations to take special measures and impose special requirements for the protection of classified information, including to determine which provisions of this Law calling for public disclosure shall not apply;]¹⁰

⁵ The Working Group is to consider whether all these definitions should be retained in article 2 or should be moved to chapter VII (framework agreements procedures) (A/64/17, paras. 64-66).

The Guide to this article will explain that the framework agreement itself would have to set out how items such as delivery times and any other variable items would be determined.

⁶ A/64/17, paras. 67-71. Based on the draft article that was included in the chapter regulating framework agreements procedures of the previous draft.

⁷ The Guide to this definition will set out the substance of the definitions of the goods, construction and services from the 1994 text (article 2 (c) to (e)). The Guide will explain that the words “by any means” in the definition should not be read as referring to unlawful acts but intended to indicate that procurement is carried out not only through acquisition by purchase but also by other means such as lease (equivalent terms in Article I.2 of the WTO Agreement on Government Procurement (1994, GPA) and the provisionally agreed text of the revised GPA Article II.2 (b) refer to “purchase, lease and rental or hire purchase, with or without an option to buy”) (A/CN.9/668, para. 273).

⁸ At the Commission’s forty-second session, when considering the article on the record of procurement proceedings, it was proposed that some provisions of that article should be revised to provide for the possibility that more than one procurement contract might result from the procurement proceedings (A/64/17, para. 267 (a)). To avoid the cumbersome use throughout the Model Law of the phrase “procurement contract or contracts”, this shorter formulation is suggested.

⁹ The Guide to this provision would explain that the term “classified information” intends to refer to information designated as classified by an enacting State in accordance with the relevant national law; and that the provision does not intend to confer any discretion on the procuring entity to expand the definition of “classified information”.

¹⁰ Pursuant to the request at the Commission’s forty-second session (A/64/17, para. 74), the Secretariat proposes adding this new definition in the light of frequent references to this term in the Model Law. Based on the wording proposed at the Commission’s forty-second session

(i) [“Procurement regulations” means regulations to be enacted in accordance with article 4 of this Law;]¹¹

(j) “Procuring entity” means:

(i) *Option I*

Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

Option II

Any department, agency, organ or other unit, or any subdivision thereof, of the (“Government” or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of “procuring entity”);

(k) [“Socioeconomic factors”¹² means environmental, social, economic and other considerations authorized by the procurement regulations to be taken into account by the procuring entity in ascertaining the qualifications of suppliers or contractors, in assessing the responsiveness of submissions, or in evaluating and comparing submissions, or any combination thereof, for the purpose of implementing the socioeconomic policies of this State. [... (the enacting State may expand this subparagraph by providing an illustrative list of such considerations)];]¹³

(A/64/17, paras. 118 and 137). The definition is supplemented by the requirement in article 23 (on the record of procurement proceedings) to include in the record the reasons and circumstances on which the procuring entity relied to justify the measures and requirements imposed during the procurement proceedings for protection of classified information, such as exemptions from public disclosure.

¹¹ Pursuant to the request at the Commission’s forty-second session (A/64/17, para. 74), the Secretariat proposes adding this new definition in the light of frequent references to this term in the Model Law.

¹² This new definition is proposed to be added by the Secretariat in the light of frequent reference to the term in the Model Law and further to the results of the Secretariat’s consultations with experts.

¹³ The 1994 Model Law (article 34 (4) (c) (iii)) refers in this context to the “balance of payments position and foreign exchange reserves of [this State], the countertrade arrangements offered by suppliers or contractors, the extent of local content, including manufacture, labour and materials, in goods, construction or services being offered by suppliers or contractors, the economic development potential offered by tenders, including domestic investment or other business activity, the encouragement of employment, the reservation of certain production for domestic suppliers, the transfer of technology and the development of managerial, scientific and operational skills.” At the Commission’s forty-second session, the suggestion was made to update the list to refer to “specific industrial sector development, development of small and medium-sized enterprises, minority enterprises, small social organizations, disadvantaged groups, persons with disabilities, regional and local development, environmental improvements, improvement in the rights of women, the young and the elderly, people who belong to indigenous and traditional groups, as well as economic factors, such as balance of payment position and foreign exchange reserves” (A/64/17, para. 164). The alternative approach of providing an illustrative list only in the Guide was also considered (A/64/17, para. 161). The definition attempts to accommodate all the suggestions made. The Guide to this definition

(l) “Solicitation” means request to suppliers or contractors to present submissions:

(i) “Open solicitation” means solicitation from an unrestricted number of suppliers or contractors that involves publication of the solicitation in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published) and, [unless decided otherwise by the procuring entity in domestic procurement,]¹⁴ in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation;¹⁵

(ii) “Direct solicitation” means the [exceptional]¹⁶ solicitation from a restricted number of suppliers or contractors under conditions specified in this Law;

(m) “Solicitation documents” means all documents for solicitation of submissions;

(n) “Standstill period” means the period before the entry into force of the procurement contract, to be specified in the solicitation documents, during which the suppliers or contractors whose submissions were examined may seek review of the intended decision of the procuring entity to accept the successful submission;¹⁷

(o) “Submission(s)”¹⁸ means tender(s), proposal(s), offer(s), quotation(s) and bid(s) referred to collectively or generically;

(p) “Submission security”¹⁹ means a security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the

would describe the costs to procurement that the use of such factors can bring, and that they are commonly considered to be appropriate only for the purposes of assisting development, such as capacity-building.

¹⁴ This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

¹⁵ The Guide will explain that international advertisement is on the increase to promote regional trade and cross-border protests.

¹⁶ Although the suggestion was made at the Commission’s forty-second session to highlight the exceptional nature of direct solicitation in the definition (A/64/17, para. 63), the Working Group may consider that direct solicitation is exceptional when the procuring entity has a choice between open and direct solicitations, which in the current draft revised Model Law is only in the request for proposals procedures. Direct solicitation is inherent in other methods of procurement, such as restricted tendering, request for quotations, competitive negotiations or single-source procurement, and cannot therefore be considered exceptional in those methods.

¹⁷ Pursuant to the request at the Commission’s forty-second session (A/64/17, para. 74), the Secretariat proposes adding this new definition in the light of frequent references to this term in the Model Law. Based on the previously agreed wording in draft article 19 (2) (c) in document A/CN.9/WG.I/WP.69/Add.2.

¹⁸ A/64/17, paras. 58-60. The term “submission” instead of the suggested term “tender or other submission” was retained because the use of the latter distorts the meaning of a number of provisions throughout the Model Law and makes reading difficult. The Guide to Enactment would explain that enacting States may wish to select another shorthand term to reflect common use of terminology in their procurement systems.

fulfilment of any obligation referred to in article [15 (1) (f)] and includes such arrangements as bank guarantees, surety bonds, standby letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract;

(q) “Successful submission” means ...;²⁰

(r) “Supplier or contractor” means, according to the context, any potential party or the party to the procurement proceedings with the procuring entity.

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]²¹

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) Treaty or other form of agreement to which it is a party with one or more other State,

(b) Agreement entered into by this State with an intergovernmental international financing institution, or

[(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,]

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

Article 4. Procurement regulations

(1) The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.

(2) The procurement regulations shall include a code of conduct for officers or employees of procuring entities, addressing, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters

¹⁹ Although there were suggestions made at the Commission’s forty-second to replace the term with “tender security” or “tender or other [submission] security” (A/64/17, paras. 55-56), the term “submission security” was retained for consistency and ease of reading. The Guide to this definition will explain that the definition does not intend to imply that multiple submission securities can be required by the procuring entity in any single procurement proceedings that involve presentation of revised bids, proposals or offers (A/64/17, para. 57).

²⁰ To be completed upon finalization of chapters III to VII.

²¹ The Guide to this article will explain that the texts in square brackets in this article are relevant and intended for consideration by federal States. It will also alert enacting States that the provisions of the article might need to be adapted to constitutional requirements or should not be enacted at all if they conflict with the constitutional law of the enacting State (A/64/17, paras. 75-78).

regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements.²²

(3) The procurement regulations shall also set out any environmental, social, economic and other considerations that the procuring entity may take into account in ascertaining the qualifications of suppliers or contractors, in assessing the responsiveness of submissions, or in evaluating and comparing submissions, or any combination thereof, for the purpose of implementing the socioeconomic policies of this State.²³

Article 5. Publication of legal texts

(1) Except as provided for in paragraph 2 of this article, the text of this Law, procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

(2) Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public and updated if need be.

[Article 6. Information on possible forthcoming procurement]

(1) Procuring entities may publish information regarding planned procurement activities for forthcoming months or years.²⁴

(2) Procuring entities may also publish an advance notice of a possible future procurement.²⁵

(3) Publication under this article does not constitute a solicitation, does not oblige the procuring entity to issue a solicitation and does not confer any rights on suppliers or contractors.^{26]}

²² The Working Group may reconsider placing the provisions of paragraph (2) in this article since in many jurisdictions these issues are regulated at the level of statutory law, not regulations.

²³ Proposed to be added in the light of the new definition “socioeconomic factors” in article 2.

²⁴ The Guide to this paragraph would emphasize the need for proper procurement planning.

²⁵ The Guide to this paragraph would explain that the reference to “an advance notice of possible future procurement” is made to enable procuring entities to assess the market for complex procurement, without using a term that might be confused with a notice seeking expressions of interest that is usually published in conjunction with request for proposals proceedings.

²⁶ A/64/17, paras. 80-87. The Guide will explain that the provisions of this article may be applied regardless of the procurement method, and will also highlight the importance of the provisions in the light of UNCAC, as ensuring transparency throughout the process and eliminating any advantageous position of suppliers or contractors that otherwise may gain access to procurement planning phases in a non-transparent manner.

Article 7. 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 [VIII] or in the course of a meeting, or forming part of the record of procurement proceedings under article [23], 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) Direct solicitation²⁷ and communication of information between suppliers or contractors and the procuring entity referred to in articles [15 (1) (d),²⁸ 16 (6) and (9),²⁹ 35 (2) (a),³⁰ 37 (1)³¹ and 44 (...)³²]³³ 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.³⁴

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall specify:

(a) Any requirement of form;

[(b) In procurements involving classified information, if the procuring entity considers it necessary, measures and requirements needed to ensure the protection of classified information at the requisite level;³⁵

(c) The means to be used to communicate information by or on behalf of the procuring entity to a supplier or contractor or to the public or by a supplier or contractor to the procuring entity or other entity acting on its behalf;³⁶

(d) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and

(e) The means to be used to hold any meeting of suppliers or contractors.

(4) The procuring entity shall use means of communication that are in common use by suppliers or contractors in the context of the particular procurement. In addition, the procuring entity shall hold any meeting with suppliers or contractors

²⁷ Corresponds to references in article 9 of the 1994 Model Law to articles 37 (3) and 47 (1) of that text.

²⁸ Id., as regards reference to article 32 (1) (d) of the 1994 text.

²⁹ Id., as regards reference to article 7 (4) and (6) of the 1994 text.

³⁰ Id., as regards reference to article 31 (2) (a) of the 1994 text.

³¹ Id., as regards reference to article 34 (1) of the 1994 text.

³² The missing reference should correspond to article 44 (b) to (f) of the 1994 text (selection procedure with consecutive negotiation). It will be updated in the light of the revisions to chapter V.

³³ It was decided that the other references in the 1994 text (to articles 36 (1) (notice of acceptance of the successful tender), and to article 12 (3) (notice of the rejection of all submissions)) would be deleted (A/64/17, para. 122).

³⁴ A/64/17, paras. 121, 122.

³⁵ A/64/17, paras. 123-137.

³⁶ A/64/17, paras. 138, 139.

using means that ensure that suppliers or contractors can fully and contemporaneously participate in the meeting.³⁷

(5) The procuring entity shall put in place appropriate measures to secure the authenticity, integrity and confidentiality of information concerned.³⁸

Article 8. Participation by suppliers or contractors

(1) Suppliers or contractors are permitted to participate in procurement proceedings without regard to nationality, except in cases in which the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on grounds specified in the procurement regulations[, including in order to implement one or more of the socioeconomic policies of this State,]³⁹ or according to other provisions of law.

[(2) Except when required to do so in order to implement one or more of the socioeconomic policies of this State set out in the procurement regulations, the procuring entity shall establish no other requirement aimed at limiting participation of suppliers or contractors in procurement proceedings that discriminates against or among suppliers or contractors or against categories thereof.]⁴⁰

(3) A procuring entity that decides to limit participation of suppliers or contractors in procurement proceedings pursuant to this article shall include in the record of the procurement proceedings a statement of the reasons and circumstances on which it relied.

(4) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare that suppliers or contractors may participate in the procurement proceedings regardless of nationality, a declaration which may not later be altered.

(5) If the procuring entity decides to limit participation of suppliers or contractors in procurement proceedings pursuant to this article, it shall so declare in the solicitation documents.

Article 9. Qualifications of suppliers and contractors

(1) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.

(2) Suppliers or contractors must meet such of the following criteria as the procuring entity considers appropriate in the particular procurement proceedings:

³⁷ A/64/17, paras. 140, 141.

³⁸ A/64/17, paras. 142, 143.

³⁹ Proposed to be added further to consultations with experts, to allow the procuring entity to limit participation in procurement proceedings on the basis of nationality on socioeconomic grounds.

⁴⁰ A reference to the restriction by reference to socioeconomic factors is suggested to be added in the light of consultations with experts, to allow for example for set-aside programmes for minorities, small and medium enterprises or indigenous groups.

- (i) That they possess the necessary professional and technical qualifications, professional and technical competence, financial resources, equipment and other physical facilities, managerial capability, reliability, experience, ethical standards, and [references],⁴¹ and the personnel, to perform the procurement contract;
 - (ii) That they have legal capacity to enter into the procurement contract;
 - (iii) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;
 - (iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State;
 - (v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.
- (3) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide such appropriate documentary evidence or other information as it may deem useful to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (2).
- (4) Any requirement established pursuant to this article shall be set forth in the prequalification documents, if any, and in the solicitation documents, and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this Law.
- (5) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set forth in the prequalification documents, if any, and in the solicitation documents.
- (6) Subject to article 8, the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof, or that is not objectively justifiable.
- (7) Notwithstanding paragraph (6) of this article, the procuring entity may require the legalization of documentary evidence provided by the supplier or contractor presenting the successful submission to demonstrate its qualifications in procurement proceedings. In doing so, the procuring entity shall not impose any

⁴¹ At the Commission's forty-second session, it was agreed when discussing evaluation criteria to replace the term "reputation" with the term "references" (the latter being more objective) (A/64/17, para. 160 (c)). The same change is therefore made here.

requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

(8) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false;

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity;

(d) The procuring entity may require a supplier or contractor that has been prequalified in accordance with article 16 of this Law to demonstrate again its qualifications in accordance with the same criteria used to prequalify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate again its qualifications if requested to do so. The procuring entity shall promptly notify each supplier or contractor requested to demonstrate again its qualifications as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.

Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement⁴²

(1) The procuring entity shall set out in the prequalification documents, if any, and in the solicitation documents the description of the subject matter of the procurement that it will use in the examination of submissions. Where minimum requirements are set by the procuring entity for identifying responsive submissions, the procuring entity shall also set out in the prequalification documents, if any, and in the solicitation documents, those minimum requirements and the manner in which they are to be applied.⁴³

(2) Subject to article 8, no description of the subject matter of a procurement that creates an obstacle to the participation of suppliers or contractors in the procurement proceedings, including any obstacle based on nationality, shall be included or used in the prequalification documents, if any, or in the solicitation documents.

⁴² The Working Group may wish to consider whether draft revised article 10 should more explicitly refer to the assessment of responsiveness, rather than to the description of the subject matter of the procurement (so doing would also align article 10 with the proposed provisions on evaluation in draft revised article 11).

⁴³ A/64/17, paras. 144-148.

(3) The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements concerning testing and test methods, packaging, marking or labelling or conformity certification, and symbols and terminology.

(4) To the extent practicable, any description of the subject matter of the procurement shall be objective, functional and generic, and shall set out the relevant technical and quality characteristics or the performance characteristics of that subject matter. There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as “or equivalent” are included.

(5) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the subject matter of the procurement shall be used, where available, in formulating any description of the subject matter of the procurement to be included in the prequalification documents, if any, and in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement and the contract to be entered into as a result of the procurement proceedings, and in formulating other relevant aspects of the prequalification documents, if any, and solicitation documents.

[Article 11. Rules concerning evaluation criteria and procedures]⁴⁴

(1) (a) Save as regards socioeconomic factors provided for in paragraph (2) below, the evaluation criteria shall relate to the subject matter of the procurement.

(b) The evaluation criteria shall include [only]:⁴⁵

(i) The price, subject to any margin of preference applied pursuant to paragraph (2) (b) of this article;

(ii) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the functional characteristics of goods or construction, the terms of payment and of guarantees in respect of the subject matter of the procurement, subject to any margin of preference applied pursuant to paragraph (2) (b) of this article;⁴⁶

(iii) Where relevant in the procurement conducted in accordance with [request for proposals procurement, add appropriate cross-references], experience, references,⁴⁷ reliability and professional and managerial

⁴⁴ A/64/17, paras. 149-174.

⁴⁵ A/64/17, para. 160 (a).

⁴⁶ The Working Group may wish to consider whether reference to margins of preference should be retained here.

⁴⁷ A/64/17, para. 160 (c).

competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement, subject to any margin of preference applied pursuant to paragraph (2) (b) of this article;⁴⁸

(iv) [Performances in environmental protection].⁴⁹

(2) If authorized by the procurement regulations (and subject to approval by ... (the enacting State designates an organ to issue the approval),) the evaluation criteria may in addition include:

(a) Socioeconomic factors;⁵⁰

(b) A margin of preference for the benefit of submissions for construction by domestic contractors, for the benefit of submissions for domestically produced goods or for the benefit of domestic suppliers of services. The margin of preference shall be calculated in accordance with the procurement regulations and reflected in the record of the procurement proceedings;⁵¹

(c) [National defence and security considerations].⁵²

(3) Subject to the provisions of [article 43], all evaluation criteria shall be given a relative weight in the evaluation procedure. Any non-price evaluation criteria shall, to the extent practicable, be objective, quantifiable and expressed in monetary terms.⁵³

⁴⁸ A/64/17, paras. 159-160. The Working Group may wish to consider whether reference to margins of preference should be retained here.

⁴⁹ As suggested at the Commission's forty-second session (A/64/17, para. 160 (e)). The Working Group may wish to consider whether reference to performances in environmental protection should be retained here or it is sufficient to address environmental considerations as part of socioeconomic factors under paragraph (2) (a) of this article (the definition of "socioeconomic factors" in article 2 makes reference to environmental considerations; removing reference to environmental considerations from the definition of "socioeconomic factors" in article 2 would have implications on consideration of environmental considerations under articles 8 (in conjunction with e.g., set-aside projects/qualifications) and 10 (in conjunction with the assessment of responsiveness of submissions). If reference stays in this paragraph, the Working Group may wish to consider whether environmental considerations would always relate to the subject matter of the procurement (see paragraph (1) of the article) or they should be excluded from the ambit of paragraph (1) as socioeconomic factors are. If the issue of environmental considerations are to be addressed only in paragraph (2) (i.e., as part of socioeconomic factors), environmental considerations could be considered in the evaluation of submissions only if the requirements in the chapeau of paragraph (2) are met (i.e., they have to be authorized by procurement regulations and applied subject to approval by a designated organ).

⁵⁰ The factors themselves are now set out in the definitions section, because they may be applied to qualification and responsiveness as well as evaluation of submissions.

⁵¹ The Working Group may wish to consider whether margins of preference are applicable to both price and non-price evaluation criteria and to all procurement methods. See relevant queries to provisions of paragraphs 1 (b) (ii) and (iii) of this article.

⁵² The Working Group may wish to consider whether this provision remains appropriate. An alternative would be to allow such considerations to be applied by an addition of a reference to essential national defence or national security in paragraph (1).

⁵³ A/64/17, paras. 157, 158.

- (4) The procuring entity shall set out in the solicitation documents:⁵⁴
- (a) The basis upon which the successful submission will be ascertained;⁵⁵
 - (b) All [evaluation] criteria established pursuant to this article, including any margin of preference; and
 - (c) Where any criteria other than price are to be used in the evaluation procedure, the relative weight to be accorded to each [evaluation] criterion (including the price), or their order of importance where the procurement is conducted under article 43, and the procedures for application of the criteria in the evaluation procedure.
- (5) [Subject to articles 14, 42 and 43 of this Law],⁵⁶ in evaluating and comparing submissions and determining the successful submission, the procuring entity shall use only those criteria and procedures that have been set out in the solicitation documents, and shall apply those criteria and procedures in the manner that has been disclosed in those solicitation documents. No criterion or procedure shall be used that has not been set out in accordance with this provision.^{57]}

[Article 12. Rules concerning estimation of the value of procurement]

- (1) A procuring entity shall neither divide its procurement into separate contracts nor use a particular valuation method for estimating the value of procurement with the intention of limiting competition among suppliers or contractors.
- (2) In estimating the value of procurement, it shall include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration.]⁵⁸

Article 13. Rules concerning the language of documents

- (1) The prequalification documents, if any, and solicitation documents shall be formulated in ... (the enacting State specifies its official language or languages) (and

⁵⁴ The paragraph is based on the provisions of article 27 (e) repeated in article 38 (m), of the 1994 text. The Working Group may consider that article 27 (Contents of solicitation documents) could alternatively contain this provision.

⁵⁵ The Guide to this article would explain that the solicitation documents must make it clear whether the selection will be on the basis of the lowest priced submission, the lowest evaluated submission, the proposal that best meets the needs of the procuring entity, etc., as appropriate.

⁵⁶ The article to which cross-references are made allow for modification of aspects originally set forth in the solicitation documents.

⁵⁷ A/64/17, paras. 152-156.

⁵⁸ New provisions are proposed to be added in the light of the suggestions made by experts. They are based on the equivalent provisions of the WTO GPA (article II.2 and 3 of the 1994 version and article II.6 of the 2006 version). The provisions are relevant in the context of low-value procurement thresholds envisaged by the Model Law for recourse to domestic procurement, restricted tendering or request for quotations proceedings.

in a language customarily used in international trade [unless decided otherwise by the procuring entity in domestic procurement,]⁵⁹).

(2) Applications to prequalify, if any, and submissions may be formulated and presented in any language in which the prequalification documents, if any, and solicitation documents have been issued or in any other language that the procuring entity specifies in the prequalification documents, if any, and solicitation documents, respectively.

⁵⁹ This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

A/CN.9/WG.I/WP.71/Add.2 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its seventeenth session****ADDENDUM**

This note sets out a proposal for articles 14-23 of chapter I (General provisions) and for chapter II (Methods of procurement) of the revised Model Law (chapter II comprises articles 24-29).

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER I. GENERAL PROVISIONS
*(continued)***[Article 14. Clarifications and modifications of solicitation documents^{1, 2}**

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting submissions. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely presentation of submissions and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for presenting submissions, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for

¹ This article was moved from the chapter on Tendering. The Working Group may wish to consider establishing limits to the extent of modification permitted under paragraph (2), of this article. It may draw on the concept of a "material change in the procurement", as defined in article 2 of this draft, in this regard.

² The Guide to this article will refer to the provisions of the Model Law that deal with the extension of the deadline for presenting submissions and will make it clear that any obligation of the procuring entity to debrief individual suppliers or contractors would arise to the extent that the identities of the suppliers or contractors are known to the procuring entity (A/CN.9/668, para. 168).

clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their submissions.]

Article 15. Submission securities³

(1) When the procuring entity requires suppliers or contractors presenting submissions to provide a submission security:

(a) The requirement shall apply to all such suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the submission security and the confirmer, if any, of the submission security, as well as the form and terms of the submission security, must be acceptable to the procuring entity;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a submission security shall not be rejected by the procuring entity on the grounds that the submission security was not issued by an issuer in this State if the submission security and the issuer otherwise conform to requirements set forth in the solicitation documents (, unless the acceptance by the procuring entity of such a submission security would be in violation of a law of this State or) unless the procuring entity requires a submission security, in cases of domestic procurement, to be issued by an issuer in this State;⁴

(d) Prior to presenting a submission, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a submission security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the submission security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other

³ The Guide to this article will refer to the use in some jurisdictions of alternatives to a submission security, such as bid securing declarations that the procuring entity may, in appropriate cases, require all suppliers or contractors to sign in lieu of requiring them to furnish submission securities. Under this type of declarations, the supplier or contractor agrees to submit to sanctions, such as disqualification from subsequent procurement, for the contingencies that normally are secured by a submission security. Sanctions however should not include debarment since the latter should not be concerned with commercial failures. These alternatives aim at promoting more competition in procurement, by increasing participation in particular of small and medium enterprises that otherwise might be prevented from participation because of formalities and expenses involved in connection with presentation of a submission security.

⁴ This wording has been included to reflect a cross-reference in article 23 of the 1994 Model Law. That article has been deleted in this draft revised Model Law, and its provisions included within various articles governing domestic procurement, for ease of reading.

principal terms and conditions of the required submission security; any requirement that refers directly or indirectly to conduct by the supplier or contractor presenting the submission shall not relate to conduct other than:

- (i) Withdrawal or modification of the submission after the deadline for presenting submissions, or before the deadline if so stipulated in the solicitation documents;
 - (ii) Failure to sign the procurement contract if required by the procuring entity to do so;
 - (iii) Failure to provide a required security for the performance of the contract after the successful submission has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.
- (2) The procuring entity shall make no claim to the amount of the submission security, and shall promptly return, or procure the return of, the security document, after whichever of the following that occurs earliest:
- (a) The expiry of the submission security;
 - (b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;
 - (c) The termination of the procurement proceedings without the entry into force of a procurement contract;
 - (d) The withdrawal of the submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

Article 16. Prequalification proceedings

- (1) The procuring entity may engage in prequalification proceedings with a view towards identifying, prior to the solicitation, suppliers and contractors that are qualified. The provisions of article [9] shall apply to prequalification proceedings.
- (2) If the procuring entity engages in prequalification proceedings, it shall cause an invitation to pre-qualify to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to pre-qualify is to be published). [Unless decided otherwise by the procuring entity in domestic procurement,]⁵ the invitation to pre-qualify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

⁵ This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

(3) The invitation to pre-qualify shall contain, at a minimum, the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article [9 (2)];

(d) A declaration to be made in accordance with article [8];

(e) The means, manner and [modalities]⁶ of obtaining the prequalification documents;

(f) The price, if any, charged by the procuring entity for the prequalification documents and, subsequent to prequalification, for the solicitation documents;

(g) [Unless decided otherwise by the procuring entity in domestic procurement,]⁷ the currency and terms of payment for the prequalification documents and, subsequent to prequalification, for the solicitation documents;

(h) [Unless decided otherwise by the procuring entity in domestic procurement,]⁸ the language or languages in which the prequalification documents are available and in which, subsequent to prequalification, the solicitation documents will be available;

(i) The manner, [modalities] and deadline for the submission of applications to prequalify. The deadline for the submission of applications to prequalify shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and submit their applications, taking into account the reasonable needs of the procuring entity.

(4) The procuring entity shall provide a set of prequalification documents to each supplier or contractor that requests them in accordance with the invitation to pre-qualify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the prequalification documents shall reflect only the cost of providing them to suppliers or contractors.

⁶ The experts consulted by the Secretariat questioned whether the Working Group's decision to use the term "modalities" as a more technological neutral substitute for the term "place" would make the text more difficult to understand. The term "modalities" has been used throughout this draft revised Model Law.

⁷ This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

⁸ Id.

(5) The prequalification documents shall include, at a minimum the following information:

- (a) Instructions for preparing and submitting prequalification applications;
- (b) Any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;
- (c) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the prequalification proceedings, without the intervention of an intermediary;
- (d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the prequalification proceedings;
- (e) If already known, the manner, [modalities] and deadline for presenting submissions;
- (f) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of applications to pre-qualify and to the prequalification proceedings.

(6) The procuring entity shall respond to any request by a supplier or contractor for clarification of the prequalification documents that is received by the procuring entity within a reasonable time prior to the deadline for the presentation of applications to pre-qualify. The response by the procuring entity shall be given within a reasonable time so as to enable the supplier or contractor to make a timely presentation of its application to pre-qualify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity provided the prequalification documents.

(7) The procuring entity shall take a decision with respect to the qualifications of each supplier or contractor presenting an application to pre-qualify. In reaching that decision, the procuring entity shall apply only the criteria and procedures set forth in the invitation to pre-qualify and in the prequalification documents.⁹

(8) Only suppliers or contractors that have been pre-qualified are entitled to participate further in the procurement proceedings.

(9) The procuring entity shall promptly notify each supplier or contractor presenting an application to pre-qualify whether or not it has been pre-qualified. It shall also make available to any member of the general public, upon request, the names of all suppliers or contractors that have been pre-qualified, [unless the procuring entity decides to withhold this information in order to protect classified information in procurement involving classified information].¹⁰

⁹ A/64/17, para. 178.

¹⁰ The closing wording was added pursuant to the instructions at the Commission's forty-second session to the Secretariat to prepare drafting suggestions for consideration by the Working Group that would accommodate sensitive type of procurement, by envisaging in particular special measures for protection of classified information in this type of procurement (A/64/17, paras. 264-265).

(10) The procuring entity shall upon request promptly communicate to suppliers or contractors that have not been pre-qualified the reasons therefore.

[Article 17. Cancellation of the procurement]

(1) The procuring entity may cancel the procurement¹¹ at any time prior to the acceptance of the successful submission.¹²

(2) The decision of the procuring entity to cancel the procurement and reasons for the decision shall be recorded in the record of the procurement proceedings and [upon request]¹³ promptly communicated to any supplier or contractor that presented a submission.¹⁴ The procuring entity shall in addition promptly publish a notice of the cancellation of the procurement in the same manner, publication and media in which the solicitation for the procurement concerned was published.¹⁵

(3) The procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have presented submissions,¹⁶ [provided that the circumstances giving rise to the cancellation [were not foreseeable by] [did not arise as a consequence of dilatory or irresponsible conduct on the part of] the procuring entity].

Article 18. Rejection of abnormally low submissions

(1) The procuring entity may reject a submission if the procuring entity has determined that the submitted price with¹⁷ the constituent elements of a submission is in relation to the subject matter of the procurement abnormally low and raises concerns with the procuring entity as to the ability of the supplier or contractor to perform the procurement contract, provided that:

¹¹ A/64/17, paras. 183-185.

¹² During the Secretariat's consultations with experts, it was suggested that the following text could be added to paragraph (1): "[, provided that the circumstances giving rise to the cancellation [were not foreseeable by] [did not arise as a consequence of irresponsible or dilatory conduct on the part of] the procuring entity]". The consultations also indicated that even in such circumstances, the public interest might be better served if the procurement were cancelled, but that such cancellation should entail consequences (such as compensation for the costs of tendering). The Working Group may wish therefore to include the suggested wording in paragraph (3), in conjunction with the issue of liability, rather than in paragraph (1). The Guide to this article would suggest safeguards for consideration by an enacting State in order to prevent possible abusive recourse by the procuring entity to the right provided for in this article.

¹³ A/64/17, paras. 195-196.

¹⁴ A/64/17, paras. 193-198. The Guide to this article will explain that the procuring entity in this case must also return unopened any unopened submissions that it received before its decision to cancel the procurement.

¹⁵ A/64/17, para. 191.

¹⁶ A/64/17, paras. 199-208. The Working Group may wish to consider whether cancellation may give rise to liability towards suppliers or contractors whose submissions have been opened (according to the experts consulted by the Secretariat, it has always been recognized that suppliers or contractors present their submissions at their own risk, and bear the related expenses, but that this position changes once submissions have been opened).

¹⁷ A/64/17, paras. 210, 211.

(a) The procuring entity has requested in writing from the supplier or contractor concerned details of the constituent elements of a submission that give rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;

(b) The procuring entity has taken account of any information provided by the supplier or contractor and the information in the submission, but continues, on the basis of such information¹⁸ to hold those concerns; and

(c) The procuring entity has recorded the concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) The decision of the procuring entity to reject a submission in accordance with this article and reasons for the decision shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

Article 19. Rejection of a submission on the grounds of inducements from suppliers or contractors, an unfair competitive advantage or conflicts of interest

(1) A procuring entity shall reject a submission if:

(a) The supplier or contractor that presented it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings;

(b) The supplier or contractor has an unfair competitive advantage in violation of the applicable standards;

(c) The supplier or contractor has a conflict of interest in violation of the applicable standards.¹⁹

(2) The rejection of the submission under this article and the reasons therefore shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor concerned.

Article 20. Acceptance of the successful submission and entry into force of the procurement contract

(1) Unless rejected in accordance with the provisions of this Law, the procuring entity shall accept the successful submission.

¹⁸ A/64/17, para. 212.

¹⁹ A/64/17, paras. 214-222. The Guide will explain references to the standards in both subparagraphs (b) and (c) and stress that those standards evolve over time. The Guide will also encourage the dialogue between the procuring entity and an affected supplier or contractor.

(2) The procuring entity shall promptly notify all suppliers or contractors whose submissions were [examined]²⁰ of its intended decision to accept the successful submission. The notice shall be sent individually²¹ and simultaneously²² to each such supplier or contractor and shall contain, at a minimum, the following information:

(a) The name and address of the supplier or contractor presenting the successful submission;

(b) The contract price or, where necessary, a summary of other characteristics and relative advantages of the successful submission, provided that the procuring entity shall not disclose any information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition²³ or would compromise essential national security or essential national defence;^{24, 25} and

(c) The duration of the standstill period, which shall be at least ([...]) (a specific number of days is to be determined by an enacting State)),²⁶ and shall run from the date of the dispatch of the notice under this paragraph to all suppliers or contractors whose submissions were examined.²⁷

[(3) Paragraph (2) of this article shall not apply to awards where the contract price is less than [...]²⁸ or where the procuring entity determines that urgent public interest considerations require the procurement to proceed without a standstill period. The decision of the procuring entity that such urgent considerations exist and the reasons for the decision shall be recorded in the record of the procurement

²⁰ The word “examined” replaced the word “evaluated” used in the earlier drafts in order to extend the protection provided for by these provisions to suppliers or contractors whose submissions were rejected as non-responsive.

²¹ The word “individually” was added in the light of A/64/17, para. 231.

²² The word was added in the light of the suggestions made to add it in other similar instances.

²³ The Guide to this provision will explain that the phrase “to impede fair competition” should be interpreted as encompassing the risks of hampering competition not only in the procurement proceedings in question but also in subsequent procurements (A/CN.9/668, para. 131).

²⁴ Reference to national security and national defence was added pursuant to A/64/17, para. 225.

²⁵ In conjunction with these provisions, it was suggested at the Commission’s forty-second session that the issues of debriefing of unsuccessful suppliers or contractors might be usefully addressed in the Guide rather than regulated in the Model Law (A/64/17, para. 240).

²⁶ A/64/17, para. 237.

²⁷ A/64/17, para. 230. The Guide to this provision will explain considerations that should be taken into account in establishing the minimum duration of the standstill period in the Law, including the impact that the duration of the standstill period would have on overall objectives of the revised Model Law as regards transparency, accountability, efficiency and equitable treatment of suppliers or contractors and the impact of a lengthy standstill period on the costs that would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate.

²⁸ The Guide to this provision will draw the attention of an enacting State to align the threshold in this provision with the thresholds found in other provisions of the Model Law referring to low-value procurement, such as those justifying recourse to domestic procurement or to request for quotations proceedings.

proceedings and shall be conclusive with respect to all levels of review under chapter VIII of this Law except for judicial review.]²⁹

(4) Upon expiry of the standstill period, or in the absence of an applicable standstill period, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission, unless the review body or a competent court orders otherwise.

(5) Unless a written procurement contract and/or approval by a higher authority is/are required, a procurement contract in accordance with the terms and conditions of the successful submission enters into force when the notice of acceptance is dispatched to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in force.

(6) Where the solicitation documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:

(a) The procuring entity (the requesting ministry) and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;

(b) Unless the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract enters into force when the contract is signed by the supplier or contractor concerned and by the procuring entity (the requesting ministry). Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity (the requesting ministry) nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(7) Where the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of submissions specified in the solicitation documents or the period of effectiveness of the submission security required under article [15] of this Law.

[(8) If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract required, or fails to provide any required security for the performance of the contract, the procuring entity may cancel the procurement under article 17 (1) or may decide to award the procurement contract to the next submission still in force which the procuring entity ascertains to be successful in accordance with the criteria and procedures set out in this Law and in

²⁹ Consideration of the paragraph in the context of framework agreements was deferred (A/64/17, paras. 242-243).

the solicitation documents. In the latter case, the provisions of this article shall apply *mutatis mutandis* to such submission.^{30]}

(9) The notices under this article are dispatched when they are promptly and properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by any reliable means specified in accordance with article [7] of this Law.

(10) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.

[(11) The provisions of this article shall apply to the selection of the party or parties to the closed framework agreements in accordance with articles [...] of this Law [as well as to the award of procurement contracts under [open and] closed framework agreements in accordance with articles [...] of this Law].^{31]}

[Article 21. Public notice of awards of procurement contract and framework agreement

(1) Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name of the supplier or contractor to whom the procurement contract was awarded or, in the case of the framework agreement, name(s) of the supplier(s) or contractor(s) with whom the framework agreement was concluded.

(2) Paragraph (1) is not applicable to:

(a) Awards where the contract price is less than [...] [the enacting State includes a minimum amount [or] the amount set out in the procurement regulations];

(b) In order to protect classified information in procurement involving classified information, when so decided by the procuring entity.^{32]}

(3) The procuring entity shall publish [quarterly] [periodic] notices of all procurement contracts referred to in paragraph (2) (a) of this article.^{33]}

³⁰ A/64/17, paras. 245, 246.

³¹ The consideration of the paragraph was deferred (A/64/17, para. 247). Views have so far varied as regards the advisability of providing for a standstill period at the stage of the award of procurement contracts under framework agreements (A/CN.9/668, paras. 141-144). An option might be to provide for a short standstill period, which might alleviate the concerns expressed regarding the speed of award appropriate for framework agreements, and which, given the more limited concerns that the award of a procurement contract thereunder may pose, may also provide sufficient time for suppliers. In electronic framework agreements, the period could be very short.

³² The provisions were added to provide for exemptions from public disclosure in procurement involving classified information where necessary in order to protect the relevant classified information (A/64/17, para. 265).

(4) The procurement regulations may provide for the manner of publication of the notices required by paragraphs (1) and (3) of this article.]

[Article 22. Confidentiality

(1) Without prejudice to articles 20 (2), 21, 23 and 36 of this Law, the procuring entity shall treat applications to pre-qualify and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors [or to any other person not authorized to have access to this type of information].³⁴

(2) Any discussions, communications, negotiations and dialogues between the procuring entity and a supplier or contractors pursuant to articles in chapter V of this Law shall be confidential. Unless required by law or ordered by [the review body or a competent court]³⁵ or permitted in the solicitation documents, no party to any discussions, communications, negotiations or dialogues shall disclose to any other person any technical, price or other information relating to these discussions, communications, negotiations or dialogues without the consent of the other party.³⁶

(3) In procurement involving classified information, the procuring entity may impose on suppliers or contractors requirements aimed at protecting the classified information, and may demand that suppliers or contractors ensure compliance with such requirements by their subcontractors.^{37]}

[Article 23. Documentary record of procurement proceedings³⁸

(1) The procuring entity shall maintain a record of the procurement proceedings containing, at a minimum, the following information:

(a) A brief description of the subject matter of the procurement;

(b) The names and addresses of suppliers or contractors that presented submissions, and the name and address of the supplier or contractor with whom the procurement contract is entered into and the contract price (in the case of the

³³ Further to consultations with experts, the provisions on periodic publication of notices of procurement contracts are proposed to be extended to all low-value awards. In the previous draft, the provisions applied only to awards of contracts under an open framework agreement.

³⁴ A/64/17, paras. 248, 249. Reference to any other person not authorized to have access to this type of information is proposed to be added further to the results of the Secretariat's consultations with experts. This addition is in line with similar provisions found in article 34 (8) of the 1994 Model Law (article 37 (8) of the present draft). The Guide would explain the ambit of this reference as referring to any third party outside the procuring entity (including a member of a bid committee), other than any oversight, review or other competent body authorized to have access to information in question under applicable provisions of law of the enacting State.

³⁵ To be considered in conjunction with article 23 (4).

³⁶ A/64/17, paras. 250-252.

³⁷ A/64/17, paras. 248, 253-266.

³⁸ The entire article was considerably redrafted further to the suggestions made at the Commission's forty-second session (A/64/17, paras. 267-280) and the Secretariat's consultations with experts. The title of the article was changed in the light of the proposed new paragraph (5).

framework agreement procedure, the name and address of the supplier or contractor with whom the framework agreement is concluded);³⁹

(c) A statement of the reasons and circumstances relied upon by the procuring entity for the decision as regards means of communication and any requirement of form;

(d) In the case of domestic procurement, a statement of the reasons and circumstances relied upon by the procuring entity for recourse to the domestic procurement;

(e) If the procuring entity uses a method of procurement other than tendering, the statement of the reasons and circumstances relied upon by the procuring entity for the use of such other method;

[(f) In the case of the use of a chapter V procurement method, the statement of the reasons and circumstances relied upon by the procuring entity for the use of the specific procurement method under that chapter;]⁴⁰

(g) In the case of recourse to an electronic reverse auction, the statement of the reasons and circumstances relied upon by the procuring entity for the use of the auction, as well as information about the date and time of the opening and closing of the auction, and the reasons and circumstances on which the procuring entity relied to justify the rejection of the bids submitted during the auction;⁴¹

(h) If the procurement was cancelled⁴² pursuant to article [17] of this Law, a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision to cancel the procurement;

(i) If, in procurement proceedings involving methods of procurement other than tendering, those proceedings did not result in a procurement contract, a statement to that effect and of the reasons therefore;

[(j) If request for expression of interest was issued in accordance with articles [cross-references to articles regulating request for proposals proceedings], a summary of each expression of interest received by the procuring entity and the procuring entity's decision as regards each of them;]⁴³

(k) A summary of any requests for clarification of the prequalification documents, if any, or solicitation documents, the responses thereto, as well as a summary of any modification of those documents;

(l) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented applications to pre-qualify, if any, or submissions;

(m) The price, or the basis for determining the price, and a summary of the other principal terms and conditions of each submission and of the procurement contract, where these are known to the procuring entity (in the case of the

³⁹ A/64/17, para. 267 (a).

⁴⁰ Reproduces article 11 (1) (j) of the 1994 Model Law. To be considered together with chapter V. A/64/17, para. 267 (e).

⁴¹ A/64/17, para. 267 (d).

⁴² A/64/17, para. 267 (c).

⁴³ Proposed to be added further to the results of the Secretariat's consultations with experts.

framework agreement procedure, a summary of the principal terms and conditions of the framework agreement);⁴⁴

(n) A summary of the evaluation and comparison of submissions, including the application of any margin of preference pursuant to article 11 (2) (b);

(o) If any socioeconomic factors were considered in the procurement proceedings, information about such factors and the manner in which they were applied;⁴⁵

(p) The information required in articles [18 and 19] if a submission was rejected pursuant to those provisions;

(q) If no standstill period was applied, a statement of the reasons and circumstances relied upon by the procuring entity for non-application of a standstill period in accordance with article 20 (3);

[(r) In the case of review in conjunction with the procurement proceedings under chapter VIII of this Law, a summary of the claim, review proceedings and decision taken at each level of the review when more than one level of review was involved;]⁴⁶

[(s) In procurement involving classified information, a statement of the reasons and circumstances relied upon by the procuring entity for measures and requirements taken for the protection of the classified information, including any exemptions from the provisions of this Law calling for public disclosure;]⁴⁷

(t) [other information required to be included in the record in accordance with the provisions of this Law is to be added (e.g., recourse to direct solicitation where there is an option between open and direct solicitation (article 11 (1) (k) of the 1994 Model Law))].⁴⁸

(2) Subject to article [36 (3)], the portion of the record referred to in subparagraphs [(a) to (f)]⁴⁹ of paragraph (1) of this article shall, on request, be made available to any person after the successful submission has been accepted or after procurement proceedings have been terminated without resulting in a procurement contract (in the case of the framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement).

(3) Subject to article [36 (3)], the portion of the record referred to in subparagraphs [(g) to (p)], of paragraph (1) of this article shall, on request, be made

⁴⁴ Proposed amendments to this subparagraph in the light of the provisions on framework agreements. Proposed amendments to this subparagraph in the light of the provisions on framework agreements.

⁴⁵ Added pursuant to A/64/17, paras. 165 and 267 (b).

⁴⁶ Proposed to be added further to the results of the Secretariat's consultations with experts.

⁴⁷ Proposed to be added further to the results of the Secretariat's consultations with experts and A/64/17, para. 136.

⁴⁸ The Working Group may wish to include further specific provision, such as regarding framework agreements if it decides that technological constraints may limit the number of suppliers that may be admitted to an open framework agreement. In addition, some other information not listed in the 1994 Model Law may be added. See, in this regard, the issues raised in A/CN.9/WG.I/WP.68/Add.1, section H.

⁴⁹ The scope of information from the record that can be disclosed to public is proposed to be expanded further to the results of the Secretariat's consultations with experts.

available to suppliers or contractors that presented submissions, or applied for prequalification, after the successful submission has been accepted or procurement proceedings have been terminated without resulting in a procurement contract (in the case of the framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement). Disclosure of the portion of the record referred to in subparagraphs [(k) to (n)], may be ordered at an earlier stage by [the review body or a competent court].⁵⁰

(4) Except when ordered to do so by [a competent court] [a competent authority] [a competent court or a competent authority] [a competent court or administrative organ referred to in article 63 of this Law] [a competent court and/or competent authority or administrative agency],⁵¹ and subject to the conditions of such an order, the procuring entity shall not disclose:

(a) Information from the record of the procurement proceedings⁵² if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition⁵³ or would compromise essential national security or essential national defence;

(b) Information relating to the examination, evaluation and comparison of submissions, and submission prices, other than the summary referred to in paragraph [(1) (n)] of this article.

(5) The procurement entity shall record, file and preserve all documents relating to the procurement proceedings as specified by the procurement regulations and according to provisions of other applicable law.⁵⁴

CHAPTER II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE

Article 24. Methods of procurement

(1) The procuring entity may conduct procurement by means of:

(a) Open tendering;

⁵⁰ To be considered in conjunction with paragraph (4) of this article (A/64/17, para. 274).

⁵¹ A/64/17, paras. 269-274.

⁵² A/64/17, para. 275.

⁵³ The Guide to this provision will explain that the phrase “to impede fair competition” should be interpreted as encompassing the risks of hampering competition not only in the procurement proceedings in question but also in subsequent procurements (A/CN.9/668, para. 131).

⁵⁴ This paragraph was added at the suggestion of experts during consultations with the Secretariat, and reflects a requirement in the United Nations Convention against Corruption that States parties must “take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of [their] domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents” (Article 9 (3)). The Guide to this article could explain the need for preservation of documents, and cross refer to any applicable rules on documentary records and archiving. If the enacting State considers that applicable internal rules and guidance should also be stored with the documents for a particular procurement, it could include those items in the regulations.

- (b) Restricted tendering;
- (c) Request for quotations;
- (d) [Request for proposals without negotiation];
- (e) Two-stage tendering;
- (f) Request for proposals with dialogue;
- (g) Request for proposals with consecutive negotiations;
- (h) Competitive negotiation

under the conditions of articles 25-27.

- (2) The procuring entity may have recourse to an electronic reverse auction under the conditions of article 28.
- (3) The procuring entity may have exceptional recourse to single-source procurement under the conditions of article 29.
- (4) The procuring entity may engage in a framework agreement procedure in accordance with the provisions of chapter VII where it engages in procurement involving open solicitation.⁵⁵

Article 25. General rules applicable to the selection of a procurement method

- (1) Except as otherwise provided by this Law, a procuring entity shall conduct procurement by means of open tendering.
- (2) A procuring entity may use a method of procurement other than open tendering only in accordance with articles 26 to 29, and shall select such other method of procurement as appropriate in the circumstances of the particular procurement, and shall seek to maximize competition to the extent practicable.
- (3) If the procuring entity uses a method of procurement other than open tendering, it shall include in the record required under article [23] a statement of the reasons and circumstances on which it relied to justify the use of that method.

Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)

- (1) A procuring entity may engage in procurement by means of restricted tendering, request for quotations and request for proposals without negotiation

⁵⁵ The Working Group at its fifteenth session decided that no reference should be made to framework agreements in the earlier draft of the provisions on choice of procurement method, because a framework agreement is not a procurement method (A/CN.9/668, para. 68). The Working Group may wish therefore to consider whether conditions for use of framework agreements should appear in this chapter II (with a consequent change to the title of this article), or elsewhere in the Model Law, in order to reflect its earlier decision that a framework agreement should be used only in conjunction with open solicitation.

where it is feasible to provide [a detailed description of the subject matter of the procurement],⁵⁶ but where the use of open tendering would not be appropriate for the reasons provided in paragraphs (2) to (4) of this article.

(2) The procuring entity may, engage in procurement by means of restricted tendering in accordance with article 39 when:

(a) The subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement, provided that the procuring entity selects such a method for the purposes of maximizing [economic efficiency] [economy and efficiency]⁵⁷ in the procurement concerned.

(3) A procuring entity may engage in procurement by means of a request for quotations in accordance with article 40 for the procurement of readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the threshold amount set out in the procurement regulations.

(4) The procuring entity may engage in procurement by means of request for proposals without negotiation in accordance with article 41 where the procuring entity will consider the [commercial] [financial] [price]⁵⁸ aspects of proposals separately and only after completion of examination and evaluation of quality and technical aspects of the proposal.

⁵⁶ The Working Group may wish to consider whether reference to “a detailed description of the subject matter of the procurement” is sufficiently flexible to allow for performance/output specifications. The Guide may provide relevant explanations, such as that the reference is not intended to exclude performance/output specifications, which in practice could also be formulated in detailed terms.

⁵⁷ The suggestion of experts during consultations with the Secretariat was that, in order to ensure consistency with the preamble (which refers to economy and efficiency), and because the terms “economy” and “efficiency” are not synonyms, the term “economy and efficiency” should be used throughout the text.

⁵⁸ The Working Group may wish to consider which of the suggested terms is the most appropriate in this context. The 1994 Model Law refers in this context only to “price”. It is proposed that the issue is considered in conjunction with article 41 of the draft.

Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, and competitive negotiations)⁵⁹

(1) A procuring entity may engage in procurement by means of two-stage tendering in accordance with article 42, request for proposals with dialogue in accordance with article 43, or request for proposals with consecutive negotiations in accordance with article 44 in the following circumstances:

(a) It is not feasible for the procuring entity to formulate a sufficiently comprehensive description of the subject matter of the procurement in accordance with article [11] and it engages in the method concerned in order to obtain the most satisfactory solution to its procurement needs;

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) In the case of procurement for reasons of national defence or national security, where the procuring entity determines that the selected method is the most appropriate method of procurement;⁶⁰ or

(d) When open tendering was engaged in but no tenders were submitted or the procurement was cancelled by the procuring entity pursuant to article [17, 19 or 37 (3)],⁶¹ and when, in the judgement of the procuring entity, engaging in new open tendering proceedings or a procurement method under chapter IV would be unlikely to result in a procurement contract.

(2) A procuring entity may engage in competitive negotiations, in accordance with the provisions of article 45 of this Law, in the circumstances specified in paragraph (1) (b) to (d) of this article⁶² and, [(subject to approval by ... (the

⁵⁹ This draft places competitive negotiations on a par with two-stage tendering and request for proposals with dialogue. This approach has been retained to reflect the 1994 text. However, as commented by experts in consultation with the Secretariat, the transparency provisions and degree of flexibility in two-stage tendering and request for proposals with dialogue are not present in competitive negotiation. The latter, in the light of its mainly unregulated nature, may be considered for use as an alternative to single-source procurement. Enacting States may be invited to consider whether competitive negotiation should be enacted other than for the reasons set out in subparagraph (1) (c) and paragraph (2) by reference to whether or not they enact some or all of the procurement methods in chapter V. If the Working Group agrees with the reasoning of the experts, it may consider that the conditions for use would be better reflected in article 29, with appropriate amendments to that article.

⁶⁰ Amended in the light of the expanded scope of the Model Law and in the light of the revisions agreed to be made in the similar provisions appearing in the context of the single-source procurement.

⁶¹ Corresponding to cross-references in article 19 (1) (d) of the 1994 Model Law to articles 12, 15 and 34 (3) of that text.

⁶² The Guide would address the overlap between this and other procurement methods (those in section I of chapter V and single-source procurement), and would invite enacting States to consider whether the more transparent procedures in two-stage tendering and request for proposals procedures could be enacted rather than competitive negotiations in the situations set

enacting State designates an organ to issue the approval),)]⁶³ when there is an urgent need for the subject matter of the procurement, and engaging in open tendering proceedings or other methods of procurement because of the time involved in using those methods would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part.⁶⁴

Article 28. Conditions for use of an electronic reverse auction

A procuring entity may engage in procurement by means of an electronic reverse auction, or may use an electronic reverse auction in other methods of procurement, as appropriate, in order to determine the successful submission, in accordance with the provisions of chapter VI of this Law, under the following conditions:

- (a) Where it is feasible for the procuring entity to formulate a detailed and precise description of the subject matter of the procurement;
- (b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured; and
- (c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.

Article 29. Conditions for use of single-source procurement

A procuring entity may engage in single-source procurement in accordance with the provisions of article 46 of this Law in the following exceptional circumstances:

- (a) The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible;
- (b) There is an urgent need for the subject matter of the procurement, and engaging in open tendering or any other method of procurement because of the time involved in using those methods would therefore be impractical, provided that the

out in paras. (1) (a) and (c), and that competitive negotiations are normally preferable to single-source procurement in the situations set out in paras. (1) (b) and (2). Thus, enacting States might choose not to enact paras. (1) (a) and (c).

⁶³ The Working Group may wish to consider whether this phrase should be retained, in the light of its decisions at the fifteenth session to remove the requirement of higher-level approval in other similar instances. The Working Group decided, at that session, that it would consider whether the requirement should be imposed on a case-by-case basis (A/CN.9/668, para. 122).

⁶⁴ Based on article 19 (2) of the 1994 Model Law, which has been amended in the light of the revisions agreed to be made at the Working Group's fifteenth session to the similar provisions appearing in the context of single-source procurement (A/CN.9/668, para. 56).

circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;⁶⁵

(c) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(d) In the case of procurement for reasons of essential national defence or national security or essential national defence purposes,⁶⁶ where the procuring entity determines that the use of any other method of procurement is not appropriate;

(e) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, where procurement from a particular supplier or contractor is necessary in order to implement a socioeconomic policy of this State set out in the procurement regulations, provided that procurement from no other supplier or contractor is capable of promoting that policy.

⁶⁵ The Working Group may wish to consider alternatives to single-source procurement in the case of urgency. Currently the Model Law provides for only one alternative — competitive negotiations (see article 19 (2) of the 1994 Model Law and article 27 (2) of this draft). Some experts consulted by the Secretariat suggested that in the case of urgency other than owing to a catastrophic event (article 19 (2) (a) of the 1994 Model Law), the procuring entity should be able to have recourse to a method of procurement not involving negotiations, such as restricted tendering or request for quotations. If such other alternative is envisaged, the Working Group may wish then to consider providing guidance on circumstances that would justify recourse to competitive negotiations as opposed to a method of procurement not involving negotiations, such as restricted tendering, in the case of urgency. It should also be noted in this regard that as a result of amendments introduced to the provisions on single-source procurement (and consequential changes made in article 27 (2) of this draft), a distinction between urgency and emergency (i.e., urgency owing to a catastrophic event) was eliminated.

⁶⁶ A/64/17, para. 119.

A/CN.9/WG.I/WP.71/Add.3 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services - a revised text of the Model Law, submitted to the Working Group on Procurement at its seventeenth session****ADDENDUM**

This note sets out a proposal for chapter III (Open tendering) of the revised Model Law, comprising articles 30-38.

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER III. OPEN TENDERING**SECTION I. SOLICITATION OF TENDERS****Article 30. Procedures for soliciting tenders¹**

(1) Subject to article 16,² a procuring entity shall solicit tenders through open solicitation.

Article 31. Contents of invitation to tender³

The invitation to tender shall contain, at a minimum, the following information:

- (a) The name and address of the procuring entity;
- (b) The nature and quantity, and place of delivery of goods to be supplied, the nature and location of construction to be effected, or the nature and location of services to be provided, or the appropriate combination thereof;
- (c) The desired or required time for the supply of goods or for the completion of construction, or the timetable for the provision of services, or appropriate combination thereof;
- (d) The criteria and procedures to be used for evaluating the qualifications of suppliers or contractors, in conformity with article [9 (2)];
- (e) A declaration pursuant to article [8], as the case may be;

¹ The draft article, which is based on article 24 of the 1994 Model Law, was amended further to the introduction of the definition of "open solicitation" in article 2.

² This reference to article 16 has been inserted to make it clear that the procuring entity may engage in prequalification. A similar reference in other procurement methods, where appropriate. The Working Group may wish to consider whether an express reference to prequalification would provide greater ease of reading.

³ The Working Group, at its fifteenth session, approved the draft article, which is based on article 25 (1) of the 1994 Model Law, with amendments to subparagraph (j) (A/CN.9/668, paras. 161-162).

(f) The means, manner and [modalities] of obtaining the solicitation documents;⁴

(g) The price, if any, charged by the procuring entity for the solicitation documents;

(h) [Unless decided otherwise by the procuring entity in domestic procurement,]⁵ the currency and means of payment for the solicitation documents;

(i) [Unless decided otherwise by the procuring entity in domestic procurement,]⁶ the language or languages in which the solicitation documents are available;

(j) The manner, [modalities] and deadline for presenting tenders.⁷

Article 32. Provision of solicitation documents⁸

The procuring entity shall provide the solicitation documents to suppliers or contractors in accordance with the procedures and requirements specified in the invitation to tender. If prequalification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been prequalified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of providing them to suppliers or contractors.

Article 33. Contents of solicitation documents⁹

The solicitation documents shall include, at a minimum, the following information:

(a) Instructions for preparing tenders;

(b) The criteria and procedures, in conformity with the provisions of article [9], relative to the evaluation of the qualifications of suppliers or contractors and relative to the further demonstration of qualifications pursuant to article [37 (6)];

(c) The requirements as to documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(d) The description of the subject matter of the procurement, in conformity with article [10]; the quantity of goods to be ordered¹⁰ and/or services to be

⁴ This subparagraph was revised to ensure that it is technologically neutral.

⁵ This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

⁶ Id.

⁷ This subparagraph was revised to ensure that it is technologically neutral.

⁸ The Working Group, at its fifteenth session, approved the draft article, which is based on article 26 of the 1994 Model Law, with a consequential change (A/CN.9/668, paras. 163-164).

⁹ The Working Group, at its fifteenth session, approved the draft article, which is based on article 27 of the 1994 Model Law (A/CN.9/668, para. 166).

performed; the location where construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;

(e) Information about the criteria and procedure for examination of tenders;

(f) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;

(g) If alternatives to the characteristics of the subject matter of the procurement, contractual terms and conditions or other requirements set forth in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated and compared;

(h) If suppliers or contractors are permitted to submit tenders for only a portion of the subject matter of the procurement, a description of the portion or portions for which tenders may be submitted;

(i) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(j) [Unless decided otherwise by the procuring entity in domestic procurement,]¹¹ the currency or currencies in which the tender price is to be formulated and expressed;

(k) [Unless decided otherwise by the procuring entity in domestic procurement,]¹² the language or languages, in conformity with article [13], in which tenders are to be prepared;

(l) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors presenting tenders in accordance with article 15, and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and material bonds;

(m) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security, a statement to that effect;

(n) The manner, [modalities] and deadline for presenting tenders, in conformity with article [34];¹³

¹⁰ Amendment proposed by an informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America.

¹¹ This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

¹² *Id.*

(o) The means by which, pursuant to article [14], suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(p) The period of time during which tenders shall be in effect, in conformity with article [35];

(q) The manner, [modalities], date and time for the opening of tenders, in conformity with article [36];¹⁴

(r) Information about the criteria and procedure for evaluation of tenders;

(s) [Unless decided otherwise by the procuring entity in domestic procurement,]¹⁵ the currency that will be used for the purpose of evaluating and comparing tenders pursuant to article [37 (5)] and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings[, including those applicable to procurement involving classified information];¹⁶

(u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) Any commitments to be made by the supplier or contractor outside of the procurement contract, such as commitments relating to [the socioeconomic factors];¹⁷

(w) Notice of the right provided under article [61] of this Law to seek review [due to non-compliance with the provisions of this Law]¹⁸ [together with information about duration of a standstill period and, if none will apply, a statement to that effect and reasons therefor];¹⁹

(x) Any formalities that will be required once a successful tender has been accepted for a procurement contract to enter into force, including, where applicable,

¹³ The Working Group may wish to add a requirement for a reasonable period to allow suppliers to prepare their tenders, as it has provided in the context of framework agreements. Suggested text is provided in proposed revised article 34 (1), but the Working Group may also wish to make appropriate reference in this article.

¹⁴ This subparagraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

¹⁵ This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

¹⁶ Amendment proposed by the informal drafting party, July 2009.

¹⁷ Amendment proposed by the informal drafting party, July 2009.

¹⁸ Amended to reflect changes in article 61.

¹⁹ Added pursuant to A/64/17, paras. 235 and 237.

the execution of a written procurement contract pursuant to article [20], and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(y) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of tenders and to other aspects of the procurement proceedings.

SECTION II. PRESENTATION OF TENDERS

Article 34. Presentation of tenders²⁰

(1) Without prejudice to paragraphs (2) to (5) of this article, the procuring entity shall fix in the invitation to tender in accordance with article 31 (j) and in the solicitation documents in accordance with article 33 (n) the manner, [modalities] and deadline for presenting tenders. The deadline for presenting tenders shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and present their tenders, taking into account the reasonable needs of the procuring entity.²¹

(2) If, pursuant to article [14], the procuring entity issues a clarification or modification of the solicitation documents, or if a meeting of suppliers or contractors is held, it shall, prior to the deadline for presenting tenders, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification, or the minutes of the meeting, into account in their tenders.

(3) The procuring entity may, in its absolute discretion, prior to the deadline for presenting tenders, extend the deadline if it is not possible for one or more suppliers or contractors to present their tenders by the deadline owing to any circumstance beyond their control.

(4) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the solicitation documents.

(5)²² (a) A tender shall be presented 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;

²⁰ The Working Group, at its fifteenth session, approved the draft article, which is based on article 30 of the 1994 Model Law, with the revisions to paragraph (1) (A/CN.9/668, para. 171).

²¹ The provisions of the paragraph were revised to make them technologically neutral and consistent throughout the Model Law.

²² The text of paragraph (5) of this article is as preliminarily approved by the Working Group at its twelfth session (see A/CN.9/640, para. 28).

(b) The procuring entity shall provide to the supplier or contractor a receipt showing the date and time when its tender was received;²³

(c) The procuring entity shall preserve the security, integrity and confidentiality of a tender, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law.

(6) A tender received by the procuring entity after the deadline for presenting tenders shall not be opened and shall be returned unopened to the supplier or contractor that presented it.

Article 35. Period of effectiveness of tenders; modification and withdrawal of tenders²⁴

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. [A supplier or contractor may refuse the request without forfeiting its tender security, and the effectiveness of its tender will terminate upon the expiry of the [original]²⁵ period of effectiveness];

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for presenting tenders.

²³ The Working Group, at its fifteenth session, accepted the suggestion that the Guide in the context of this subparagraph should discuss the nature of the receipt to be provided, and should state that the certification of receipt provided by the procuring entity would be conclusive (A/CN.9/668, para. 173).

²⁴ The Working Group, at its fifteenth session, deferred the consideration of the draft article, which is based on article 31 of the 1994 Model Law, in the light of divergent views expressed regarding the suggestion to delete the second sentence of paragraph (2) (a) (A/CN.9/668, paras. 175-176). For the discussion of the drafting history of the provisions, see A/CN.9/WG.I/WP.68/Add.1, section G.

²⁵ Amendment proposed by the informal drafting party, July 2009.

SECTION III. EVALUATION AND COMPARISON OF TENDERS

Article 36. Opening of tenders²⁶

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for presenting tenders, or at the deadline specified in any extension of the deadline, in accordance with the manner, [modalities] and procedures specified in the solicitation documents.²⁷

(2) All suppliers or contractors that have presented tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they have been given opportunity to be fully and contemporaneously apprised of the opening of the tenders.

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have presented tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article [23].²⁸

Article 37. Examination, evaluation and comparison of tenders²⁹

(1) (a) The procuring entity may ask a supplier or contractor individually for clarifications of its tender in order to assist in the examination, evaluation and comparison of tenders. No change in a matter of substance in the tender, including

²⁶ The Working Group, at its fifteenth session, approved the draft article, which is based on article 33 of the 1994 Model Law and the text of paragraph (2) preliminarily approved by the Working Group at its twelfth session (see A/CN.9/640, para. 38), without change (A/CN.9/668, para. 177). It was agreed that the Guide should highlight that the modalities for the opening of tenders established by the procuring entity (time, place where applicable, and other factors) should allow for the presence of suppliers or contractors (A/CN.9/668, para. 178). The informal drafting party, July 2009, suggested that the Guide should also elaborate on “deemed” present or “virtual” presence of suppliers or contractors at the opening of tenders.

²⁷ This paragraph has been revised to make it technologically neutral and consistent with similar provisions of the Model Law.

²⁸ The Working Group may recall that the provisions of article 23 (1) (b) require the equivalent details of all those that submitted tenders to be recorded, and may wish to include a note in the Guide to explain that any late tenders would be returned unopened, but their (late) submission would be noted in the record.

²⁹ The Working Group, at its fifteenth session, deferred the consideration of this article, which is based on article 34 of the 1994 Model Law, in the light of the divergent views expressed regarding the drafting suggestions thereto (A/CN.9/668, paras. 180-181). As was requested by the Working Group, the drafting suggestions were placed in square brackets in the present draft for further consideration by the Working Group. The Secretariat was also requested to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (*ibid.*). The results of the research are reflected in document A/CN.9/WG.I/ WP.68, sections II.A and B.

changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted;

(b) Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall [require purely arithmetical errors that are discovered during the examination of tenders to be corrected by the supplier or contractor that presented the tender].³⁰

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity [shall]³¹ regard a tender as responsive [only]³² if it conforms to [all requirements set forth in the solicitation documents in accordance with article 11 of this Law] [the relevant requirements set forth in the solicitation documents] [the description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement [set out in the solicitation documents in accordance with article 11 of this Law]];³³

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation and comparison of tenders.³⁴

(3) The procuring entity shall reject a tender:

(a) If the supplier or contractor that presented the tender is not qualified;

³⁰ Amendments proposed by the informal drafting party, July 2009.

³¹ The Working Group may wish to consider replacing the word “may” appearing in the 1994 text with the word “shall”, to ensure that responsiveness is ascertained objectively. The Working Group may consider that the use of the word “may” in this context might allow unintended and undesirable subjectivity, and provides a description of what a responsive tender might be, rather than a definition of a responsive tender. The informal drafting party, July 2009, proposed retaining the word “shall”.

³² The Working Group may consider that the word “only” is unnecessary if the word “shall” is used in this provision, as to which, see the footnote above. The informal drafting party, July 2009, proposed retaining the word “only”.

³³ The Working Group, at its fifteenth session, deferred the consideration of these alternative texts in square brackets and requested the Secretariat to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (A/CN.9/668, paras. 180 (a) and 181). The results of the research are reflected in document A/CN.9/WG.I/WP.68, section II.A. The informal drafting party, July 2009, proposed retaining the first alternative text.

³⁴ The Working Group may wish to consider whether the assessment of responsiveness is a step that should be regulated in some or all other procurement methods. At the fifteenth session, a suggestion was made to include in paragraph 3 (c) of this article a cross-reference to revised draft article 10 (A/CN.9/668, para. 179 (b)). The current scope of revised draft article 10 does not allow for an appropriate cross-reference, as it refers to the description of the subject matter of the procurement and the terms and conditions of the procurement contract rather than the assessment of responsiveness.

(b) If the supplier or contractor that presented the tender does not [correct an arithmetical error pursuant to paragraph (1) (b) of this article];³⁵

(c) If the tender is not responsive;

(d) In the circumstances referred to in articles [18 and 19].

(4) (a) The procuring entity shall evaluate and compare the tenders that have not been rejected in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set forth in the solicitation documents. No criterion shall be used that has not been set forth in the solicitation documents;

(b) The successful tender shall be:

(i) [Where price is the only award criterion],³⁶ the tender with the lowest tender price, subject to any margin of preference applied pursuant to article [11]; or

(ii) [Where there are price and other award criteria],³⁷ if the procuring entity has so stipulated in the solicitation documents, the [lowest evaluated tender].³⁸ ascertained on the basis of the criteria and procedures for evaluating tenders specified in the solicitation documents in accordance with article [11].

(5) When tender prices are expressed in two or more currencies, the tender prices of all tenders shall be converted to the same currency, according to the rate specified in the solicitation documents pursuant to article [33 (s)], for the purpose of evaluating and comparing tenders.

(6) Whether or not it has engaged in prequalification proceedings pursuant to article [16], the procuring entity may require the supplier or contractor presenting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article [9]. The criteria

³⁵ Changes to this provision have been made further to the changes proposed by the informal drafting party, July 2009, in paragraph 1 (b) of this article.

³⁶ The Working Group, at its fifteenth session, deferred the consideration of the suggestion to add this phrase in the beginning of this subparagraph and requested the Secretariat to research the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and to report its findings when the provisions were considered (A/CN.9/668, paras. 180 (d) and 181). The results of the research are reflected in document A/CN.9/WG.I/WP.68, section II.B.2. The informal drafting party, July 2009, proposed retaining this additional phrase.

³⁷ Ibid.

³⁸ No consensus has so far been reached as regards retaining in the revised Model Law of this term and, if it is not retained, which alternative term should replace it (A/64/17, paras. 169-174). The alternative terms considered so far are the “best evaluated tender” or “most advantageous/economical tender”. The Secretariat, further to the Working Group’s request at its fifteenth session (A/CN.9/668, paras. 180 (c), 181 and 220), researched the drafting history of the provisions concerned, and the manner in which similar issues were addressed in applicable international instruments, and reported its findings in document A/CN.9/WG.I/WP.68, section II.B.1. The informal drafting party, July 2009, proposed retaining reference to the “lowest evaluated tender”. Some experts consulted by the Secretariat also supported retaining this term in the context of all types of tendering proceedings (open, restricted and two-stage tendering).

and procedures to be used for such further demonstration shall be set forth in the solicitation documents. Where prequalification proceedings have been engaged in, the criteria shall be the same as those used in the prequalification proceedings.

(7) If the supplier or contractor submitting the successful tender is requested to demonstrate again its qualifications in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders still in force, subject to the right of the procuring entity, in accordance with article [17 (1)], to cancel the procurement.

(8) Information relating to the examination, clarification, evaluation and comparison of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation or comparison of tenders or in the decision on which tender should be accepted, except as provided in articles [20 and 23].

Article 38. Prohibition of negotiations with suppliers or contractors³⁹

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender presented by the supplier or contractor.

³⁹ The Working Group, at its fifteenth session, approved the draft article, which is based on article 35 of the 1994 Model Law, without change (A/CN.9/668, para. 182).

A/CN.9/WG.I/WP.71/Add.4 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its seventeenth session****ADDENDUM**

This note sets out a proposal for chapter IV (Procurement methods not involving negotiations: Restricted tendering, Request for quotations and Request for proposals without negotiation) of the revised Model Law, comprising articles 39-41.

The Secretariat's comments are set out in the accompanying footnotes.

Chapter IV. Procurement methods not involving negotiations (restricted tendering, request for quotations and request for proposals without negotiation)**Article 39. Restricted tendering¹**

(1) (a) When the procuring entity engages in restricted tendering on the grounds that the subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors, it shall solicit tenders from all suppliers and contractors from whom the subject matter of the procurement is available;

(b) When the procuring entity engages in restricted tendering on the grounds that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement, it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner, and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(2) [Where a procuring entity intends to use restricted tendering under paragraph 1 (b) of this article,] the procuring entity [shall] [may] engage in pre-selection proceedings. Article 16 of this Law shall apply to the pre-selection proceedings except:

(a) The invitation to pre-selection and the pre-selection documents shall state, in addition to the information listed in article 16 (3) and (5):

¹ Document A/CN.9/WG.I/WP.69/Add.3 sets out all options for this article considered by the Working Group so far. This document sets out only one option, which is presented based on the Secretariat's consultations with experts and the draft submitted to the Secretariat by the informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, and in the light of the provisions on conditions for use of restricted tendering set out in article 26 of chapter II of this draft.

- (i) That the procuring entity intends upon completion of the pre-selection proceedings to solicit tenders only from a limited number of pre-qualified suppliers or contractors that best meet the prequalification criteria;
- (ii) The maximum number of pre-qualified suppliers or contractors from whom the tenders will be solicited, which shall be at least [five]; and
- (iii) The manner in which the selection of that number will be carried out, in accordance with paragraph (2) (b) below;

(b) The procuring entity shall rate the suppliers or contractors that meet the prequalification criteria on the basis of the criteria applied to assess their qualifications and select suppliers or contractors that will be invited to present tenders upon completion of the pre-selection proceedings. In selecting those suppliers, the procuring entity shall apply only the manner of rating that is set forth in the invitation to pre-selection and the pre-selection documents. [The procuring entity shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner and it shall select a sufficient number of suppliers or contractors to ensure effective competition];²

(c) The procuring entity shall promptly notify each supplier or contractor whether or not it has been selected and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been selected, [unless the procuring entity decides to withhold this information in order to protect classified information in procurement involving classified information].³ The procuring entity shall upon request communicate to suppliers or contractors that have not been selected the reasons therefor.

(3) The procuring entity shall cause a notice of the restricted tendering proceeding to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published). The notice shall contain at a minimum the information listed in article 31 of this Law.

(4) The procuring entity shall not be required to employ the procedure set out in paragraph (3) of this article in procurement involving classified information in order to protect classified information. The procuring entity shall include in the record of the procurement required under article [23] of this Law, a statement of the reasons and circumstances on which it relied to justify its decision not to issue a notice of the restricted tendering.⁴

² The Working Group may wish to consider whether the last sentence is superfluous in the light of procedural safeguards already contained in the preceding provisions of paragraph (2) of this article and the relevant general principles found elsewhere in the Model Law. The provision is also repetitive with paragraph (1) (b) of this article.

³ The closing wording was added pursuant to the instructions at the Commission's forty-second session to the Secretariat to prepare drafting suggestions for consideration by the Working Group that would accommodate sensitive type of procurement, by envisaging in particular special measures for protection of classified information in this type of procurement (A/64/17, paras. 264-265).

⁴ Paragraph (4) was added pursuant to the instructions at the Commission's forty-second session to the Secretariat to prepare drafting suggestions for consideration by the Working Group that would accommodate sensitive type of procurement, by envisaging in particular special measures for protection of classified information in this type of procurement (A/64/17, paras. 264-265).

(5) The procuring entity shall invite all selected suppliers or contractors to submit their tenders. Where the solicitation documents are not made publicly available from the date of publication of the invitation to pre-selection, the procuring entity shall ensure that those documents are made available at the same time to all the selected suppliers or contractors.

(6) The provisions of chapter III of this Law shall apply to the subsequent stages of restricted tendering.

Article 40. Request for quotations⁵

(1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the subject matters of the procurement themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.

(2) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation submitted by the supplier or contractor.

(3) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity.⁶

Article 41. Request for proposals without negotiation⁷

(1) Subject to article 16, the procuring entity shall solicit proposals through open solicitation unless it decides that direct solicitation is necessary because:

(a) The subject matter of the procurement is available only from a limited number of suppliers or contractors, provided that it solicits proposals from all those suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the subject matter of the

⁵ The Working Group, at its fifteenth session, approved the draft article, which is based on article 50 of the 1994 Model Law, as revised at that session (A/CN.9/668, paras. 202-208).

⁶ The Working Group may wish to consider whether a notice of the request for quotations proceedings should be required to be published and whether this article should therefore contain provisions similar to the ones in article 39 (3) and (4) above. The same issue is valid in all cases where direct solicitation takes place.

⁷ The Working Group, at its fifteenth session, after a debate on whether the provisions should be retained in the revised Model Law, decided to retain the draft article, which was based on article 42 of the 1994 Model Law, but deferred its consideration to a later stage (A/CN.9/668, para. 201). The article proposed in this document has been redrafted to make the intended scope and purpose of the article clearer, in the light of the deliberations at the Working Group's fifteenth session (A/CN.9/668, paras. 193-201) and Secretariat's consultations with experts. The Working Group may wish to consider to what extent all provisions on request for proposals in chapters IV and V should conform, in particular as regards transparency requirements and level of detail in regulating the procedure.

procurement, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

(c) Direct solicitation is the only means to protect classified information in procurement involving classified information, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.⁸

(2) The request for proposals shall include, at a minimum:

(a) A description of the subject matter of the procurement, including the quality, technical and other parameters to which the proposal must conform and the location where the subject matter of the procurement is to be provided;

(b) The criteria and procedures for opening, examining, evaluating and comparing the proposals in accordance with articles 10 and 11, including any minimum requirements that the procuring entity will establish with respect to quality, technical and commercial aspects of proposals, [and any maximum price,]⁹ and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;

(c) The terms and conditions of the procurement contract;

(d) Instructions to suppliers or contractors to submit simultaneously to the procuring entity proposals in two envelopes: one envelope containing quality and technical aspects of the proposal and the other envelope containing the [commercial][financial][price]¹⁰ aspects of the proposal.

(3) Before opening the envelopes containing the [commercial][financial][price] aspects of the proposals, the procuring entity shall evaluate the quality and technical aspects of proposals in accordance with the criteria and procedures specified in the request for proposals.

(4) The results of the evaluation of the quality and technical aspects of proposals shall be immediately recorded in the record of procurement proceedings.

(5) The proposals whose quality and technical aspects fail to meet the relevant minimum requirements shall be considered to be non-responsive and shall be rejected on that ground. The notice of rejection [and reasons for rejection],¹¹ together with an unopened envelope containing the [commercial][financial][price]

⁸ Based on provisions of article 37 (3) of the 1994 Model Law and A/64/17, para. 265. The Working Group may wish to consider that as a general rule the procuring entity shall be required to publish a notice of procurement (similar to the one required under draft article 39 (3) above) even in the case of direct solicitation unless it decides otherwise in procurement involving classified information in order to protect classified information (draft article 39 (4) above).

⁹ The Working Group may wish to consider whether this reference should be included to accommodate procurement with a fixed budget. See, further, the discussions pertaining to procurement of advisory services in A/CN.9/WG.I/WP.71.

¹⁰ The Working Group may wish to consider which of the suggested terms is the most appropriate in this context. The 1994 Model Law refers in this context only to "price".

¹¹ The provision in square brackets is linked to the issue of debriefing. The Working Group may recall that it has not yet finally decided the manner in which debriefings should be addressed in the text or the Guide, and may wish therefore to finalise that decision before addressing whether to retain this provision in the text or encourage such a step in the Guide. See, also, the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H.

aspect of the proposal, shall be promptly communicated individually and simultaneously to each respective supplier or contractor whose proposal was rejected.

(6) The proposals whose quality and technical aspects met or exceeded the relevant minimum requirements shall be considered to be responsive. The procuring entity shall promptly and simultaneously communicate to the suppliers or contractors submitting such proposals the score of the quality and technical aspects of their respective proposals as recorded in the record of procurement proceedings pursuant to paragraph (4) of this article. The procuring entity shall invite these suppliers or contractors to the opening of the envelopes containing the [commercial][financial][price] aspects of their proposals.

(7) The score of the quality and technical aspects of each responsive proposal and the corresponding [commercial][financial][price] aspect of the proposal shall be read out in the presence of the suppliers or contractors invited in accordance with paragraph (6) of this article to the opening of the envelopes containing the [commercial][financial][price] aspects of the proposals.

(8) The procuring entity shall compare the [commercial][financial][price] aspects of the proposals [that do not exceed any maximum price]¹² and on that basis identify the successful proposal in accordance with the criteria and the procedure set out in the request for proposals. The successful proposal shall be:

- (a) The proposal with the lowest price; or
- (b) The proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price.

¹² See footnote 9 above.

A/CN.9/WG.I/WP.71/Add.5 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its seventeenth session****ADDENDUM**

This note sets out a proposal for chapter V of the revised Model Law (Procurement methods involving negotiations: Two-stage tendering, Request for proposals with dialogue, Request for proposals with consecutive negotiations, Competitive negotiations and Single-source procurement), comprising articles 42-46.

The Secretariat's comments are set out in the introduction and accompanying footnotes.

CHAPTER V. PROCUREMENT METHODS INVOLVING NEGOTIATIONS**Section I: TWO-STAGE TENDERING, REQUEST FOR PROPOSALS WITH DIALOGUE AND REQUEST FOR PROPOSALS WITH CONSECUTIVE NEGOTIATIONS****Section II: COMPETITIVE NEGOTIATIONS AND SINGLE-SOURCE PROCUREMENT****1. Introduction**

1. At its sixteenth session, Working Group I requested the Secretariat to review a proposal for draft article 40 (Competitive dialogue) for chapter IV of the draft revised Model Law and to make the changes necessary to align the text with the rest of the draft revised Model Law (A/CN.9/672, para. 13). The proposal, amended accordingly, was before the Commission at its forty-second session (A/CN.9/XLII/CRP.2). The Commission referred the proposal and other outstanding issues in the draft revised Model Law to the Working Group for further consideration (A/64/17, para. 284), and expressed support for intersession informal consultations on the entire text (to be inclusive and have as wide a geographical representation of participants as possible (A/64/17, para. 281)).

2. The text of the proposal has been revised further to those consultations, the results of which are reflected in draft article 43 below (Request for proposals with dialogue). The understanding is that this new method of procurement will replace the method envisaged in article 48 of the 1994 Model Law (Request for proposals). The Working Group may wish to note that the provisions regarding a pre-selection procedure (draft article 43 (3)) are not consistent with the pre-selection procedure provided for in draft article 39 (Restricted tendering), as proposed by an informal

drafting party during the forty-second session of the Commission in July 2009.¹ The Working Group may therefore wish to consider whether one consistent procedure should apply to both methods, and if so, which procedure. As noted in connection with draft article 41 (Request for proposals without negotiation), the Working Group may also wish to consider the need for appropriate consistency in regulation of various request for proposals procedures (with and without negotiation/dialogue), in particular as regards procedural safeguards to ensure transparency.

3. In the light of the strong support expressed in the Working Group for retaining two-stage tendering (article 46 of the 1994 Model Law) as a separate procurement method in the revised Model Law (A/CN.9/672, paras. 48 and 66), suggested text for this procurement method is presented in draft article 42.

4. In the light of suggestions that competitive negotiations as envisaged in article 49 of the 1994 Model Law should be retained in the revised Model Law as a separate procurement methods (A/CN.9/672, para. 61), suggested text for this procurement method is presented in draft article 45.

5. In the light of noted concerns that simultaneous negotiations, provided for in the 1994 Model Law (article 43), would not be appropriate for some types of services (A/CN.9/672, paras. 67 and 123), and the views that emerged during consultations that a method for advisory or non-quantifiable services would be required, request for proposals with consecutive negotiations as envisaged in article 44 of the 1994 Model Law is proposed to be retained and is set out in draft article 44.

6. At the Working Group's sixteenth session, the view was expressed that request for proposals without negotiations should also be preserved in the revised Model Law as a separate procurement method. The Working Group deferred the consideration of this issue, including whether that procurement method should be included in chapter IV as a method alternative to tendering and not involving negotiations, rather than in chapter V that sets out methods involving negotiations (A/CN.9/672, para. 49). The present draft sets out provisions for request for proposals without negotiations based on article 42 of the 1994 Model Law in chapter IV (draft article 41).

¹ This drafting party comprised Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America.

Proposed text for chapter V of the Model Law

Section I

Article 42. Two-stage tendering

(1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings, except to the extent those provisions are derogated from in this article.

(2) The solicitation documents shall call upon suppliers or contractors to submit, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the subject matter of the procurement as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.

(3) The procuring entity shall, in the first stage, engage in [negotiations/dialogue/discussions]² with [all]³ suppliers or contractors whose tender have not been rejected pursuant to articles [17, 18, 19 or 37], concerning any aspect of their tenders.

(4) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite all suppliers or contractors [whose tenders have not been rejected]⁴ to submit final tenders with prices with respect to a single description of the subject matter of the procurement. In formulating that description, the procuring entity may delete or modify any aspect, originally set out in the solicitation documents, of the technical or quality characteristics of the subject matter of the procurement, and any criterion originally set forth in those documents for evaluating and comparing tenders and for ascertaining the successful tender, and may add new characteristics or criteria that conform with this Law.⁵ Any such deletion, modification or addition shall be communicated to suppliers or contractors in the invitation to submit final tenders. A supplier or contractor not wishing to submit a final tender may withdraw from the tendering proceedings without forfeiting any submission security that the supplier or contractor may have been required to provide. The final tenders shall be evaluated and compared in order to ascertain the successful tender as defined in article [37 (4) (b)].

² The Working Group may wish to decide how to refer to the interaction between the parties. The 1994 Model Law referred to negotiations in this context, but the interaction does not involve negotiations in the classical sense.

³ The 1994 text read “any”. The Working Group may wish to consider making this replacement in the light of potential abuse that may occur in the second stage of the two-stage tendering proceedings if negotiations in the first stage were held only with one or a few suppliers or contractors that would effectively determine the content of the revised solicitation documents and ultimately successful supplier.

⁴ The wording put in square brackets should not give impression that rejection of tenders is possible subsequent to negotiations referred to in paragraph (3) of the article. The Working Group may wish to consider making this point clearer in the text or in the Guide to this provision.

⁵ Concern was expressed by some experts about the extent of permissible modifications under this provision. The suggestion was made to set a limit by for example requiring that no material change in the procurement should occur as a result of such modifications.

Article 43. Request for proposals with dialogue⁶

(1) Subject to article 16, the procuring entity shall solicit proposals through open solicitation unless it decides that direct solicitation is necessary for the reasons set out in article 41 (1) (a) to (c)⁷ of this Law.

(2) Prior to the [publication of the notice soliciting participation in the procurement, or where prequalification or pre-selection is involved, prior to the publication of the invitation to pre-qualify or to pre-selection as appropriate] [issue of the request for proposals], the procuring entity may establish any minimum requirements⁸ with respect to quality, technical, financial⁹ and commercial aspects of proposals, including the technical and other parameters to which the proposal must conform, that will be applied during the procedure.¹⁰

(3) The procuring entity may engage in pre-selection proceedings. Article 16 of this Law shall apply to the pre-selection proceedings except:

(a) The invitation to pre-selection and the pre-selection documents shall state, in addition to the information listed in article 16 (3) and (5):

(i) That the procuring entity intends upon completion of the pre-selection procedure to request a limited number of suppliers or contractors to submit proposals;

⁶ This procurement method is available for all types of procurement, including the procurement of non-quantifiable advisory services. However, the Working Group's attention is drawn to the discussion in A/CN.9/WG.I/WP.71 regarding the particular features of such procurement. The Working Group is invited to consider whether a dedicated procurement method for it would be required in the revised Model Law. Alternatively, the Guide to Enactment might explain that in such type of procurement, regulations could provide additional steps or provisions. For example, proposals need not contain financial elements or prices where the cost is not an evaluation criterion or not a significant evaluation criterion, proposals could be submitted in two envelopes with technical and financial aspects in different envelopes, and an additional step could include a public opening of the envelopes in one or two sittings. As regards evaluation criteria in such type of procurement, the Guide could explain that for non-quantifiable advisory services, relevant issues may include (i) cost, (ii) the service-provider's experience for the specific assignment, (iii) the quality of the understanding of the assignment under consideration and of the methodology proposed, (iv) the qualifications of the key staff proposed, (v) transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the description of the assignment, and (vi) when applicable, the extent of participation by nationals among key staff in the performance of the services.

⁷ The Working Group may wish to consider whether all grounds listed in draft article 41 (1) (a) to (c) would be applicable in the context of this procurement method or reference should be made only to the grounds listed in (a) and (c), not (b). This should be considered also in conjunction with article 44 (1) where a cross-reference to article 43 (1) is made.

⁸ This term is used, as it is with reference to the description of the subject matter of the procurement (article 10 of this draft), to avoid confusion with the notion of (financial) thresholds for low-value procurements.

⁹ The Guide to Enactment would note that the procuring entity may choose to invite initial proposals with or without a price.

¹⁰ These minimum requirements are intended to allow the procuring entity to set the benchmark for responsiveness. The Working Group may wish to consider the appropriate point in the proceedings at which these minimum requirements should be set, weighing advantages of flexibility and discretion and the manner in which they can assist in identifying the best solutions, against the risk of abuse.

(ii) The number of suppliers or contractors to be so requested, provided that sufficient suppliers or contractors are pre-qualified;

(iii) The manner in which the selection of that number will be carried out, in accordance with paragraph (3)(b) below.

(b) The pre-selected suppliers shall comprise either the stated number of suppliers or contractors that best meet the prequalification criteria, or those suppliers or contractors that meet or exceed minimum requirements as regards the prequalification criteria set by the procuring entity.¹¹ All suppliers or contractors that are not pre-selected will be disqualified from further participation in the procedure.¹²

(c) The procuring entity shall promptly notify each supplier or contractor whether or not it has been pre-selected and shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been pre-selected[, unless the procuring entity decides to withhold this information in order to protect classified information in procurement involving classified information].¹³ The procuring entity shall upon request communicate to suppliers or contractors that have not been pre-selected the reasons therefore.

(4) The notice soliciting participation in the procurement must set out, at a minimum, the following information:

(a) The name and address of the procuring entity;

(b) A description of the subject matter of the procurement to the extent known, and the desired or required time and location for the provision of such subject matter;

(c) The intended stages of the procedure;

(d) Any minimum requirements that may be established by the procuring entity pursuant to paragraph (2) of this article, and, if applicable, a statement that

¹¹ The implication of this provision is that the procuring entity could raise the pre-qualification requirements during the procedure. The Working Group may wish to consider whether this flexibility would be subject to abuse, and so that any minimum requirements should be set at the outset (as is the case with responsiveness requirements in paragraph (2) of this article). If so, the situation would be addressed in the pre-selection documents and would not require specific mention here. If the Working Group considers that the procuring entity should be able to raise the requirements during the procedure, it may wish to build in transparency safeguards, for example by providing in the notice that the minimum requirements may be raised if more than a stated maximum number of suppliers are pre-qualified.

¹² The two ways of conducting pre-selection were suggested by experts during consultations with the Secretariat. As noted in the introductory note to this chapter, the provisions in this paragraph deviate from those in draft paragraph (2)(b) of draft article 39 on restricted tendering. The Working Group may wish to consider whether deviations are justifiable.

¹³ The closing wording was added pursuant to the instructions at the Commission's forty-second session to the Secretariat to prepare drafting suggestions for consideration by the Working Group that would accommodate sensitive type of procurement, by envisaging in particular special measures for protection of classified information in this type of procurement (A/64/17, paras. 264-265).

proposals that fail to achieve these minimum requirements shall be regarded as non-responsive and rejected from the procedure;¹⁴

(e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article [9], and any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications;

(f) A declaration pursuant to article [8];

(g) The means, manner and [modalities] of obtaining the request for proposals;

(h) The price, if any, charged by the procuring entity for the request for proposals;

(i) [Unless decided otherwise by the procuring entity in domestic procurement,]¹⁵ the currency and terms of payment for the request for proposals;

(j) [Unless decided otherwise by the procuring entity in domestic procurement,]¹⁶ the language or languages in which the request for proposals are available, in which proposals are to be prepared and in which the dialogue will be held;

(k) The manner, [modalities] and deadline for presenting proposals. The deadline for presenting proposals shall be expressed as a specific date and time and shall allow sufficient time for suppliers or contractors to prepare and submit their proposals, taking into account the reasonable needs of the procuring entity.

(5) The request for proposals shall be issued to all suppliers or contractors that respond to the solicitation and pay the price, if any, charged for the request unless prequalification or pre-selection procedures were involved. In the latter case, the request for proposals shall be issued to all pre-qualified or pre-selected suppliers or contractors.

(6) The request for proposals shall include, in addition to the information referred to in paragraphs (4)(a) to (f) and (k) of this article, at a minimum, the following information:¹⁷

(a) The criteria and procedure for evaluating the proposals in accordance with article 11;¹⁸

¹⁴ This is a new provision that reflects the needs expressed during consultations for the manner in which any limitation of proposals will be made, and is based on Model Provision 15 of the UNCITRAL PFIPs instruments.

¹⁵ This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

¹⁶ Id.

¹⁷ Provisions of subparagraphs (a) and (e) to (o) are based on the respective provisions of article 38 of the 1994 Model Law. The content of other provisions of article 38 of the 1994 Model Law, except for subparagraphs (d) and (h), is reflected in the relevant provisions of paragraph (4) of this article. The content of subparagraphs (d) and (h) of article 38 of the 1994 Model Law was not reflected in the current draft as not applicable in the light of the revisions agreed so far to be made in the revised Model Law.

(b) Any elements of the description of the subject matter of the procurement or term or condition of the procurement that will not be the subject of dialogue during the procedure;

(c) Where the procuring entity intends to fix the number of suppliers or contractors that it will invite to participate in the dialogue, the minimum number of suppliers or contractors, which shall be not lower than three, if possible, and, where appropriate, the maximum number;

(d) Instructions for preparing and presenting proposals;

(e) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;¹⁹

(f) If suppliers or contractors are permitted to submit proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be submitted;²⁰

(g) [Unless decided otherwise by the procuring entity in domestic procurement,]²¹ the currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating and comparing proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used;²²

(h) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;²³

(i) If alternatives to the characteristics of the subject matter of the procurement, contractual terms and conditions or other requirements set out in the request for proposals are permitted, a statement to that effect and a description of the manner in which alternative proposals are to be evaluated and compared;²⁴

¹⁸ Based on article 38 (m) of the 1994 Model Law. The Guide to Enactment would address the question of sub-criteria and the guidance that would be needed to ensure that a true picture of the evaluation criteria is given. Different procurements might require different levels of flexibility in this regard.

¹⁹ Based on article 38 (p) of the 1994 Model Law.

²⁰ Based on article 38 (i) of the 1994 Model Law.

²¹ This opening phrase corresponds to the relevant cross-reference in the provisions of article 23 of the 1994 Model Law, which were deleted in the current draft revised Model Law. The experts consulted by the Secretariat suggested that it might be desirable to reconsider some of the exceptions permitted under article 23 of the 1994 Model Law in cases of domestic procurement.

²² Based on article 38 (j) and (n) of the 1994 Model Law.

²³ Based on article 38 (k) of the 1994 Model Law.

²⁴ Based on article 38 (o) of the 1994 Model Law.

(j) The means by which suppliers or contractors may seek clarifications of the request for proposals;²⁵

(k) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;²⁶

(l) Notice of the right provided under article [61] of this Law to seek review [due to non-compliance with the provisions of this Law] [together with information about duration of a standstill period and, if none will apply, a statement to that effect and reasons therefore];²⁷

(m) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;²⁸

(n) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings[, including those applicable to procurement involving classified information];²⁹

(o) [Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of proposals and to the procurement proceedings.]³⁰ [The desired format and any instructions, including any relevant timetables applicable in respect of the procurement process.]

(7) Where the procuring entity established any minimum requirements pursuant to paragraph (2) of this article, the procuring entity shall examine all proposals received against such requirements, and shall reject each proposal that fails to meet these minimum requirements on the grounds that it is non-responsive. The notice of rejection [and reasons for rejection]³¹ shall be promptly communicated individually and simultaneously to each respective supplier or contractor whose proposal was rejected.

(8) The procuring entity shall invite all suppliers and contractors whose proposals it received and, where applicable, were not rejected as non-responsive pursuant to paragraph (7) of this article, to participate in dialogue on their proposals. The

²⁵ Based on article 38 (q) of the 1994 Model Law.

²⁶ Based on article 38 (r) of the 1994 Model Law.

²⁷ Based on article 38 (t) of the 1994 Model Law and reflecting the proposed amendment to the corresponding provisions in the article applicable to the open tendering (article 33 (w) of the current draft).

²⁸ Based on article 38 (u) of the 1994 Model Law.

²⁹ Based on article 38 (s) of the 1994 Model Law, and reflecting the proposed amendment to the corresponding provisions in the article applicable to the open tendering (article 33 (t) of the current draft).

³⁰ Based on article 38 (v) of the 1994 Model Law.

³¹ The provision in square brackets is linked to the issue of debriefing. The Working Group may recall that it has not yet finally decided the manner in which debriefings should be addressed in the text or the Guide, and may wish therefore to finalize that decision before addressing whether to retain this provision in the text or encourage such a step in the Guide. See, also, the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H.

procuring entity shall ensure that the number of suppliers invited to participate in the dialogue is sufficient to guarantee effective competition, and shall be at least three, if possible.

(9) The dialogue shall be [conducted by the same representatives of the procuring entity, and shall be]³² concurrent.

(10) During the course of the [dialogue/discussions], the procuring entity shall not modify the subject matter of the procurement, nor shall there be any other modification to the description that changes the subject matter of the procurement, nor any modification to [any qualification, or evaluation criterion,] any element of the procurement that is not subject to [dialogue/discussions] as notified in the request for proposals, or to any other terms and conditions of the procurement.³³

(11) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that are communicated by the procuring entity to a supplier or contractor shall be communicated at the same time on an equal basis to all other participating suppliers or contractors, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article 22 of this Law.³⁴

(12) Following the dialogue, the procuring entity shall issue a finalized request for proposals to each participating supplier or contractor, inviting it to submit its best and final offer with respect to all aspects of its proposal. The request shall be in writing, and shall specify the manner, [modalities] and deadline by which offers must be submitted.

(13) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

³² No consensus was reached at the Working Group's sixteenth session as regards advisability of including the text in square brackets in the Model Law as opposed to the Guide (A/CN.9/672, para. 110).

³³ There was no consensus among the experts during consultations held by the Secretariat on the scope of modifications and the issue of consistency with two-stage tendering that is very flexible at this stage. See, for comparison, the greater flexibility as regards modifications at this stage in draft article 39 (4) above and the relevant accompanying footnote. The Working Group may consider whether the degree of flexibility should be conformed, or whether one method should have more flexibility than the other. Two-stage tendering is generally a less flexible method than request for proposals with dialogue (because the latter procedure is intended to facilitate the identification of the best solution for the procuring entity through a high degree of flexibility). Also, in two-stage tendering, the dialogue leads to the issue of a single set of specifications and greater flexibility might be at less risk of abuse as a result. The degree of flexibility that would be needed for specialized procurement such as of advisory services should also be considered, linked to the issue of whether a distinct method would be required for such procurement (see footnote 6 above, and A/CN.9/WG.I/WP.71). The Working Group may also wish to consider this provision in the light of the draft definition of the term "material change" in article 2.

³⁴ The Working Group may recall that article 22 addresses consent to disclosure of the confidential information among suppliers.

Article 44. Request for proposals with consecutive negotiations³⁵

(1) The provisions of article 43 (1) and (3) to (6) of this Law shall apply to procurement conducted by means of request for proposals with consecutive negotiations except to the extent those provisions are derogated from in this article.

(2) Prior to the [publication of the notice soliciting participation in the procurement, or where prequalification or pre-selection is involved, prior to the publication of the invitation to pre-qualify or to pre-selection as appropriate] [the issue of the request for proposals,] the procuring entity shall establish minimum requirements with respect to quality, technical and commercial aspects of proposals, [and any maximum price].³⁶

(3) The procuring entity shall examine the proposals against the applicable minimum requirements and shall reject each proposal that fails to meet these minimum requirements on the grounds that it is non-responsive. The notice of rejection [and reasons therefore] shall be promptly communicated individually and simultaneously to each respective supplier or contractor whose proposal was rejected.

(4) The procuring entity shall rate each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals, and shall:

(a) Invite for negotiations [on the price of its proposal]³⁷ the supplier or contractor that has attained the best rating in accordance with those criteria and procedure; and

(b) Inform other suppliers or contractors that submitted responsive proposals that they may be considered for negotiation if the negotiations with the suppliers or contractors with better ratings do not result in a procurement contract.

(5) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (4)(a) of this article will not result in a procurement contract, the procuring entity shall inform that supplier or contractor that it is terminating the negotiations.

(6) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best rating; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall

³⁵ Based on article 44 of the 1994 Model Law, and the method set out in draft article 43 above. The Working Group may wish to consider when the use of consecutive negotiations is appropriate by reference to the draft conditions for use in chapter II. It may also wish to consider whether the method should be linked to draft article 41 (Request for proposals without negotiations) as in the 1994 Model Law, instead of draft article 43 above as in the current draft.

³⁶ The Working Group may wish to consider whether this reference should be included to accommodate procurement with a fixed budget. See, further, the discussions pertaining to procurement of advisory services in A/CN.9/WG.I/WP.71.

³⁷ The 1994 Model Law permits holding consecutive negotiations only on price (article 44 (b)). Experts consulted by the Secretariat questioned advisability of imposing such a restriction. The Working Group may wish therefore consider whether in this procurement method negotiations should also be permitted on non-price criteria.

invite the other suppliers or contractors for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

(7) During the course of the negotiations, the procuring entity shall not modify the subject matter of the procurement, nor shall there be any other modification to the description that changes the subject matter of the procurement, nor any modification to [any qualification, or evaluation criterion,] any element of the procurement that is not subject to negotiation, as notified in the request for proposals, or to any other terms and conditions of the procurement.³⁸

Section II

Article 45. Competitive negotiations³⁹

(1) In competitive negotiations, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition.

[(2) The procuring entity shall cause a notice of the competitive negotiations to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) [In procurement involving classified information in order to protect classified information]⁴⁰ or in the case of urgency referred to in article 27 (2), the procuring entity shall not be required to employ the procedure set out in paragraph (2) of this article. The procuring entity shall include in the record of the procurement required under article [23] of this Law, a statement of the reasons and circumstances on which it relied to justify its decision not to issue a notice of the competitive negotiations.]⁴¹

(4) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor before or during the negotiations shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

(5) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to submit, by a specified date, a best and final offer with respect to all aspects of their proposals.

³⁸ As regards the issue of flexibility, see footnote 33 above.

³⁹ Based on article 49 of the 1994 Model Law, with the addition of a notice requirement suggested to be included further to the results of the Secretariat's consultations with experts. The Working Group may wish to consider when the use of competitive negotiations is appropriate by reference to the draft conditions for use in chapter II.

⁴⁰ The opening wording was added pursuant to the instructions at the Commission's forty-second session to the Secretariat to prepare drafting suggestions for consideration by the Working Group that would accommodate sensitive type of procurement, by envisaging in particular special measures for protection of classified information in this type of procurement (A/64/17, paras. 264-265).

⁴¹ Paragraphs (2) and (3) are suggested to be added further to the results of the Secretariat's consultations with experts.

(6) The successful offer shall be the offer that best meets the needs of the procuring entity.

Article 46. Single-source procurement

(1) In the circumstances set out in article [29], the procuring entity may solicit a proposal or price quotation from a single supplier or contractor.

[(2) The procuring entity shall cause a notice of the single-source procurement to be published in ... (each enacting State specifies the official gazette or other official publication in which the notice is to be published).

(3) [In procurement involving classified information in order to protect classified information]⁴² or in the case of urgency referred to in article 29 (b), the procuring entity shall not be required to employ the procedure set out in paragraph (2) of this article. The procuring entity shall include in the record of the procurement required under article [23] of this Law, a statement of the reasons and circumstances on which it relied to justify its decision not to issue a notice of the competitive negotiations.]⁴³

⁴² The opening wording was added pursuant to the instructions at the Commission's forty-second session to the Secretariat to prepare drafting suggestions for consideration by the Working Group that would accommodate sensitive type of procurement, by envisaging in particular special measures for protection of classified information in this type of procurement (A/64/17, paras. 264-265).

⁴³ Paragraphs (2) and (3) are suggested to be added further to the results of the Secretariat's consultations with experts.

A/CN.9/WG.I/WP.71/Add.6 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its seventeenth session****ADDENDUM**

This note sets out a proposal for chapter VI (Electronic reverse auctions) of the revised Model Law, comprising articles 47 to 52.

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER VI. ELECTRONIC REVERSE AUCTIONS**Article 47. Procedures for soliciting participation in procurement involving the use of electronic reverse auctions¹**

(1) Subject to article 16,² where an electronic reverse auction is to be used as a stand-alone procurement method, the procuring entity shall solicit bids through open solicitation.

(2) Where an electronic reverse auction is to be used in other methods of procurement, as appropriate, the procuring entity shall notify suppliers and contractors when first soliciting their participation in the procurement proceedings that an electronic reverse auction will be held.

Article 48. Contents of the notice of the electronic reverse auction³

(1) The notice of the electronic reverse auction shall include, at a minimum, the following information:

(a) In addition to the information required under article 11 (4), the mathematical formula to be used in the evaluation procedure and an indication of any criteria that cannot be varied during the auction;

(b) How the electronic reverse auction can be accessed, and information about the electronic equipment being used and technical specifications for connection;

¹ The article was revised further to the introduction of the definition "open solicitation".

² Phrase inserted in lieu of specific reference to prequalification information in article 48, to ensure consistency with other procurement methods.

³ This article was restructured to clearly differentiate information that should be included in any notice of ERA (whether stand-alone or connected to another procurement method) from information that is specific in the context of the notice of a stand-alone ERA.

(c) The manner and, if already determined, deadline by which the suppliers and contractors shall register to participate in the auction;

(d) Criteria governing the closing of the auction and, if already determined, the date and time of the opening of the auction;

(e) 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

(f) 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 notice of an electronic reverse auction to be used as a stand-alone procurement method shall in addition include:

(a) Information referred to in article [31 (a), (d) and (e), and article 33 (d), (f), (h) to (j) and (t) to (y)];

(b) A number of suppliers or contractors to be invited to the auction where the procuring entity decides to impose a minimum and/or maximum number, provided that in doing so the procuring entity has satisfied itself that it would ensure that effective competition and fairness are maintained. Where the maximum is imposed, the notice of an electronic reverse auction shall also include the criteria and procedure that will be followed in selecting the maximum number of suppliers or contractors;⁴

(c) An invitation to present initial submissions together with information referred to in articles [31 (f) to (j) and 33 (a), (k) to (s) and (z)] where the procurement contract is awarded on the basis of the lowest evaluated bid,⁵ or where the procuring entity decides that the electronic reverse auction shall be preceded by examination of initial submissions.

Article 49. Invitation to participate in the electronic reverse auction⁶

(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 [48 (2) (b)], the procuring

⁴ The Working Group may wish to ensure consistency between this provision and the provisions on pre-selection in proposed article 39.

⁵ The Guide will explain that in such case, the electronic reverse auction shall always be preceded by a full examination and evaluation of initial submissions in accordance with the criteria to be used by the procuring entity in determining the successful bid and the relative weight of such criteria, as specified in accordance with article [11] and as set out in the notice of the electronic reverse auction.

⁶ The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222). Some changes were required to be made in the light of revisions made in other provisions of the draft Model Law.

entity shall send an invitation to participate in the auction individually and simultaneously to each supplier or contractor selected corresponding to the number,⁷ and in accordance with the criteria and procedure, specified in the notice of the electronic reverse auction.

(3) Where prequalification took place in accordance with article [16,] the procuring entity shall send the invitation to participate in the auction individually and simultaneously to each pre-qualified supplier or contractor.

(4) Where the auction has been preceded by examination or full evaluation of initial submissions, the procuring entity shall:

(a) Promptly notify each supplier or contractor concerned whether or not its initial submission is responsive. [Where a supplier or contractor's initial submission is not responsive, and is accordingly rejected in accordance with article [37 (3)], the procuring entity shall, upon request, promptly communicate to the supplier or contractor concerned the grounds upon which its initial submission was considered to be non-responsive;]⁸

(b) Send an invitation to participate in the auction individually and simultaneously to each supplier or contractor whose initial submission was responsive. The invitation shall be accompanied by the outcome of the examination and evaluation of the initial submission of the supplier or contractor concerned.⁹

(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.

⁷ The Guide will explain that, if there are fewer participants than the maximum permitted number, all qualified must be invited to participate.

⁸ The Working Group may recall that it has not yet finally decided the manner in which debriefings should be addressed in the text or the Guide, and may wish therefore to finalise that decision before addressing whether to retain this sentence in the text or encourage such a step in the Guide. Consistency is required because the auction procedure may take place as a phase in other procurement methods, which do not contain debriefing obligations. See, also, the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H.

⁹ The Guide will address the extent of the information on the outcome of the full evaluation that should be provided.

Article 50. Registration to participate in the electronic reverse auction and timing of holding of the auction¹⁰

- (1) The fact of the registration to participate in the auction shall be promptly confirmed individually to each registered supplier or contractor.
- (2) If the number of suppliers or contractors registered to participate in the auction is in the opinion of the procuring entity insufficient to ensure effective competition, the procuring entity may cancel the electronic reverse auction. The fact of the cancellation of the auction shall be promptly communicated individually to each registered supplier or contractor.
- (3) The auction shall not take place before expiry of adequate time after the notice of the electronic reverse auction has been issued or, where invitations to participate in the auction are sent, from the date of sending the invitations to all suppliers or contractors concerned. This time shall be sufficiently long to allow suppliers or contractors to prepare for the auction, taking into account the reasonable needs of the procuring entity.¹¹

Article 51. Requirements during the auction¹²

- (1) The electronic reverse auction shall be based on:
 - (a) Price, where the procurement contract is to be awarded to the lowest priced bid; or
 - (b) Prices and other criteria to be used by the procuring entity in determining the successful bid, specified in accordance with article [11] and as set out in the notice of the electronic reverse auction, where the procurement contract is to be awarded to the lowest evaluated bid.
- (2) During an electronic reverse auction:
 - (a) All bidders shall have an equal and continuous opportunity to present their bids;
 - (b) There shall be automatic evaluation of all bids in accordance with the criteria and other relevant information included in the notice of the electronic reverse auction;
 - (c) Each bidder must instantaneously and on a continuous basis during the auction receive sufficient information allowing it to determine the standing of its bid vis-à-vis other bids;¹³

¹⁰ The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222).

¹¹ The words “taking into account the reasonable needs of the procuring entity” were added to ensure consistency with other similar provisions of the Model Law (see, e.g., articles 16 (3) (i) and 34 (1) of this draft).

¹² The Working Group, at its fifteenth session, approved the article without change (A/CN.9/668, para. 222). Some changes were made in the light of revisions subsequently made in other provisions of the draft Model Law.

¹³ The Working Group, at its fifteenth session, approved the subparagraph without change but agreed that the Guide would highlight the risks of collusion that might arise where information

(d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in subparagraphs (a) and (c) of this paragraph.

(3) The procuring entity shall not disclose the identity of any bidder during the auction.

(4) The auction shall be closed in accordance with the criteria specified in the notice of the electronic reverse auction.

(5) The procuring entity shall suspend or terminate the electronic reverse auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the electronic reverse auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.

Article 52. Requirements after the auction¹⁴

(1) The bid ascertained at the closure of the auction to be the lowest priced bid or the best¹⁵ evaluated bid, as applicable, shall be the successful bid.

(2) Whether or not it has engaged in prequalification proceedings pursuant to article [16], the procuring entity may require the bidder presenting the bid that has been found at the closure of the auction to be the successful bid to demonstrate again its qualifications in accordance with criteria and procedures conforming to the provisions of article [9]. If the bidder fails to do so, the procuring entity shall reject that bid and, without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)], [shall][may] select the bid that at the closure of the auction was the next lowest priced or next best evaluated bid, provided that the bidder that presented that bid can demonstrate its qualifications if required to do so.

(3) Where it has not examined initial submissions prior to the auction, the procuring entity shall assess after the auction the responsiveness of the bid that at the closure of the auction has been found to be the successful bid. The procuring entity shall reject the bid if that bid is found to be unresponsive and, without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)], [shall][may] select the bid that at the closure of the

about other bids is provided, and would provide examples of existing good practice to mitigate these risks.

¹⁴ The Working Group, at its fifteenth session, approved the article subject to the consideration at a later stage of the use of the term “the best evaluated bid” in place of the term “the lowest evaluated bid” (A/CN.9/668, para. 222). See the footnote immediately below.

¹⁵ At the Working Group’s fifteenth session, it was suggested that the term “the lowest evaluated bid” should be replaced with the term “the best evaluated bid”, since in practice it was the highest or the best, not the lowest, evaluated bid that was accepted. The Working Group deferred the consideration of the issue to a later stage (A/CN.9/668, paras. 220 and 222). The informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, supported the use of the term “best” rather than the term “lowest,” with the Guide to Enactment carefully explaining the meaning of the term “best” in the special circumstances of reverse auctions.

auction was the next lowest priced or next best evaluated bid, provided that that bid is found to be responsive.

(4) The procuring entity may engage in procedures described in article [18] if the bid that at the closure of the auction has been found to be the successful bid gives rise to concerns as to the ability of the bidder that presented that bid to perform the procurement contract. If the procuring entity rejects the bid on the grounds specified in article [18], it [shall][may] select the bid that at the closure of the auction was the next lowest priced or next best evaluated bid. This provision is without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)].

A/CN.9/WG.I/WP.71/Add.7 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its seventeenth session****ADDENDUM**

This note sets out a proposal for chapter VII (Framework agreements procedures) of the revised Model Law, comprising articles 53 to 60.

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER VII. FRAMEWORK AGREEMENTS PROCEDURES¹**Article 53. Conditions for use of a framework agreement procedure²**

(1) A procuring entity may engage in a framework agreement procedure in accordance with this chapter where it determines that:

(a) The need for the subject matter of the procurement is expected to arise on a [repeated or indefinite]³ basis during a given period of time; or

(b) By virtue of the nature of the subject matter of the procurement, the need for it may arise on an urgent basis during a given period of time; or

¹ At the Working Group's fifteenth session, the view was expressed that it might be necessary to allow for negotiated procedures subsequent to the conclusion of the framework agreements. It was suggested that drafting of the provisions allowing for negotiations in the context of framework agreements should be undertaken together with chapter V. The Working Group agreed with these suggestions (A/CN.9/668, para. 224).

² The Working Group, at its fifteenth session, agreed to remove to article 2 the definitions proposed to be included in this article in the note by the Secretariat (A/CN.9/WG.I/WP.66/Add.4) (A/CN.9/668, paras. 229 and 273 (f)). The Working Group deferred the consideration of other revisions proposed to be made to the draft article to a later stage (A/CN.9/668, para. 229).

³ One of the issues deferred by the Working Group was a proposal presented at the fifteenth session to reconsider the inclusion and extent of conditions for use (A/CN.9/668, paras. 227-229). The alternatives in square brackets were provided by participants at the session to the Secretariat, for further consideration by the Working Group, with the comment that the term "indefinite" indicates unknown timing and/or unknown quantities. The informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, recommended that the Guide to Enactment should explain that a procuring entity should offer estimates of future quantities in the solicitation documents, in part to guide prospective vendors as to the government's likely requirements. The Guide to Enactment should also explain why the Model Law refers to indefinite quantities, e.g., because it is possible that an item may be ordered only once.

[(c) Other grounds and circumstances that justify recourse to a framework agreement procedure.]⁴

(2) The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify the recourse to a framework agreement procedure and the type of framework agreement selected.⁵

Article 54. Information to be specified when first soliciting participation in a framework agreement procedure⁶

When first soliciting the participation of suppliers or contractors in a framework agreement procedure, the procuring entity shall specify:

(a) The name and address of the procuring entity [that will award the framework agreement and the name and address of any other procuring entities that will have the right to award procurement contracts under the framework agreement];⁷

(b) That the procurement will be conducted as a framework agreement procedure;

(c) The type of the framework agreement to be concluded — a closed or open framework agreement; if closed, whether it is with or without second-stage competition; and, if closed without second-stage competition, whether it is to be concluded with one or more than one supplier or contractor;

(d) All minimum information required to be included in the framework agreement in accordance with article [57] or [59], as applicable;

(e) In framework agreements with more than one supplier or contractor, any minimum or maximum number of suppliers or contractors that will be parties to the framework agreement;

⁴ At the Working Group's fifteenth session, it was alternatively suggested that an additional open-ended subparagraph (c) could be included, which would allow the procuring entity to have recourse to framework agreement procedures subject to the justification of its decision in the record of the procurement proceedings (A/CN.9/668, para. 228). The informal drafting party, July 2009, recommended that the Guide to Enactment should give examples of what these circumstances might be.

⁵ At the Working Group's fifteenth session, it was suggested that all provisions in this chapter referring to the record of procurement proceedings should be consolidated for further consideration at a later date (A/CN.9/668, para. 229). The Secretariat consolidated as many of the provisions in this paragraph that the context would allow. The understanding is that their content will eventually be also reflected in an article on the record of procurement proceedings (article 23 of the proposed revised Model Law).

⁶ The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 233).

⁷ Proposed wording by the informal drafting party, July 2009. It was explained that the proposed language was offered so that framework agreements can be used by other agencies, and not only by the procuring entity that entered into the framework agreement. This approach — centralized procurement facilitated by framework agreements — makes it easier to consolidate government demand, and thus to increase the government's negotiating leverage in the marketplace.

(f) The procedures and criteria to be used by the procuring entity in the selection of the parties to the framework agreement; in the case of closed framework agreements, in addition any evaluation criteria, their relative weight and the manner in which they will be applied in the selection and whether the selection will be based on the lowest price or [lowest] [best]⁸ evaluated submission;

(g) In closed framework agreements procedures, the information referred to in article 31 (e)-(j) and article 33 (a)-(c) and (g)-(z), unless such information will be established in a second-stage competition.

Article 55. No material change during the operation of the framework agreement⁹

During the operation of the framework agreement, no material change in the procurement shall be permitted.

Article 56. Selection of the party or parties to a closed framework agreement

(1) The procuring entity shall select the party or parties to a closed framework agreement with a procuring entity:

(a) By means of open tendering proceedings in accordance with provisions of chapter III of this Law except to the extent that those provisions are derogated from in this article and article [57]; or

(b) By means of a method of procurement of chapter IV under the conditions of article [26] of this Law and in accordance with the relevant provisions of chapter IV except to the extent that those provisions are derogated from in this article and article [57];

(c) In the case of a framework agreement concluded with one supplier or contractor, in addition to the methods of procurement specified in subparagraphs (a) and (b) of this paragraph, by means of single-source procurement under the conditions set out in article [29 (a) and (c) to (e)].

(2) The procuring entity shall include in the record required under article 23 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of any method of procurement other than tendering for the selection of the party or parties to a closed framework agreement with the procuring entity.

(3) The procuring entity shall select the supplier(s) or contractor(s) with which to enter into the framework agreement on the basis of the specified selection criteria, including the relative weights of such criteria and the manner of their application.

⁸ The informal drafting party, July 2009, recommended referring to the “best evaluated submission”.

⁹ The Working Group, at its fifteenth session, agreed to remove to article 2 the definition of “material change” proposed to be included in this article in the note by the Secretariat (A/CN.9/WG.I/WP.66/Add.4) (A/CN.9/668, paras. 235-237 and 273 (f)). The Working Group deferred the consideration of the revised draft article (A/CN.9/668, paras. 235-237).

The procuring entity shall promptly notify the selected supplier(s) or contractor(s) of their selection.¹⁰

Article 57. Minimum requirements of closed framework agreements¹¹

(1) A closed framework agreement may be concluded between the procuring entity and one supplier or contractor or more than one supplier or contractor.¹²

(2) A closed framework agreement shall be concluded in writing and shall set out:

(a) The duration of the framework agreement, which shall not exceed [the enacting State specifies a maximum] years;¹³

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement established when the framework agreement is concluded;

(c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;

(d) Whether in a closed framework agreement concluded with more than one supplier or contractor there will be a second-stage competition to award a procurement contract under the framework agreement¹⁴ and, if so:

(i) A statement of the terms and conditions that are to be established or refined through second-stage competition;

(ii) The procedures for and the possible frequency¹⁵ of any second-stage competition and envisaged deadlines for submission of second-stage tenders;¹⁶

¹⁰ The Working Group may wish to consider whether, in the light of the strengthened review provisions, the paragraph should also provide for debriefing of suppliers or contractors that were not selected. See in this context the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H. The informal drafting party, July 2009, recommended that the Guide to Enactment should state that debriefing is a best practice, and that debriefings are a best practice at both stages of frameworks agreements procedures (at the time the framework agreement is awarded, and at the time contracts are awarded under an existing framework agreement).

¹¹ The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 245).

¹² The paragraph was revised further to a suggestion at the Working Group's fifteenth session that the reference to a defined number should be deleted, and a decision on any required number left to an enacting State (A/CN.9/668, para. 243).

¹³ At the Working Group's fifteenth session, it was agreed that this provision should be accompanied with the provisions in the Guide highlighting the danger of closed framework agreements of long duration, in the light of their potentially anticompetitive nature (A/CN.9/668, para. 244).

¹⁴ The provision has been redrafted to avoid giving the impression that all multi-supplier agreements must involve second-stage competition.

¹⁵ At the Working Group's fifteenth session, it was agreed that the reference to the "envisaged frequency" should be replaced with a reference to the "possible frequency" (A/CN.9/668, para. 240).

- (iii) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or [lowest] [best] evaluated tender [...];
 - (iv) Evaluation procedures and criteria, including the relative weight of such criteria and the manner in which they will be applied, in accordance with article [11] of this Law, during any second-stage competition. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second-stage competition, provided that any such variation does not lead to the material change in the procurement.
- (3) A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless:
- (a) The procuring entity determines that it is in the interests of either party that separate agreements with each supplier or contractor party to the framework agreement be concluded; and
 - (b) The procuring entity includes in the record required under article [23] a statement of the reasons and circumstances on which it relied to justify the conclusion of separate agreements; and
 - (c) Any variation in the terms and conditions of the separate agreements for a given procurement is minor, of a non-material nature and concerns only those provisions that justify the conclusion of separate agreements.
- (4) If the procuring entity is to maintain a closed framework agreement electronically, the framework agreement shall in addition to information specified elsewhere in this article contain all information necessary to allow the effective operation of the electronic framework agreement, including information on how the electronic framework agreement and notifications of forthcoming procurement contracts under the framework agreement can be accessed, the electronic equipment being used, and technical specifications for connection.

¹⁶ At the Working Group's fifteenth session, the view was expressed that information about tentative deadlines within which second-stage submissions would have to be presented was to be disclosed to suppliers or contractors in advance. That information was considered to be important for suppliers or contractors to decide whether to become parties to the framework agreement. The suggestion was made that the issue should be addressed in the context of proposed article 54 (g) to the extent it was not already covered, with explanation in the Guide that information provided was intended to be indicative rather than binding on the procuring entity (A/CN.9/668, para. 248). The Working Group may wish to consider that this type of information would most likely in practice be included in the framework agreement itself rather than in the solicitation notice. Since in accordance with the proposed article 54 (d), the minimum content of the framework agreement is to be disclosed at the outset of the procurement proceedings, the Working Group may wish to include the relevant information in the present subparagraph rather than in proposed article 54 (g).

Article 58. Selection of parties to an open framework agreement procedure¹⁷

(1) The procuring entity shall establish and maintain an open framework agreement in electronic form.

(2) An open framework agreement shall be established by means of open solicitation. For the first solicitation of participation in the open framework agreement, the procuring entity shall issue a notice of the open framework agreement procedure that shall contain the information specified in article [54].

(3) The procuring entity shall, during the period of operation of the open framework agreement, either:

(a) Republish as frequently as practicable, but at least once annually, the initial notice of the open framework agreement procedure, a notice of the award of a framework agreement and an invitation to present further submissions to become a party to the framework agreement, in the publication or publications in which the initial notice of the open framework agreement procedure was published; or

(b) Maintain a copy of the published information at the website or other electronic address set out in the initial notice of the open framework agreement procedure.

(4) Suppliers and contractors may apply to become a party or parties to the open framework agreement at any time during its operation by presenting their submissions to the procuring entity in compliance with the requirements of the notice of the open framework agreement procedure.

(5) The procuring entity shall examine all such submissions to become a party to the framework agreement received during the period of its operation within a maximum of [...] days in accordance with the procedures set out in the notice of the open framework agreement procedure.

(6) The framework agreement shall be concluded with all suppliers or contractors unless their submissions were rejected in accordance with article [37 (3)] of this Law.

(7) The procuring entity may set out a maximum number of parties to the open framework agreement because of technical or other capacity limitations. The procuring entity shall provide information about the imposition of such a maximum and the maximum number in accordance with article 54 of this Law. The procuring entity shall include a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum in the record required under article [23] of this Law.

(8) The procuring entity shall promptly notify the suppliers or contractors whether they have been selected to be parties to the framework agreement.¹⁸

¹⁷ The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 250-253).

¹⁸ The Working Group may wish to consider whether, in the light of the strengthened review provisions, the paragraph should also provide for debriefing of suppliers or contractors that

Article 59. Minimum requirements as regards open framework agreements¹⁹

(1) An open framework agreement shall provide for second-stage competition for the award of a procurement contract under the agreement and shall in addition contain at a minimum:

(a) The description of the subject matter of the procurement and all other terms and conditions of the procurement known when the open framework agreement is established;

(b) Any terms and conditions that may be refined through second-stage competition;

(c) The language or languages of the open framework agreement and all information about the electronic operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts under the agreement can be assessed, electronic equipment used and the technical arrangements and specifications;

(d) If any limitation on a number of suppliers or contractors that are parties to the agreement is imposed, a maximum number of suppliers or contractors that may enter into the framework agreement;

(e) The terms and conditions for suppliers or contractors to be admitted to the open framework agreement, including:

(i) An explicit statement that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation, subject to any maximum number of suppliers, if any;

(ii) The information specified in article 31 (e), and article 33 (b), (c), (t), (u), (w) and (z); and

(iii) Instructions for preparing and submitting indicative tenders, including the information referred to in article 33 (i) to (k);

(f) The procedures and the possible frequency of second-stage competition;

(g) Whether the award of a procurement contract under the framework agreement will be based on the lowest price or [best] [lowest] evaluated tender;

(h) The evaluation procedures and criteria to be applied during the second-stage competition, including the relative weight of the evaluation criteria and the manner in which they will be applied, in accordance with article [11] of this Law. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second-stage competition, provided that any such variation does not lead to the material change in the procurement;

were not selected. See in this context the relevant discussion in a note by the Secretariat A/CN.9/WG.I/WP.68/Add.1, under section H.

¹⁹ The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, para. 254).

(i) The duration of the framework agreement.²⁰

(2) The procuring entity shall, during the entire period of operation of the open framework agreement, ensure unrestricted, direct and full access to the specifications and terms and conditions of the open framework agreement and to any other necessary information relevant to its operation.

Article 60. Second stage of a framework agreement procedure²¹

(1) The award of any procurement contract under a framework agreement shall be effected in accordance with its terms and conditions and the provisions of this article.

(2) No procurement contract under the closed framework agreement shall be awarded to suppliers or contractors that were not originally parties to the closed framework agreement.

(3) (a) Each anticipated procurement contract under a closed framework agreement with the second-stage competition and an open framework agreement shall be the subject of a written invitation to tender;

(b) The procuring entity [for the procurement contract]²² shall invite all suppliers or contractors that are parties to the framework agreement, or only those then capable of meeting the needs of that procuring entity in the subject matter of the procurement, to present their tenders;

(c) The invitation to tender shall:

(i) Restate the existing terms and conditions of the framework agreement to be included in the anticipated procurement contract, set out the terms and conditions that are to be subject to the second-stage competition and provide further detail of the terms and conditions where necessary;

(ii) Restate the procedures and selection criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application), and include the information referred to in article 33 (q) to (s) and (x) to (z) of this Law;

(iii) Set out instructions for preparing second-stage tenders, including information specified in article 33 (g) to (p) of this Law;

(iv) Fix the manner, [modalities] and deadline for the submission of tenders. The deadline for the submission of tenders shall be expressed as a specific date and time and allow sufficient time for suppliers or contractors to prepare and

²⁰ The Working Group, at its fifteenth session, agreed to add the reference to the duration of the framework agreement in this article (A/CN.9/668, para. 254).

²¹ The Working Group, at its fifteenth session, agreed to merge draft articles addressing second-stage procedures in closed and open framework agreements. With this change, it approved the substance of the draft article (A/CN.9/668, paras. 247 and 255).

²² Amendment proposed by the informal drafting party, July 2009, to ensure consistency with the changes proposed for article 54 (a) above, to allow a centralized procurement entity to enter into a framework agreement that can be used by other agencies to enter into procurement contracts.

submit their tenders, taking into account the reasonable needs of the procuring entity [for the procurement contract];^{23, 24}

(d) The procuring entity [for the procurement contract] shall evaluate all tenders received and determine the successful tender in accordance with the evaluation criteria and the procedures set out in the invitation to tender;

(e) The procuring entity [for the procurement contract] shall accept the successful tender in accordance with article 20.²⁵

(4) The procuring entity [for the procurement contract] shall promptly notify in writing all suppliers or contractors that are parties to the framework agreement of the award of the contract, the name and address of the supplier or contractor to whom the notice has been issued and the contract price.²⁶

²³ Amendment proposed by the informal drafting party, July 2009.

²⁴ The provisions of the paragraph were revised to make them technologically neutral and consistent with similar provisions in other articles of this proposed revised Model Law.

²⁵ To be reviewed in the light of the pending decision of the Working Group with respect to draft article 20 (11), in particular as regards the advisability of providing for a standstill period at the stage of the award of procurement contracts under framework agreements (A/CN.9/668, paras. 141-144).

²⁶ Ibid.

A/CN.9/WG.I/WP.71/Add.8 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL
Model Law on Procurement of Goods, Construction and Services
— a revised text of the Model Law, submitted to the Working
Group on Procurement at its seventeenth session****ADDENDUM**

This note sets out a proposal for chapter VIII (Review) of the revised Model Law, comprising articles 61 to 66.

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER VIII. REVIEW**Article 61. Right to review¹**

Any supplier or contractor that claims to have suffered, or that may suffer, loss or injury due to non-compliance with the provisions of this Law² may seek review in accordance with articles 62 to 66 and challenge in appropriate bodies in accordance with applicable law any decisions taken as a result of such a review.

**Article 62. Review by the procuring entity or the
approving authority³**

(1) Without prejudice to the right of suppliers or contractors to seek directly review before an independent administrative body in accordance with article 63 of this Law, a supplier or contractor entitled under article 61 to seek review may

¹ The Working Group, at its fifteenth session, approved the draft article without change (A/CN.9/668, para. 257). An informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, recommended that the Guide to this article should amplify that article 17 of the Model Law would explicitly exempt a procuring entity from monetary liability for cancelling a procurement. The Working Group may wish to consider this recommendation in the light of the wording of article 17 that will be eventually agreed upon.

² The Working Group may wish to consider the suggestion of experts during consultations with the Secretariat that the scope of this provision is too limited, and should be expanded to include the denial of a fair opportunity to compete.

³ The Working Group, at its fifteenth session, approved the article as revised at that session (A/CN.9/668, paras. 259-260). In particular, it was agreed that the provisions should not fix any deadlines in terms of a specific number of days but leave this information in square brackets to be filled in by an enacting State. It was also agreed that the Guide should in this respect bring to the attention of enacting States the time period specified in the WTO Agreement on Government Procurement.

submit a complaint to the procuring entity or where applicable to the approving authority.⁴ The complaints shall be submitted in writing provided that:

(a) Complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting the submissions;

(b) All other complaints arising from the procurement proceedings shall be submitted before the entry into force of the procurement contract within [...] days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(2) Unless the complaint is resolved by mutual agreement of the parties, the procuring entity or the approving authority as appropriate shall, within [...] days after the submission of the complaint, issue a written decision. The decision shall:

(a) State the reasons for the decision; and

(b) If the complaint is upheld in whole or in part, state the corrective measures that shall be undertaken.

(3) If the procuring entity or the approving authority does not issue a decision by the time specified in paragraph (2) of this article, the supplier or contractor submitting the complaint or the procuring entity as the case may be is entitled immediately thereafter to institute proceedings under article 63 or 66. Upon the institution of such proceedings, the competence of the procuring entity or the approving authority to entertain the complaint ceases.

Article 63. Review before an independent administrative body^{*, 5}

(1) A supplier or contractor entitled under article 61 to seek review may submit a complaint to [insert name of administrative body].⁶

⁴ The paragraph was redrafted further to the suggestion at the Working Group's fifteenth session to make the provisions of the proposed article less ambiguous as regards the optional nature of the review under article 62 (A/CN.9/668, para. 259).

^{*} States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit this article and provide only for judicial review (article 66), on the condition that in the enacting State exists an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption.

⁵ The Working Group, at its fifteenth session, approved the draft article as revised at that session subject to further consideration of an outstanding issue (see the footnote immediately below) (A/CN.9/668, para. 265). It was agreed to clarify in the Guide in the context of this article the meaning of the term "independent administrative body," in particular whether the body should be composed of outside experts. It was noted that the Guide might highlight the disruptions to the procurement proceedings if decision-taking at the review stage lacked independence since decisions would be subject to appeal and would cause further delays (A/CN.9/668, para. 262 (g)).

⁶ As suggested by experts during consultations with the Secretariat, the Guide to Enactment will draw a clear distinction between this review procedure and a debriefing procedure.

(2) The complaints shall be submitted in writing within [...] days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or of when that supplier or contractor should have become aware of those circumstances, whichever is earlier, provided that the complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting submissions.

(3) The [timely] submission of a complaint under article 62 shall suspend the time period for submission of a complaint under this article for the whole duration of the actual proceedings under article 62 up to the maximum period required for the procuring entity or the approving authority as the case may be to take a decision in accordance with article 62 (2) and communicate such decision to the supplier or contractor in accordance with article 65 (3).⁷

(4) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity and to the approving authority where applicable.

(5) The [insert name of administrative body] may grant one or more of the following remedies, unless it dismisses the complaint:

(a) Declare the legal rules or principles that govern the subject matter of the complaint;⁸

(b) Prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) Require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) Annul in whole or in part an unlawful act or decision of the procuring entity;

(e) Revise an unlawful decision by the procuring entity or substitute its own decision for such a decision;⁹

(f) [Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity, and for any loss or damages suffered, which [may] [shall] be limited to [either] costs for the preparation of the submission or [protest]

⁷ As suggested by experts during consultations with the Secretariat, the Guide to Enactment will explain that this suspension of time limits is not the suspension of the procurement procedure referred to in article 65.

⁸ At the Working Group's fifteenth session, in response to the suggestion that paragraph (5) (a) should be included in the chapeau of the paragraph, the Secretariat was requested to research the drafting history of the provisions. The Working Group decided to defer the consideration of the suggestion until after the findings of the Secretariat were considered (A/CN.9/668, para. 264). The results of the requested research were set out in a note by the Secretariat A/CN.9/WG.I/WP.68, under section D.

⁹ The Working Group may wish to revise the wording of this subparagraph to include a reference to corrective action, which is the term used in both the WTO Agreement on Government Procurement (1994) (the GPA) and the provisionally agreed text of the revised WTO Agreement on Government Procurement (the draft revised GPA).

[the costs relating to the challenge, or both];]¹⁰ [Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of any unlawful act or decision of, or procedure followed by, the procuring entity;]¹¹

(g) Order that the procurement proceedings be terminated;

(h) Annul the procurement contract that entered into force unlawfully and, if notice of the procurement contract award has been published, order the publication of notice of the annulment of the award.

(6) The [insert name of administrative body] shall within [...] days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(7) The decision shall be final unless an action is commenced under article 66.

Article 64. Certain rules applicable to review proceedings under articles 62 and 63¹²

(1) Promptly after the submission of a complaint under article 62 or article 63, the review body shall notify all suppliers or contractors participating in the procurement proceedings¹³ to which the complaint relates as well as any governmental authority

¹⁰ The Working Group, at its fifteenth session, agreed to retain in paragraph (5) (f) option I only, the wording of which should be aligned with the relevant provisions of international instruments, such as article XX (7) (c) of the GPA and article XVIII (7) (b) of the draft revised GPA. The Working Group further agreed to move option II from paragraph (5) (f) to the Guide with the explanations of the reasons for removing it, in particular that allowing for compensation of anticipatory losses proved to be highly disruptive for procurement proceedings since it provided additional incentives for complaints. It was also suggested that the Guide should explain evolution in regulations on this matter and highlight the relevant provisions of the WTO instruments. For the reasons set out in a note by the Secretariat A/CN.9/WG.I/WP.68, section C, the Secretariat faced difficulties with the implementation of the Working Group's instructions. The Working Group may wish to consider the wording proposed in this pair of square brackets together with the considerations raised in the referred note by the Secretariat. The words put in this pair of square brackets also reflect the different wording in article XX (7) (c) of the GPA and article XVIII (7) (b) of the draft revised GPA.

¹¹ The proposed wording of the informal drafting party, July 2009, based on option I from the 1994 Model Law. The suggested wording was accompanied by an explanatory note stating that, per the decision of the Working Group at its February 2009 session, option II from the 1994 Model Law is to be moved "from paragraph 5 (f) to the Guide to Enactment with the explanations of the reasons for removing it, in particular that allowing for compensation of anticipatory losses proved to be highly disruptive for procurement proceedings since it provided additional incentives for complaints." (A/CN.9/668, paragraph 262 (f)). Moving option II to the Guide would leave it to the enacting State to allow for broader damages, if the enacting State so decided.

¹² The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 267-268).

¹³ At the Working Group's fifteenth session, it was agreed to clarify in the Guide that the term "participating in the procurement proceedings" could include a different pool of participants depending on the timing of the review proceedings and subject of the complaint, and further to specify that those whose submissions were rejected might not have the right to participate in the

whose interests are or could be affected of the submission of the complaint and of its substance.

(2) Any such supplier or contractor or governmental authority has the right to participate in the review proceedings. A supplier or contractor or the governmental authority that fails to participate in the review proceedings is barred from subsequently making the same type of claim.

(3) The participants to the review proceedings shall have access to all proceedings and shall have the right to be heard prior to a decision of the review body being made on the complaint, the right to be represented and accompanied, [and the right to request that the proceedings take place in public]¹⁴ and that witnesses be presented. No information shall be disclosed if its disclosure would be contrary to law, or would impede law enforcement, or would not be in the public interest, or would prejudice legitimate commercial interests of the suppliers or contractors or would impede fair competition.¹⁵

(4) In the cases of the review by the approving authority or the [insert name of administrative body], the procuring entity shall provide timely to the review body all the documents pertinent to the complaint, including the record of the procurement proceedings, provided, however, there should be appropriate protections in place to ensure that no information will be disclosed to those outside the review process, if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition or would compromise essential national security or essential national defence.¹⁶

(5) A copy of the decision of the review body shall be furnished within [...] days after the issuance of the decision to the participants to the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede

review proceedings if the latter concerns the stages in the procurement proceedings subsequent and not related to the rejection (A/CN.9/668, para. 267 (c)).

¹⁴ The informal drafting party, July 2009, proposed putting these words in square brackets for further consideration, in particular in order to accommodate concerns regarding national defence and security and other grounds justifying exemptions of information from public disclosure.

¹⁵ The Working Group, at its fifteenth session, agreed to consider including in paragraphs (3) and (4) exceptions to disclosure on the basis of confidentiality, with the Guide explaining that considerations of confidentiality should not impair a fair trial and a fair hearing (A/CN.9/668, para. 267 (b)). The paragraph was redrafted accordingly by the addition of the second sentence. The provisions added should be considered together with similar provisions in other articles of the proposed revised Model Law, such as draft article 20 (2) (b). At its fifteenth session, the Working Group deferred the consideration of the possible exceptions to the disclosure (A/CN.9/668, para. 131).

¹⁶ This paragraph has been revised pursuant to the agreement at the Working Group's fifteenth session to remove the ambiguity in reference to "relevant documents" and to include in the paragraph exceptions to disclosure on the basis of confidentiality, with the Guide explaining that considerations of confidentiality should not impair a fair trial and a fair hearing (A/CN.9/668, para. 267 (a) and (b)). See the immediately preceding footnote for the issues related to the confidentiality provisions.

fair competition or would compromise essential national security or essential national defence.¹⁷

(6) Any decision by the review body and the reasons and circumstances therefore shall be made part of the record of the procurement proceedings.

Article 65. Suspension of procurement proceedings¹⁸

(1) The [timely] submission of a complaint suspends the procurement proceedings for a period to be determined by the review body.¹⁹

(a) Provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, that it is probable that the complaint will succeed, and that the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors;

(b) Unless the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the reasons for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.²⁰

(2) The review body may extend the originally determined period of suspension in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed the period required for the review body to take decision in accordance with article 63 or 64 as applicable.

(3) The decision on the suspension or the extension of the suspension shall be promptly communicated to all participants to the review proceedings, indicating the duration of suspension or extension. Where the decision was taken not to suspend the procurement proceedings on the grounds indicated in paragraph (1) of this article, the review body shall notify the supplier or contractor concerned about that decision and the reasons therefor. Any decision under this article and the reasons and circumstances therefor shall also be made part of the record of the procurement proceedings.

¹⁷ Ibid., as regards confidentiality provisions.

¹⁸ The Working Group, at its fifteenth session, approved the draft article, which is based on article 56 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

¹⁹ As suggested by experts during consultations with the Secretariat, the Working Group may wish to address what happens at the end of the period determined for the suspension of the procurement; and who determines, and on what basis, whether the complaint fulfils the requirements of subparagraph (1) (a).

²⁰ As suggested by experts during consultations with the Secretariat, the Guide to Enactment will explain that this provision is included because the review body's determination of public interest considerations cannot bind a Court or other Tribunal.

Article 66. Judicial review²¹

The [insert name of court or courts] has jurisdiction over actions pursuant to article 61 and 65²² and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time limit, under article 62 or 63.

²¹ The Working Group, at its fifteenth session, approved the draft article, which is based on article 57 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

²² This additional cross-reference was suggested by experts during consultations with the Secretariat, in order to allow for a further suspension of the procurement at the expiry of the suspension granted by the review body under article 65.

**C. Report of the Working Group on Procurement
on the work of its eighteenth session
(New York, 12-16 April 2010) (A/CN.9/690)
[Original: English]**

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I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the “Commission”) entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”, A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh to thirteenth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, New York, 24-28 April 2006, Vienna, 25-29 September 2006,

New York, 21-25 May 2007, Vienna, 3-7 September 2007, and New York, 7-11 April 2008, respectively) (A/CN.9/575, A/CN.9/590, A/CN.9/595, A/CN.9/615, A/CN.9/623, A/CN.9/640 and A/CN.9/648), the Working Group considered the topics related to the use of electronic communications and technologies in the procurement process: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions (ERAs), including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered, and their procedural aspects.

3. At its seventh, eighth and tenth to twelfth sessions, the Working Group in addition considered the issues of abnormally low tenders, including their early identification in the procurement process and the prevention of negative consequences of such tenders.

4. At its thirteenth and fourteenth (Vienna, 8-12 September 2008) sessions, the Working Group held an in-depth consideration of the issue of framework agreements on the basis of drafting materials contained in notes by the Secretariat. At its thirteenth session, the Working Group also discussed the issue of suppliers' lists and decided that the topic would not be addressed in the revised Model Law, for reasons that would be set out in the Guide to Enactment. At its fourteenth session, the Working Group also held an in-depth consideration of the issue of remedies and enforcement and addressed the topic of conflicts of interest.

5. At its fifteenth session (New York, 2-6 February 2009), the Working Group completed the first reading of the draft revised model law and although a number of issues were outstanding, including the entire chapter IV, the conceptual framework was agreed upon. It also noted that further research was required for some provisions in particular in order to ensure that they were compliant with the relevant international instruments.

6. At its sixteenth session (New York, 26-29 May 2009), the Working Group considered proposals for article 40 of the revised model law, dealing with a proposed new procurement method — competitive dialogue. The Working Group agreed on the principles on which the provisions should be based and on much of the draft text, and requested the Secretariat to review the provisions in order to align the text with the rest of the draft revised model law. The Secretariat was also entrusted with revising the draft provisions for chapter I.

7. At its seventeenth session (Vienna, 7-11 December 2009), the Working Group completed its reading of chapters I to IV of the draft revised Model Law contained in document A/CN.9/WG.I/WP.71/Add.1 to 4, and proceeded to consider the provisions contained in chapter V of the draft revised Model Law in document A/CN.9/WG.I/WP.71/Add.5. The Working Group settled most of the substantive issues that were outstanding in the provisions considered, and requested the Secretariat to redraft certain provisions to reflect its deliberations at the session.

8. At its thirty-eighth to forty-first sessions, in 2005 to 2008, respectively, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel

procurement practices in the revised Model Law (A/60/17, para. 172, A/61/17, para. 192, A/62/17 (Part one), para. 170, and A/63/17, para. 299). At its thirty-ninth session, the Commission recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflict of interest and should consider whether any specific provisions addressing those issues would be warranted in the revised Model Law (A/61/17, para. 192). At its fortieth session, the Commission recommended that the Working Group should adopt a concrete agenda for its forthcoming sessions in order to expedite progress in its work (A/62/17 (Part one), para. 170). Pursuant to that recommendation, the Working Group adopted the timeline for its deliberations at its twelfth and thirteenth sessions (A/CN.9/648, annex), and agreed to bring an updated timeline to the attention of the Commission on a regular basis. At its forty-first session, the Commission invited the Working Group to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time (A/63/17, para. 307).

9. At its forty-second session, in 2009, the Commission considered chapter I of the draft revised model law and noted that most provisions of that chapter had been agreed upon, although some issues remained outstanding. It entrusted the Secretariat with the preparation of drafting suggestions that would address those outstanding issues, for consideration by the Working Group. The Commission noted that the draft revised model law was not ready for adoption at that session of the Commission. The importance of completing the revised model law as soon as reasonably possible was highlighted (A/64/17, paras. 283-285).

II. Organization of the session

10. The Working Group, which was composed of all States members of the Commission, held its eighteenth session in New York, from 12 to 16 April 2010. The session was attended by representatives of the following States members of the Working Group: Austria, Belarus, Bulgaria, Canada, China, Czech Republic, Egypt, Fiji, France, Germany, Greece, Guatemala, Iran (Islamic Republic of), Lebanon, Madagascar, Mexico, Nigeria, Paraguay, Poland, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

11. The session was attended by observers from the following States: Bangladesh, Belgium, Croatia, Democratic Republic of the Congo, Kuwait, Panama, Philippines, Sweden and Turkey. The session was attended also by an observer from Palestine.

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

(a) *United Nations system*: the World Bank;

(b) *Intergovernmental organizations*: Common Market for Eastern and Southern Africa (COMESA), European Space Agency (ESA), European Union, Inter-American Development Bank (IADB), and International Development Law Organization (IDLO);

(c) *International non-governmental organizations invited by the Working Group*: American Bar Association (ABA), Forum for International Conciliation and

Arbitration (FICA), International Bar Association (IBA), International Federation of Consulting Engineers (FIDIC), and International Law Institute (ILI).

13. The Working Group elected the following officers:

Chairman: Mr. Tore WIWEN-NILSSON (Sweden)¹

Rapporteur: Mr. Seung Woo SON (Republic of Korea)

14. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP. 72);

(b) Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law (A/CN.9/WG.I/WP.73 and Add.1-8).

15. 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

16. At its eighteenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. Chapter V. Procurement methods involving negotiations (A/CN.9/WG.I/WP.71, paras. 21-23, and A/CN.9/WG.I/WP.73/Add.5)

Article 42. Two-stage tendering

17. The Working Group noted that the draft article had been revised in the light of amendments agreed at its seventeenth session.

18. In response to a query as to whether references to the notion of “comparing” proposals should be retained along with the notion of “evaluation” in paragraph (4) (f) of the article and in similar provisions throughout the Model Law,

¹ Elected in his personal capacity.

it was agreed that the notion of “evaluation” necessarily encompassed the notion of “comparison”. Accordingly, it was agreed to delete all references to “comparing” submissions throughout the text.

19. The Working Group approved the article as revised at the current session.

Article 43. Request for proposals with dialogue

20. The Working Group noted that the draft article had been revised in the light of amendments agreed at its seventeenth session. It recalled that the Working Group had not been able to consider the entire article at that session for lack of time.

21. In response to a query as to whether the method should be used only for the procurement of services, the Working Group confirmed its understanding that the revised Model Law should follow a “toolbox” approach and that all methods of procurement should be open for use in all types of procurement regardless of the subject matter being procured, subject to the conditions of use in chapter II.

22. The Working Group agreed:

(a) To include in paragraph (2) (h) wording to the effect that any price charged for request for proposals should reflect only the costs of providing them to suppliers (drawing on the wording of article 32);

(b) To delete the words in square brackets in paragraph (2) (i) and (j) and equivalent provisions throughout the Model Law. It was also agreed that the context of the deleted provisions should be addressed in the Guide;

(c) To delete the wording in square brackets in paragraph 5 (n), which was considered excessively detailed for the Model Law and too restrictive in some situations. The point was made that the Guide should elaborate on the substance of the deleted provisions;

(d) To retain paragraph (9) as drafted, with further elaboration on the meaning of its provisions in the Guide, in particular that they sought to prevent the procuring entity from making the changes described (but would not prevent suppliers from making changes in their proposals as a result of the dialogue). Objections were raised to an alternative proposal to substituting the proposed wording with an alternative that would incorporate the definition of “material change” from article 2 (e). The latter was considered not well suited for the purposes of article 43, in particular since the definition of “material change” referred to responsiveness and ranking of submissions. The suggestion was made that the Guide should refer to the content of footnote 10 of document A/CN.9/WG.I/WP.73/Add.5.

23. The Working Group approved the article as revised at the current session.

Article 44. Request for proposals with consecutive negotiations

24. The Working Group recalled that, at its seventeenth session, it had heard several comments on certain provisions of the article but had not been able to consider the article in detail for lack of time.

25. Support was expressed for reflecting in the Model Law itself, such as in its article 27, or alternatively in the Guide as in the 1994 text, that this procurement

method was appropriate only for advisory services (i.e. those with an intellectual output). In the view of some other delegations, however, including such a restriction on the use of this procurement method in the Model Law would contradict the “toolbox” approach agreed to be taken in the revised Model Law. Support was therefore expressed for stating in the Guide that that method was in particular appropriate for, and recommended for use by multilateral donors only in, the procurement of advisory services. This approach, it was stated, would ensure greater flexibility and the enhanced application of the Model Law’s provisions in the longer term, considered necessary in the light of rapid changes in the nature of the subject matter of procurement and the manner in which procurement was conducted.

26. Whether this approach was advisable was, however, questioned in the light of the accumulated experience worldwide that indicated a need to distinguish the manner in which advisory/intellectual types of services were procured from that in which other procurement was conducted. That experience, it was said, indicated that the use of consecutive negotiations was appropriate for these specialized forms of services only. On the other hand, it was said, restricting this method to one type of procurement would raise the issue of whether other methods should be similarly restricted, and re-opening this issue would be undesirable. After discussion, it was agreed that the text would not restrict the use of the method, but that the Guide should recite the history and usage of the procurement method in question. It would also then be open for users to restrict the method in practice if they so desired.

27. With reference to paragraph (2) (a), questions were raised about whether it would be advisable or appropriate to restrict the negotiations under this method to issues of price, particularly given that the main use of this method would be for advisory services in which quality issues would be paramount. The suggestion was therefore made to delete the wording in square brackets in subparagraph (2) (a). Some support was expressed for that suggestion, on the condition that the reference in paragraph (1) of that article to article 43 (9) would be replaced with a prohibition of any material change to the terms of the procurement as a result of the negotiations (the latter term as defined in article 2 (e)). This approach, it was explained, while allowing some flexibility with respect to the aspects to be negotiated, would not permit any changes to the ranking of suppliers that had previously been assigned as a result of the evaluation of technical and quality aspects of the proposals.

28. The opposing view shared by some delegations and observers was that the provisions of paragraph (2) (a) had stood the test of time and should be retained. Concerns were raised about the equality of treatment of suppliers if the provisions allowed for the negotiation of non-price criteria where not all participating suppliers were the given opportunity to participate in the negotiations. The differences between this procurement method and the request for proposals with dialogue method in article 43 on the one hand, and the similarities and differences between this procurement method and the request for proposals without negotiation method in article 41 on the other hand, were highlighted in this regard.

29. It was recalled that in its deliberations on article 41, the Working Group had agreed to replace the reference to price in the relevant context with a reference to the “financial aspects of the proposal”. The Working Group was invited to consider whether the same change would be appropriate in article 44. The Working Group agreed to make such a change on the understanding that the Guide would explain

what those financial aspects would encompass, in particular that no aspects of the proposal that had been considered as part of the assessment of responsiveness and evaluation of quality and technical characteristics of proposals should subsequently be open for negotiation. It further agreed to delete the cross-reference to article 43 (9) in paragraph (1), and to introduce a prohibition of any “material change” (as defined in article 2 (e)) to the procurement in the course of the consecutive negotiations.

30. Support was expressed for retaining paragraph (5) as drafted, with an explanation in the Guide that the notion “termination of negotiations” meant (in the context of this provision and of paragraph (3)) the rejection of a supplier’s final price proposal and its consequent exclusion from further participation in the procurement proceedings. The notion, it was further explained, encompassed the idea that no procurement contract could be awarded to the supplier(s) with whom the negotiations were terminated pursuant to article 44 (3) and (5). The alternative view was that this approach would be excessively rigid, as only at the end of the process would the procuring entity know which was in fact the best offer, and although the procuring entity should not be permitted to reopen negotiations, it should be permitted to accept that best offer (and award the contract to the supplier that had proposed it). The prevailing view was, however, that the procuring entity should not be able to award the contract to a supplier with which negotiations had been terminated.

31. With reference to footnote 31, support was expressed for envisaging the possibility of pre-selection in this procurement method, and it was agreed to provide for it accordingly.

32. The Working Group approved the article as revised at the current session.

Article 45. Competitive negotiations

33. In the light of an observed overlap between articles 43 and 45, it was suggested that article 45 should be deleted. The other view was that, given the conditions for use set out in the newly proposed article 27 bis (which restricted the use of the method to urgent procurement and procurement for national defence and similar purposes), article 45 should be retained as an alternative to single-source procurement but not as an alternative to request for proposals proceedings. The Working Group agreed to retain article 45 in the light of proposed article 27 bis. The Secretariat was instructed to ensure that the text did not confuse procurement methods for situations of urgency and other negotiation or dialogue-based procurement.

34. The view was expressed that article 27 bis should itself be amended by deleting paragraph (b) (which allowed the use of competitive negotiations following catastrophic events) because the situation was adequately covered by single-source procurement under article 29 (b). The alternative view was that both articles 27 bis and 29 (b) should apply in catastrophic events, but that article 29 (b) should in addition make it clearer when recourse to single-source procurement, rather than to competitive negotiations, would be allowed (distinguishing extreme urgency and urgency). This latter approach was agreed, to be supported by discussion in the Guide, which would also refer the procuring entity to the general requirement in article 25 (2) to maximize competition when selecting procurement methods.

35. The Working Group approved the article as revised at the current session.

Article 46. Single-source procurement

36. The view was expressed that an obligation to negotiate in the course of single-source procurement should be introduced in the article. The alternative view was that the possibility of negotiations was inherent in the method (which was the reason for locating the method in chapter V). The Secretariat was requested to consider revising the provisions to refer to the need for negotiations. It was also agreed that the Guide should elaborate on the utility for the procuring entity to negotiate and request, when feasible and necessary, market data or costs clarifications, in order to avoid unreasonably priced proposals or quotations. It was further agreed that the Guide should also underscore single-source procurement as the method of last resort after all other alternatives had been exhausted, and should encourage the use of framework agreements to anticipate urgent procurement.

37. The Working Group approved the article as revised at the current session.

B. Chapter VI. Electronic reverse auctions (A/CN.9/WG.I/WP.71, para. 29, and A/CN.9/WG.I/WP.73/Add.6)

Article 47. Procedures for soliciting participation in electronic reverse auctions as a stand-alone procurement method

38. The Working Group noted that the article was based on the previous drafts approved by the Working Group at its earlier sessions, restructured to differentiate clearly between the requirements for ERAs as a stand-alone procurement method and those applicable to ERAs used as a phase preceding the award in other procurement methods.

39. The Working Group heard the following suggestions and made the following decisions with regard to them:

(a) As the word “electronic” indicated the means by which a reverse auction could be held rather than the substance of the auction as such, that the Secretariat should consider whether a change in terminology from “electronic reverse auction” to “reverse auction conducted by electronic means” or a similar notion should be made throughout the Model Law. In this regard, the Working Group confirmed its previous decision that auctions in online form only should be permitted, in order to preserve the anonymity of the bidders;

(b) That the terms “most advantageous bid” or the “best evaluated bid” should be used to denote the successful bid (instead of “lowest evaluated bid”). Consistent with the Working Group’s decision to use the term the “most advantageous tender” elsewhere in the Model Law, the Working Group decided to use the term the “most advantageous bid”. The understanding was that the Guide should refer to the reasons of the Working Group for using this term;

(c) That differences between simple and complex stand-alone auctions (reflecting whether the auction would be of price or of price and other criteria) should be explained in detail in the Guide. The Working Group agreed with this suggestion;

(d) That the provisions of paragraph (2), listing the content of the invitation to participate in the procurement proceedings, should be shortened by using a cross-reference to relevant provisions found elsewhere in the Model Law, such as in draft article 33. The Working Group recalled that the suggested approach had been considered in previous drafts but had been considered by experts consulted by the Secretariat to be less user-friendly than the one in the current text, and decided to retain the formulation as presented in paragraph (2);

(e) That the provisions in paragraph (2) that were repetitive with those in article 49 (1) should be replaced with a cross-reference to article 49. The Working Group agreed with this suggestion;

(f) That the Guide text to paragraph (2) (l) should cross-refer to paragraph (4) (a). The Working Group agreed with this suggestion;

(g) That the provisions in paragraphs (2) (n) (i) to (iii) should be moved to the Guide, as suggested in the accompanying footnote. The Working Group agreed with this suggestion. It also recalled its decision earlier in the session also to move to the Guide the provisions in square brackets in paragraph (2) (i) (see para. 22 (b) above);

(h) That paragraph (2) (u) should be deleted and the wording of that paragraph used in other articles of the Model Law should be reconsidered. The Working Group agreed with this suggestion;

(i) That the provisions of paragraph (5) (a) should read “the auction may be preceded by an examination and where necessary by an evaluation of initial bids where the procurement contract is to be awarded to the most advantageous bid”. The Working Group agreed with this suggestion and that the Guide would elaborate on when examination and evaluation would be appropriate.

40. The Working Group requested the Secretariat to revise the article taking into account these suggestions and the Working Group’s decision as regards them, as appropriate.

Article 48. Specific requirements for solicitation of participation in procurement proceedings involving an electronic reverse auction as a phase preceding the award of the procurement contract

41. The Working Group noted that the article was based on the previous drafts approved by the Working Group at its earlier sessions, restructured to differentiate clearly between the requirements for ERAs as a stand-alone procurement method and those applicable to ERAs used as a phase preceding the award in other procurement methods.

42. The Working Group heard the following suggestions and made the following decisions with regard to them:

(a) To shorten the title of the article, and to make the relevant safeguards of article 47 applicable, *mutatis mutandis*, to ERAs used as a phase in other procurement methods. The Working Group agreed with this suggestion;

(b) To retain the wording in the first set of square brackets in the chapeau of paragraph (1). In response, a concern was expressed that the resulting provision would allow ERAs in any procurement method. It was suggested that the provisions

should exclude the use of ERAs in those procurement methods where it would be obviously inappropriate to do so. Strong support was expressed for retaining the wording in the first set of square brackets without change and without square brackets, in the light of the current practices in some jurisdictions and evolving practices that indicated the possibility of using ERAs in various procurement methods, and because the use was qualified by the phrase “as appropriate”. The Working Group agreed with that approach, on the understanding that the Guide would elaborate on the procurement methods in which it would be appropriate or inappropriate to hold ERAs, in the light of the conditions for the use of ERAs as set out in article 28;

(c) To replace the narrow reference to a mathematical formula in paragraph (1) (a) with a broader reference to an automatic evaluation methodology including a formula, drawing on the relevant wording found in the WTO Agreement on Government Procurement (WTO GPA). The Working Group agreed with this suggestion.

43. The Working Group requested the Secretariat to revise the article taking into account these suggestions and the Working Group’s decisions as regards them, as appropriate.

Article 49. Registration for the auction and timing of holding of the auction

44. The Working Group recalled that at its fifteenth session it had approved the draft article without change (A/CN.9/668, para. 222). It noted that some subsequent changes had been required in the light of revisions made elsewhere in the draft revised Model Law.

45. Paragraph (3), it was said, allowed an entirely subjective decision on the part of the procuring entity as to whether the number of suppliers or contractors registered for the auction was sufficient to ensure effective competition (and accordingly whether to hold or cancel the auction). The suggestion was made to revise the provision in the light of article 47 (2) (k) that required the disclosure in advance of the minimum number of suppliers or contractors that would have to be registered for the auction in order for the auction to take place. It was thus agreed to delete in article 49 (3) the part reading “in the opinion of the procuring entity”.

46. The Working Group approved the article as revised at the current session.

Article 50. Requirements during the auction

47. The Working Group recalled that at its fifteenth session it had approved the draft article without change (A/CN.9/668, para. 222). It noted that some subsequent changes had been required in the light of revisions made elsewhere in the draft revised Model Law.

48. Noting that the term “most advantageous bid” would be used in the article, the Working Group approved the article.

Article 51. Requirements after the auction

49. The Working Group recalled that at its fifteenth session it had approved the draft article subject to the consideration at a later stage of the use of the term “the lowest evaluated bid” (A/CN.9/668, para. 222).

50. The Working Group agreed to use the term the “most advantageous bid” in the article and to retain “shall” in preference to “may” in paragraphs (2) to (4) on the understanding that the procuring entity would always have an option either to award the procurement contract to the next successful bidder or to cancel the procurement. The Working Group agreed that the Guide should elaborate on the risks of collusion if the procuring entity were obliged to accept the next successful bid without an option to cancel the procurement.

51. The Working Group approved the article as revised at the current session.

C. Chapter VII. Framework agreements procedures (A/CN.9/WG.I/WP.71, para. 29, and A/CN.9/WG.I/WP.73/Add.7)

52. The Working Group was informed about World Bank draft revised guidelines on procurement of goods, works and non-consulting services under IBRD loans and IDA credits by World Bank borrowers (March 2010). The Working Group noted the following provisions of the draft guidelines that would address framework agreements:

“3.6 A Framework Agreement (FA) is a long-term agreement with suppliers, contractors and providers of non-consulting services which sets out terms and conditions under which specific procurements (call-offs) can be made throughout the term of the agreement. FAs are generally based on prices that are either pre-agreed, or determined at the call-off stage through competition or a process allowing their revision without further competition.* FAs may be permitted as an alternative to the Shopping and NCB methods for: (a) goods that can be procured off-the-shelf, or are of common use with standard specifications; (b) non-consulting services that are of a simple and non-complex nature and may be required from time to time by the same agency (or multiple agencies) of the Borrower; or (c) very small value contracts for works under emergency operations. The Borrower shall submit to the Bank for its no objection the circumstances and justification for the use of an FA, the particular approach and model adopted, the procedures for selection and award, and the terms and conditions of the contracts. FAs should be limited to a maximum duration of 3 years. Maximum aggregate amounts for the use of a FA shall be set in the procurement plan in accordance with risks, but in no case higher than the NCB thresholds, and shall be agreed with the Bank. FAs shall follow all guiding principles and procedures of NCB under paragraphs 3.3 and 3.4, including but not limited to the procedures for advertisement, fair and open competition, and transparent bid evaluation and selection criteria. Publication of award of the FA shall follow the procedure described in paragraph 7 of Appendix 1.

* Borrowers have adopted different models of FAs under different names. There are three most commonly used models, based on closed or open, one-stage or two-stage, competition methods; (i) “Closed FA” based on predefined criteria including for the award of “call offs”, signed with one or multiple suppliers/contractors and not permitting new entrants during the duration of the agreement; (ii) “Closed FA” with a restriction on new entrants but conducted in two stages: a first stage to select more than one supplier/contractor, and a second stage when call offs are decided through competition among suppliers/contractors selected at the first stage and the award is made to the lowest

evaluated bidder based on the offered priced and delivery conditions; and (iii) “Open FA” also following a two-stage approach as per the above model, but without any restrictions on the participation of new entrants.”

53. The Working Group noted that the guidelines had not yet been approved, and that they had been made available for comments on the World Bank website. Concerns were raised as regards restricting framework agreements under the proposed draft to non-consulting services. A query was also raised regarding the grounds under the proposed draft for restricting framework agreements to emergency operations in case of very small value contracts for works.

Article 52. Award of a closed framework agreement

54. No comments were raised as regards the article. The Working Group approved the article without change.

Article 53. Requirements of closed framework agreements

55. The Working Group heard the following suggestions and took the following decisions with respect to them:

(a) That reference to one or more procuring entities should be retained without square brackets in paragraph (1). The opposing view was that the concept of multiple procuring entities as purchasers was no different in framework agreements procedures than in any other procurement proceedings. It was therefore suggested that the words in square brackets should be deleted and the Guide should explain that more than one procuring entity may be a party to a framework agreement. The alternative approach suggested was to address the issue in the definition of the procuring entity. The Working Group agreed to consider the matter further when article 2 (Definitions) was considered;

(b) That a reference to months as well as to years should be added in paragraph 2 (a), as the duration of some framework agreements (in particular those dealing with items, such as IT products, whose price might fluctuate rapidly) might be measured in months rather than years. The Working Group agreed to replace the ending of paragraph (2) (a) with the following words that should remain in square brackets “[the enacting State specifies a maximum number of years or months]”;

(c) That the word “possible” should be retained in paragraph 2 (d) (ii) and in other relevant instances because the alternative term proposed was too restrictive. The opposing view was that the word “anticipated” should be retained as it would encourage procurement planning. While the word “anticipated” was preferred, the point was made that the frequency of calls for second-stage submissions could not be always anticipated and therefore the provisions should be qualified with the opening words “if necessary”. It was observed that the information about frequency of calls for second-stage submissions was not binding on the procuring entity. The Working Group agreed to retain the word “anticipated” and that the other matters raised would be addressed in the Guide;

(d) That the term the “most advantageous submission” should be used in paragraph 2 (d) (iii). The Working Group agreed with that suggestion. It recalled its decisions at the seventeenth and current sessions (see para. 39 (b) above) that the Guide would explain in all relevant instances why the Working Group preferred

using the term the “most advantageous tender/submission/bid” to the term the “lowest evaluated tender” used in the 1994 Model Law;

(e) That the provisions such as those in paragraph 3 (b) should appear only in the article on the record of the procurement proceedings (article 23 of the current draft). Noting that the Guide would cross-refer to article 23 (where the requirements for the record would be centralized), flexibility as regards the extent to which other references would be included was suggested. The alternative view was that the provisions should be retained in the article as they provided an important procedural safeguard, which, if only found in article 23, could be overlooked. The Working Group agreed to retain paragraph (3) (b) in its current formulation, but that it would consider whether to retain similar references in other articles of the Model Law on a piecemeal basis;

(f) That in paragraph 4 reference to “electronic” should be deleted and reference to “equipment” should be replaced with “means” or a similar term. The Working Group agreed with that suggestion and recalled its earlier decision that the concerns arising from the use of electronic means of communication in procurement proceedings, such as over security, would be addressed in detail in the Guide.

56. The Working Group approved the article as revised at the current session.

Article 54. Establishment of an open framework agreement

57. With reference to paragraph (3) (a), some support was expressed for deleting the words in square brackets. Other delegations considered that the words should be retained without square brackets to maximize flexibility, which it was said, might be required for example in open framework agreements used for transnational procurement. In support of this view, the specific features of open framework agreements were noted. In particular, the understanding of one delegation was that not only new suppliers but also new procuring entities might join the framework agreement at any time. That understanding was not shared by other delegations, which considered that, although the addition of purchasers during the operation of the framework agreement was permitted in one or perhaps more jurisdictions, the provisions as drafted were based on the understanding that all procuring entities would be identified at the outset. The importance of this information in contributing to the decision by suppliers to join the framework agreement was highlighted in this regard. The opposing view was that the Model Law should envisage the possibility of new procuring entities joining the framework agreement with the consent of suppliers that were parties to the agreement.

58. An alternative suggestion was to split the provisions in question in a manner that would differentiate the procuring entity that established the open framework agreement from other procuring entities that placed purchase orders under it. While a view was expressed that only the former would be considered the procuring entity for the purposes of the Model Law, the alternative view, which eventually prevailed, was that any procuring entity placing a purchase order under the framework agreement would in fact be a procuring entity under the Model Law. This notion was considered essential in order to ensure that all safeguards available to suppliers under the Model Law applied to the relations between suppliers and a procuring entity placing a purchase order. The Working Group agreed to consider the definition of the procuring entity in article 2 in due course to ensure that the

definition adequately provided for framework agreement procedures. It also agreed that paragraph (3) (a) should be revised to ensure that there was sufficient flexibility to permit multiple users of the framework agreement, that suppliers were adequately informed as to the administrative arrangements for their operation, and that the parties to and users of the framework agreement should be appropriately described.

59. The Working Group agreed to retain paragraph (7) without square brackets.

60. The Working Group requested the Secretariat to revise the article taking into account these suggestions and the Working Group's decisions as regards them, as appropriate.

Article 55. Requirements of open framework agreements

61. Noting that a consequential change would need to be made in paragraph (1) (d) in the light of the Working Group's decision earlier at the session to use the word "anticipated" rather than "possible" in similar circumstances (see para. 55 (c) above), the Working Group approved the article.

Article 56. Second stage of a framework agreement procedure.

62. Noting that consequential changes in paragraphs (4) (a) and (c) might be needed in due course, and that paragraph (4) (b) (ix) should be deleted, the Working Group approved the article.

Article 57. No material change during the operation of a framework agreement

63. Whether the notion of "material change" as defined in draft article 2 was appropriate in the context of operation of framework agreements was questioned. It was also suggested that the opening words "during the operation of a framework agreement" were too restrictive and the provisions should cover the entire framework agreement procedure, in particular in order to apply the prohibition of material changes to the procurement contract as well as at the first stage of the procedure. A question was raised about the impact of these provisions on other procurement methods, in particular whether the absence of similarly explicit provisions in other procurement methods would imply that material changes were permitted.

64. A reservation was expressed about a proposal to delete the words "to the procurement" in the article, which were considered essential to indicate that no fundamental change should be permitted to the procurement. In response, it was observed that the definition of "material change" already addressed this point and the Working Group would consider that definition in due course. It was in addition observed that "procurement" was a defined term, which as defined in article 2 was not appropriate for article 57.

65. The Working Group agreed to retain the article with the deletion of the words "to the procurement", but to consider the definition of "material change" in due course, taking into account its envisaged use in two articles — articles 44 and 57. (For consideration of the definition of "material change," see paras. 96 to 99 below.)

D. Chapter VIII. Review (A/CN.9/WG.I/WP.71, paras. 26-27, and A/CN.9/WG.I/WP.73/Add.8)*Article 61. Right to review*

66. The Working Group recalled that, at its fifteenth session, it had approved the draft article without change (A/CN.9/668, para. 257). The Working Group noted that the article had subsequently been significantly revised in the light of consultations of the Secretariat with experts.

67. No comments were made as regards the article. The Working Group approved the article without change. The Working Group noted that it would be desirable for the Guide to explain that, apart from those persons listed in the article, various State bodies might have the right to initiate review under chapter VIII.

68. As regards the chapter as a whole, it was commented that the provisions should strive to ensure an effective review process, and that the chapter touched upon many issues that were outside the scope of a model law on procurement. The Working Group confirmed its understanding that the chapter contained a minimum set of provisions that aimed at ensuring an effective review process, and that the Guide should therefore encourage enacting States to incorporate all the provisions of the chapter to the extent that the legal system of the enacting State so permitted. Evolving practices and ongoing reforms in procurement review mechanisms aimed at ensuring effectiveness of those review mechanisms, and the contribution that the revised Model Law might make in this respect, were noted in this regard.

Article 62. Review by the procuring entity or the approving authority

69. The Working Group heard the following suggestions:

(a) That the opening words in paragraph (1) should be deleted because they were superfluous;

(b) That the Model Law should provide for a broader spectrum of possibilities in the course of review, including the possibility of immediate judicial review (in the highest court rather than lower courts) of a decision made by an administrative review body; that any available administrative review process should be exhausted before any judicial review, and that reference should be made to the exhaustion of local remedies. As regards the latter two points, it was considered that they fell outside the scope of the Model Law;

(c) That in paragraph (2) (a), the reference to the terms of the solicitation in fact encompassed any addenda that might be issued as a result of clarification or modification and that the Guide should explain that point;

(d) That the proviso in the end of paragraph (2) (b) reading “provided that no complaint may be submitted after the entry into force of the procurement contract” should be deleted, because the proviso set out an unnecessary limitation. It was suggested that the Guide should explain that such a proviso might be relevant in some jurisdictions where it was not possible to set aside a procurement contract, but that it was irrelevant in those jurisdictions in which the procuring entity retained authority so to do;

(e) That if this proviso were deleted, additional wording should be inserted to prevent suppliers from disrupting the entry into force of the procurement contract by filing a complaint immediately before the contract was to be signed. The Working Group did not finalize the consideration of this issue;

(f) That paragraph (2) (b) should make a link with the provisions on standstill period as regards the time limits for filing a complaint, and should restrict the scope of complaints that could be filed under that paragraph, in particular in the light of paragraph (2) (a);

(g) That the words “the enacting State specifies the desired number of days” should be inserted in the square brackets in paragraph (2) (b);

(h) That the provisions should provide for liability of suppliers in the case of intentional disruption of the entry into force of, or the performance of, the procurement contract. In response, the view was expressed that article 65 already provided for a manner of handling unjustifiable complaints.

70. The Working Group requested the Secretariat to revise the article in the light of those suggestions.

Article 63. Review before an independent administrative body

71. The Working Group heard the following suggestions:

(a) That the opening words in paragraph (1) should be deleted;

(b) That as the chapeau in paragraph (5) might be interpreted to permit the administrative body to be given a limited power to grant only one of these remedies, the text and the Guide should make it clear that the intent of the provisions was to ensure that the administrative body was able to exercise all these powers in order to create an effective remedies system;

(c) That the words “unless it dismisses the complaint” should be deleted in the chapeau provisions of paragraph (5) and that dismissal of the complaint should be added as remedy in the list contained in paragraph (5);

(d) That paragraphs (5) (a) to (c) should be deleted in that they did not provide remedies per se, but rather set out actions that the review body would usually take in the course of the review process and when granting the remedies listed in paragraphs (d), (e), (g) and (h). The opposing view was that the entire list of remedies in paragraph (5) should be retained. In response to a concern that some remedies necessarily encompassed the other steps listed, the view was expressed that the administrative review body would not grant all the remedies listed, but only those that were appropriate in the case concerned, and that the choice would depend on the stage of the procurement proceedings at which the review was held. The suggestion was made to omit the reference to “remedies” in the chapeau provisions of paragraph (5), or to replace it with a phrase along the lines of “measures and remedies” (instead of deleting any of the remedies listed in paragraph (5)). Another related suggestion was to merge some of the remedies in paragraph (5);

(e) That paragraph (5) (a) should be merged with the chapeau of paragraph (5), to avoid giving the impression that the measure was a remedy at the same level as the other ones listed in paragraph (5). Particular concerns were expressed in this regard about the power to declare the applicable legal rules or

principles since such a measure was unlikely to constitute an effective remedy. The alternative view was that paragraph (5) (a) should be retained and perhaps expanded since in some situations a declaration of the legal rules or principles might be the only measure that an administrative review body could or needed to take;

(f) That the term “annul” in paragraphs (5) (d) and (h) and in any other places where it appeared should be replaced with another term that would not imply what the consequences of the action would be, and the Guide should explain that the term intended to cover both *ex nunc* and *ex tunc* effects, as appropriate in the given circumstances and under the law of the enacting State;

(g) That the remedy listed at the end of paragraph (5) (e) (substitution of a decision of the procuring entity with the decision of the administrative review body) should be reconsidered in the light of its questionable utility and appropriateness in practice. Concerns were expressed that the provisions, if retained, would change the nature of administrative review body from a purely oversight body to a decision-making body, allowing it to interfere in decisions as regards the procurement project in question that should be within the exclusive purview of the procuring entity. This approach, it was noted, would require the administrative review body to have expertise on procurement-related matters and knowledge of the procurement project in question, which in practice it did not usually possess. In response, it was observed that in some systems, it was common to give such a power to an administrative review body. The prevailing view was to retain the provisions, on the understanding that various types of decisions were made in the course of procurement and the administrative review body should be in position to substitute those unlawful decisions of the procuring entity with respect to which the administrative review body had authority and capacity to do so;

(h) That paragraph (5) (e) should restate the ending from article 54 (3) (d) of the 1994 Model Law reading “other than any act or decision bringing the procurement contract into force”. That wording, it was said, imposed an appropriate limit preventing the administrative review body from substituting its own decision on the award of a procurement contract. The alternative view was that no such unconditional restriction should be imposed: if the legal system of the enacting State allowed the administrative review body to substitute its own decision on the award of the procurement contract, this possibility should be preserved. The Working Group recalled in this respect its decision at an earlier session not to incorporate the wording in question in the revised Model Law (as a consequence of its decision to provide for the possibility by an administrative review body to annul the procurement contract entered into force);

(i) That the words “confirm a lawful decision by the procuring entity or the approving authority where applicable” should be added in paragraph (5) (e);

(j) That both options in paragraph (5) (f) should be retained as was the approach in the 1994 Model Law (i.e. by restating the 1994 text of both options). In response, the history of the Working Group’s consideration of the question of compensation for anticipatory losses was recalled. In the light of concerns expressed at those earlier sessions about permitting the award of compensation for anticipated losses, such as the disruptive impact on procurement proceedings, the view prevailed that the wording in the first set of square brackets in paragraph (5) (f) should be retained (retaining the word “shall” in preference to “may”) and limiting

the compensation to the costs of the preparation of the tender or other submission, or relating to the complaint, or both. It was noted that the Guide should discuss that this approach would support a speedy and effective administrative review process, but did not exclude the possibility of seeking anticipatory losses through court action (or in proceedings before administrative review bodies where the legal system in an enacting State so permitted, or in an action under a contract that had been executed and where performance had commenced). It was noted that the latter point should be emphasized in the Guide text accompanying paragraph (5) (f) and in that addressing article 66 on judicial review;

(k) That paragraph (f) should be placed in the end of the list in paragraph (5) to make it clear that the provisions were intended to cover both complaints filed before the entry into force of the procurement contract and those filed thereafter;

(l) That whether it was appropriate to include the remedy listed in paragraph (5) (h) in a procurement law should be reconsidered. In response, it was observed that the remedy could be made optional. Opposition was expressed to that suggestion, both because the list of remedies was a list of possible remedies and because the provisions were considered essential as part of an effective system of review. The Working Group recalled in this respect its decision at its earlier session to overrule the approach in the 1994 Model Law that did not envisage that an administrative review body could annul the procurement contract once it entered into force;

(m) That imposing a time limit for any possible annulment of the procurement contract by the administrative body should be considered either in the Model Law or the Guide. The point was made in this respect that all other remedies were linked to stages of the procurement proceedings before the entry into force of the procurement contract, and thus were limited in time, while the possibility of annulling the procurement contract appeared to be open-ended;

(n) That the following should be added in the end of the list in paragraph (5): “and the [insert name of administrative body] shall take the decision appropriate in the given circumstances”;

(o) That the term “independent administrative review body,” rather than simply “administrative review body” should be used throughout the chapter. Concern was expressed that, except for the change in the title of article 63, nothing had been built in the draft revised Model Law that ensured the independence of the administrative review body. Suggestions were made that the provisions of the article should contain at least minimum requirements that would ensure the independence of the body (for example, as regards its composition, in that its members should be independent from the Government concerned). The alternative view, which eventually prevailed, was that the Model Law should establish the principle of independence of the administrative review body, but should not prescribe the manner in which that independence should be achieved, with the understanding that there would be various ways of so doing in various jurisdictions depending on their prevailing conditions, and that the Guide would address these matters.

72. The Working Group decided that certain of the above suggestions should be incorporated into paragraph (5), which would then be revised to read as follows:

“The [insert name of administrative body] may declare the legal rules or principles that govern the subject matter of the complaint and shall be empowered to do one or more of the following:

(a) [deleted];

(b) to (d) [as is, except for replacement of the word “annul” in subparagraph (d) with a more appropriate term and accompanying explanation of the term in the Guide];

(e) Revise an unlawful decision by the procuring entity or the approving authority where applicable or substitute its own decision for such a decision[, other than any act or decision bringing the procurement contract into force] or confirm the lawful decision by the procuring entity or the approving authority, where applicable; [with the statement in the Guide that the part in square brackets might be omitted in those enacting States where substituting the procurement contract by the administrative review body would be permissible]

(f) [moved as revised at the session in the end of the list];

(g) [as is];

(h) [as is, except for replacement of the word “annul” with another more appropriate term and the accompanying explanation in the Guide];

(i) Dismiss the complaint;

(j) Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity or the approving authority where applicable, and for any loss or damages suffered, which shall be limited to costs for the preparation of the submission or the costs relating to the complaint or both;

and the [insert name of administrative body] shall take the decision appropriate in the circumstances.”

73. The understanding of the Working Group was that the accompanying Guide text would emphasize that the list of measures in paragraph (5) was a minimum set of measures that the administrative review body should be able to take according to the circumstances, in order to ensure an effective and independent administrative review. The enacting State therefore would be expected to incorporate all of the listed measures except when so doing would be in violation of the constitution or other laws of the State. The Working Group also noted that the Guide text would state that the last phrase added to the provisions of paragraph (5) aimed at ensuring an effective review process.

Article 64. Certain rules applicable to review proceedings under articles [62 and 63]

74. The Working Group recalled that, at its fifteenth session, it had approved the draft article as revised at that session (A/CN.9/668, paras. 267-268) but that it had deferred the consideration of the possible exceptions to disclosure (A/CN.9/668, para. 131). It was noted that, subsequently, amendments had been proposed by the

informal drafting party, in July 2009, to include the words “and the right to request that the proceedings take place in public” in paragraph (3) in square brackets for further consideration, in particular in order to accommodate concerns regarding national defence and security and other grounds justifying exemptions of information from public disclosure. The Working Group noted that some provisions of the article had been further revised in the light of the consultations between the Secretariat and experts, in particular as regards exceptions to disclosure on the basis of confidentiality, and pursuant to the Working Group’s consideration at its fifteenth session (A/CN.9/668, para. 267 (b)).

75. The Working Group agreed: (a) to use the term “complaint” rather than “claim” throughout the chapter to ensure consistency; (b) to retain the words in square brackets in paragraph (3) without square brackets, on the understanding that the provisions were to be read together with paragraph (6) that would permit the review body to reject the right to request that the proceedings take place in public on the grounds of confidentiality; (c) to replace the final phrase of paragraph (3) with “the right to present evidence, including witnesses”; and (d) to retain paragraph (7) without square brackets, which should ensure adequate transparency and that the record of the procurement proceedings would be complete. It was noted that article 23 (1) (r) should be made consistent with paragraph (7) by requiring that the decision, rather than a summary of the decision, should be included in the record of the procurement proceedings.

76. The Working Group approved the article as revised at the current session.

Article 65. Suspension of procurement proceedings

77. The Working Group recalled that, at its fifteenth session, it had approved the draft article, which was based on article 56 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

Paragraph (1)

78. The Working Group heard the following suggestions:

(a) That the chapeau provisions of paragraph (1) should make it clear to which review body a complaint was submitted, drawing on article 56 (1) of the 1994 Model Law (by cross-referring to the appropriate articles under which complaints were submitted). A query was raised as to whether cross-references to articles 62 and 63 without a cross-reference to article 66 would be sufficient;

(b) That the reference to a “frivolous complaint” should be deleted from paragraph (1) (a) because it was superfluous in that a complaint that satisfied the other element of the proviso could not be frivolous. The alternative view was that the concept of “frivolous complaint” should not be abandoned, as in practice there could be obviously inappropriate complaints that should be dismissed immediately and that there would be no need to consider the substance of the complaint in order to demonstrate that it could not succeed;

(c) That an alternative term to the term “frivolous” that would better convey the intended meaning and encompass a complaint that was intended to obstruct the process should be considered. The Working Group decided to use the term “a complaint manifestly without merit” on a provisional basis;

- (d) That paragraph (1) (a) should be redrafted as follows:

“(1) The submission of a complaint suspends the procurement proceedings for a period to be determined by the review body:

- (a) Provided that:

(i) The complaint contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer serious injury in the absence of a suspension;

(ii) The complaint is not manifestly without merit and therefore it is probable that the complaint will succeed;

(iii) The granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors;”

- (e) That paragraph (1) (a) should alternatively be redrafted as follows:

“(1) The submission of a complaint suspends the procurement proceedings for a period to be determined by the review body:

(a) Provided that the complaint is not manifestly without merit and contains a declaration the contents of which, if proven, demonstrate that:

(i) The supplier or contractor will suffer serious injury in the absence of a suspension;

(ii) It is probable that the complaint will succeed; and

(iii) The granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors;”

- (f) That the issues of fraudulent declarations that could be made under paragraph (1) (a) should be left to the other branches of law.

79. Concerns were expressed about the proposed alternative wordings of paragraph (1) (a) since they did not eliminate the superfluity referred to above: if the complaint was manifestly without merits on its face, it could not succeed. After subsequent discussion, the Secretariat was requested to redraft paragraph (1) to reflect the following principles:

(a) There would be no automatic suspension if the complaint on its face were manifestly without merit;

(b) If the complaint on its face was not manifestly without merit, then the complaint should contain a declaration that the supplier or contractor would suffer serious injury in the absence of a suspension and that it was probable that it would succeed. It was the burden on the supplier to demonstrate or prove the content of such declaration;

(c) If the procuring entity wished to challenge an automatic suspension, or intended not to apply a suspension, in situations described in paragraph (b) above, it would have the burden of proving that the suspension would cause or had caused disproportionate harm to the procuring entity or to other suppliers or contractors or

that the conditions of article 65 (1) (b) were present. A further reservation was expressed about the ability of the procuring entity to challenge any automatic suspension at all;

(d) The provisions should make it clear to whom the declaration and demonstration or proof of the conditions in paragraphs (a) to (c) above were to be made.

Footnotes 16 and 17

80. With reference to footnote 16, the Working Group was invited to address whether there should be a further short suspension once the complaint had been decided in order to allow an appeal, and who determined, and on what basis, whether the complaint fulfilled the requirements of subparagraph (1) (a). The suggestion was made that paragraph (2) could address these issues.

81. Support was expressed for reflecting the content of that footnote and footnote 17 only in the Guide. A related suggestion was also to move paragraph (2) to the Guide. The Working Group did not agree with this suggestion.

Paragraph (4)

82. The Working Group agreed that paragraph (4) should be retained without square brackets.

Article 56 (2) of the 1994 Model Law

83. The Working Group recalled that at its fourteenth session it had decided not to include the provisions of article 56 (2) in the revised Model Law in the light of the introduction of a standstill period (A/CN.9/664, para. 71). The Working Group also recalled that draft article 20 (3) provided that there might be no standstill period under certain conditions. In the light of this, the Working Group considered whether the provisions of article 56 (2) should be reinstated in the revised Model Law. While support was expressed for that suggestion, the view was expressed that the reinstated provisions should be made applicable only in the absence of a standstill period.

84. The Working Group decided to reinstate the provisions of article 56 (2) in the revised Model Law after paragraph (2) of article 65, without reference to a standstill period.

Time limits for submission of complaints

85. Concern was expressed that the time limits for submission of complaints established under articles 62 and 63 (and as a related matter that the period during which suspension of the procurement contract would be possible) were indefinite. The Working Group was invited to consider establishing reasonable deadlines after which no complaints should be entertained.

86. After discussion, the Working Group requested the Secretariat to redraft the relevant provisions to provide for a deadline for submission of complaints, which in turn would determine the period during which suspension of the procurement contract would be possible. It was suggested that the date from which the deadline would run should be linked to the publication of the award where publication was

required, or otherwise from the date of the notice of the award to the suppliers or contractors in accordance with article 20 (10). It was also suggested that the determination of the specific deadline should be left to enacting States as had been done with respect to the standstill period, and that the attention of enacting States should be drawn to the need for alignment of all the relevant time limits left for their determination throughout the Model Law. The Working Group deferred the consideration of the same issues in the context of failed procurement (i.e. procurement not resulting in a procurement contract).

87. Concern was expressed that the Model Law did not indicate whether time periods were to be expressed in calendar or working days. The Secretariat was requested to make a clear reference to working or calendar days in the redraft of the relevant provisions and to explain in the Guide that working days should be used for short period of time.

88. The Working Group approved the article as revised at the current session.

Article 66. Judicial review

89. The Working Group recalled that, at its fifteenth session, it had approved the draft article, which was based on article 57 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

90. The suggestion was made that the article should be expanded to make its provisions more effective by incorporating the contents of articles 62 to 65, in particular the provisions ensuring due process and transparency, the provisions on available remedies and those on suspension of the procurement proceedings or of the entry into force or performance of the procurement contract. Reservations were expressed about this suggestion, as those issues would be regulated or were intended to be regulated in a separate body of law in enacting States, and so as not to interfere in the independence of the judicial branch. It was also noted that some provisions from articles 62 and 65 would not be appropriate or applicable in the context of judicial review. The Working Group emphasized that broader powers of the courts should not be inadvertently restricted (such as the powers to award compensation for anticipatory costs or to grant interim measures). It was proposed alternatively, to redraft the article to reflect the requirements of the United Nations Convention against Corruption² (the “Convention against Corruption”). A query was also raised as to whether ways to achieve effective judicial review should instead be discussed in the Guide alone.

91. Concern was expressed that some jurisdictions would not recognize the procedures of articles 63 to 65, as was indicated in a footnote to article 63, and would provide only for judicial review. It was noted that the safeguards built into these articles might therefore not be available in such jurisdictions. The point was made that these safeguards should be ensured in judicial review proceedings if articles 61 to 65 were not enacted.

92. The Working Group requested the Secretariat to incorporate additional provisions in chapter VIII for those jurisdictions that would not enact articles 62 to 65, which would ensure that the appropriate safeguards of those articles would be present in judicial review proceedings.

² United Nations, *Treaty Series*, vol. 2349, No. 42146.

93. It was suggested that the Guide provisions accompanying chapter VIII should refer to the applicable provisions of the Convention against Corruption. It was also noted that those Guide provisions should contain a discussion, along the lines suggested in footnote 21 of document A/CN.9/WG.I/WP.73/Add.2, of the relevance of other branches of law and of other bodies if a review were triggered for example by fraud or corruption (including the need to alert the relevant authorities to ensure that appropriate action was taken).

E. Chapter I. General provisions (A/CN.9/WG.I/WP.73/Add.1 and 2)

Preamble

94. Concern was expressed about the wording of paragraph (b) as regards nationality, which might indicate general support for national competition, rather than international competition. The suggestion was therefore made to delete the words “, especially where appropriate, participation by suppliers and contractors” in that paragraph. The Working Group agreed with this suggestion.

Title and article 1

95. No comments were made with respect to the title and article 1 of the draft.

Article 2. Definitions

“Material change”

96. Concern was expressed that the definition did not refer to one of the primary risks of material change — that the pool of potential suppliers might be affected. It was suggested that the definition should be revised to ensure that such a consequence would be covered.

97. It was noted that, as a result of the deliberations at the current session, the revised Model Law would prohibit any material change in the context of article 44 (consecutive negotiations) and article 57 (framework agreement procedures). Concern was expressed that no such prohibition was envisaged in article 14 (clarifications and modifications of solicitation documents). A query was raised as to the possible consequences if a material change to the procurement took place in the course of a modification of the solicitation documents. The Working Group was invited to consider the following options:

(a) To introduce a general prohibition of any material change in the course of procurement proceedings, which would be applicable to all procurement methods, with very limited exemptions, such as in the request for proposals with dialogue procedure (article 43). The understanding was that in such cases any material change must lead to a new procurement;

(b) Permitting a material change on the condition that such changes would be advertised or distributed in the same manner as the original solicitation. The need for taking a more flexible approach in some procurement methods, such as the dialogue procedure (article 43) was noted.

98. The Working Group agreed that it would be difficult to formulate one definition of steps that might involve a material change suitable for all situations in

which the prohibition of material change was warranted. The Working Group requested the Secretariat to revise the definition, so that it provided that a material change was any change to any aspect of the procurement that had the effects described in the latter part of the definition. In addition, article 14 and if necessary other articles of the Model Law should be revised to ensure that a material change was publicized as above (or that the provisions would require a new procurement where necessary). A related comment was that the provisions of article 14 (2) should cross-refer to article 13 bis (3), so that any addendum amending the solicitation issued by the procuring entity should lead to an appropriate extension of the submission deadline.

99. The Secretariat was also invited to consider reflecting in the Guide that a “material change” arose when, for reasons of competition, efficiency, fairness or otherwise, a procurement must be reopened because the nature of the procurement — the goods or services being bought, for example — had changed so substantially that the original competition did not put prospective bidders or others fairly on notice of the government’s true requirements. It was recalled that the point of material change in a procurement contract was not addressed in the deliberations and was open for further deliberations.

“Prequalification documents”

100. It was agreed that the definition should remain in the text without square brackets.

“Procurement”

101. The Secretariat was requested to reconsider the phrase “by any means”.

“Procuring entity”

102. The suggestion was made to amend the definition to allow multiple entities to become parties to a framework agreement. The alternative suggestion was to amend the definition of “public procurement” to allow for such a possibility. It was understood that the issue of multiple procuring entities was relevant not only in the context of framework agreements.

103. A reservation was expressed about amending the definition of “public procurement” for this purpose. The primary purpose of that definition — to highlight that the Model Law dealt with public procurement rather than with private procurement — was noted. The Working Group decided to adopt the first suggestion in paragraph 102 above. It was also agreed that the words “in this State” should be deleted in the definition of “procuring entity”, to allow for transnational procurement.

“Socioeconomic policies”

104. The need for the definition was questioned. Concern was expressed that it was drafted in excessively broad terms, allowing virtually any policy to be considered as a socioeconomic policy of the State. The alternative view was that the definition should remain, as it set out an important safeguard that socioeconomic policies should be defined in the legislation.

105. Suggestions were made to delete the words in square brackets and the words “and other”. Support was expressed for both suggestions. In response to the concern about deletion of the words “and other”, a query was raised as to which policies other than environmental, social and economic policies were intended to be covered. On the understanding that the definition was also intended to cover policies of a political as well as of an environmental, social or economic nature, and that their application in procurement should be permitted, provided that the transparency requirement that they be set out in legislation or regulations was met, the view prevailed that the words “and other” should be retained in the definition.

106. The Working Group agreed to retain the definition with the words “and other” and without the words in square brackets. It was agreed that the Guide should explain that the reference to other socioeconomic policies in the definition was not intended to be open-ended but encompass those set out in the legislation of the enacting State, and those that could be triggered by international regulation such as United Nations Security Council anti-terrorism measures or sanctions regimes.

107. The Working Group also heard that practice in some jurisdictions would indicate that there would normally be more than one organ in a State with the authority to adopt socioeconomic policies. The Secretariat was requested to revise the comments in footnote 16 (the substance of which might be reflected in the Guide) in the light of these reported practices.

“Solicitation”

“Direct solicitation”

108. The views varied on whether the word “exceptional” in the definition should be retained. After discussion, the Working Group decided to delete the word.

“Standstill period”

109. The suggestion was made that the phrase “anticipated decision” should be replaced with the phrase “anticipated award” and that the rest of the definition should be deleted. Concern was expressed about this suggestion, as it ignored the possibility that the procuring entity could award the contract to the next successful submission or could cancel the procurement under the conditions set out in the Model Law.

110. The Secretariat was requested to align the definition with article 20 (2) so that the intended meaning of that article would be more accurately conveyed.

“Successful submission”

111. It was agreed that the definition should be deleted.

Other definitions

112. No comments were made with respect to other definitions in the article.

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

113. It was the understanding that the Guide would explain references to treaties and their effect on national implementation of this law, in particular that more stringent requirements might be applicable but international commitments should not be used as a pretext to avoid basic safeguards under the Model Law.

Article 4. Procurement regulations

114. No comments were made with respect to the article.

Article 5. Publication of legal texts

115. Concern was expressed about the ending of paragraph (2) reading “and updated if need be”. The Working Group agreed to delete these words.

Article 6. Information on possible forthcoming procurement

116. No comments were made with respect to the article.

Article 7. Communications in procurement

117. Suggestions were made that the accompanying Guide text should explain that: (a) in procurement containing classified information, classified information could be included in an appendix to the solicitation documents that would not be made public unlike the remainder of the solicitation documents; and (b) that the means of communication could be changed by issuing an addendum to the original solicitation documents.

Article 8. Participation by suppliers or contractors

118. The Working Group heard the following suggestions as regards paragraph (1) (a):

(a) That it should refer to “law”, not to “procurement regulations”, since some jurisdictions might not have procurement regulations;

(b) That it should be redrafted or deleted to avoid providing for the automatic right to have recourse to domestic procurement in case of low-value procurement. The view was expressed that limitation of competition could be achieved through the application of socioeconomic policies as permitted in the Model Law and that the aim of the provisions was to allow more efficient procurement where international competition would not take place. The view was also expressed that the provisions contradicted one of the objectives of the Model Law — to promote international competition. In support of that view, it was also stated that the provisions would otherwise lead to unfair or unequal treatment and negatively restrict freedom of opportunities and participation;

(c) That it should be retained as drafted because many systems including that of the World Bank envisaged recourse to domestic procurement, and efforts to open markets to foreign suppliers or contractors were not universal. If the proposed amendments, it was added, made the provisions unreasonably restrictive, they would be ignored by enacting States;

(d) That it should be redrafted to achieve a better balance between the goal of promoting competition and acknowledging the sovereign right to use the procurement system for the purpose of promoting local development and local entrepreneurship. The Working Group recalled that one of the guiding principles in drafting the provisions of article 8 was that the State was free to use procurement for promoting its socioeconomic and other policies to the extent that the latter were made known and transparently applied throughout the procurement process;

(e) That it should be retained, with the Guide explaining what was meant by low-value procurement, to prevent enacting States from setting the threshold high to exclude the bulk of its procurement from international competition. It was noted that the threshold for the low-value procurement would not be the same, and it would be impossible to set out a single threshold, for all enacting States. However, the Guide should promote a common understanding what low value was meant to involve;

(f) That the provisions should be redrafted to require both the low value consideration, and an anticipated lack of a cross-border interest in participating in the procurement concerned, drawing in this respect on the provisions of article 23 of the 1994 Model Law. It was recalled that the respective provisions of the 1994 text sought to convey that even if the procuring entity held an international competition, no international participation would result in the absence of interest on the part of foreign suppliers or contractors;

(g) That reinstating the provisions from the 1994 Model Law would eliminate the blanket prohibition on participation of foreigners in low-value procurement. The view was expressed that foreign suppliers should be allowed to participate in such procurement if they so choose, but (following the 1994 Model Law approach) the procuring entity would not be required to apply certain procedures relevant only for international procurement (e.g. publication of the solicitation in a newspaper of wide international circulation in a language customarily used in international trade).

119. As regards other paragraphs of the text, the Working Group heard the following suggestions:

(a) That paragraph (1) (b) should refer to socioeconomic policies of the State. The opposing view was that the provisions, based on the equivalent provisions of the 1994 Model Law, should be retained as drafted;

(b) That paragraph (2) should state “Except when required or permitted”, to cover possibility of excluding from participation in procurement as a result of debarment;

(c) That paragraph (4) should be included without square brackets.

120. The Working Group agreed: (i) to revise paragraph (1) (a) along the lines of the text in article 23 of the 1994 Model Law; (ii) to retain paragraph (b) as drafted; (iii) to redraft paragraph (2) as suggested; (iv) to retain paragraph (4) without square brackets; and (v) to reconsider the need for a definition of the socioeconomic policies.

Article 9. Qualifications of suppliers and contractors

121. With respect to the opening phrase in paragraph (2) in square brackets, views varied as to whether the 1994 wording should be reinstated. The Working Group requested the Secretariat to combine the 1994 wording with the current text.

122. The Working Group agreed with the suggestion that reference to the applicable ethical and other standards should be removed from paragraph (2) (i) and should be set out as a separate requirement not linked to the ability to perform the procurement contract.

123. A suggestion to replace in paragraph (4) “be set out” with the word “refer” did not gain support. The reasons for the suggestion were noted, in particular that in some jurisdictions standard qualifications requirements were found in procurement regulations and the prequalification documents cross-referred to those regulations instead of restating the requirements. It was pointed out, however, that for reasons of transparency and equal treatment, the Model Law required all requirements to be set out in the solicitation and prequalification documents. It was suggested that the Guide would state that the requirements of paragraph (4) would be satisfied where the prequalification or solicitation documents would refer to the qualification requirements set out in sources that were transparent and readily available.

Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement

124. The Working Group requested the Secretariat to consider redrafting the broad reference to an “obstacle” to the participation of suppliers or contractors in the procurement proceedings in paragraph (2). It was also agreed that paragraph (5) (b) should refer to standardized terms and conditions.

125. In response to a suggestion that paragraph (3) should be prescriptive, the point was made that not all listed items would necessarily be required to be included in the description of the subject matter of the procurement. It was suggested that the Guide should state that the description must be sufficiently precise.

Article 11. Rules concerning evaluation criteria and procedures

126. No comments were made with respect to the article.

Article 12. Rules concerning estimation of the value of procurement

127. It was the understanding that the Guide would explain that estimates were to be used for internal purposes of the procuring entity and not to be revealed to suppliers.

Article 13. Rules concerning the language of documents

128. No comments were made with respect to the article.

Article 13 bis. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or submissions

129. The Working Group agreed that the accompanying Guide text should state that: (i) the mechanism for presenting submissions should be reasonably accessible

to suppliers; (ii) the procurement regulations should specify a minimum period for presenting submissions for each procurement method (reference in this regard was made to the provisions of the WTO GPA, article XI (2) for open procedures that required the period to be not less than 40 days); (iii) such a period should be sufficiently long in international and complex procurement to allow suppliers reasonable time to prepare their submissions; and (iv) failures in electronic presentation of submissions and allocation of risks should be addressed in the Guide and procurement regulations.

Article 14. Clarifications and modifications of solicitation documents

130. The Working Group recalled its decisions as regards article 14 taken earlier at the session (see paras. 97 and 98 above), in particular that in paragraph (2) a cross-reference to article 13 bis (3) should be inserted and the article should address the issue of occurrence of a material change in the solicitation documents.

Article 15. Tender securities and Article 16. Prequalification proceedings

131. The articles were adopted with changes to paragraphs (3) (g) and (h) of article 16 to reflect the Working Group's earlier decisions on similar provisions in article 43 (see para. 22 (b) above).

Article 17. Cancellation of the procurement

132. It was suggested that paragraph (1) should refer to cancellation for good cause with the Guide explaining what these causes might be, such as the public interest. The Working Group recalled its extensive consideration of the matter at previous sessions and the resulting compromise reflected in the current draft, which aimed at preserving flexibility on the part of the procuring entity to cancel the procurement, but provided in paragraph (3) of the article for liability for doing so irresponsibly.

133. It was suggested that the wording in square brackets in paragraph (1) should remain without square brackets. Another suggestion was that the wording should be retained with the addition of the phrase "or afterwards as expressly provided by the Model Law". Reference in this respect was made to article 20 (8). The difference between articles 17 and 20 (8) was, however, highlighted in that while under article 17 cancellation was at the discretion of the procuring entity, cancellation under article 20 was triggered by the failure of the winning supplier to sign the procurement contract or to provide a contract performance security (requirements that would be stated in the solicitation documents). The Working Group requested the Secretariat to revise the provisions in this respect to ensure consistency between the provisions in question.

134. It was agreed to retain the words in square brackets in paragraph (2) without square brackets.

Article 18. Rejection of abnormally low submissions

135. The article was adopted with the retention of the provisions without square brackets.

Article 19. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest

136. The suggestion was made that the Guide should refer to applicable international regulations addressing corrupt practices, should explain that such regulations would evolve, and should encourage enacting States to consider the standards applicable at the time of enactment of the Model Law. The Guide should also emphasize that the article was intended to be consistent with international standards and should outlaw any corrupt practices regardless of their form and how they were defined.

137. The article was adopted with the retention of the provisions in square brackets without square brackets.

Article 20. Acceptance of the successful submission and entry into force of the procurement contract

138. As regards two alternatives in paragraph (2) (c), suggestions were made to combine both alternatives and to retain the first alternative (with the Guide explaining that the period should be reasonably long). The Working Group agreed with the second suggestion (to retain the first alternative in the text with the appropriate explanation in the Guide), and approved the article as revised, and with the retention of the provisions in paragraph (3) (c) without square brackets.

Article 21. Public notice of awards of procurement contract and framework agreement

139. As regards two alternatives in square brackets in paragraph (3), views varied as to whether the word “may”, being more flexible, or the word “shall” would be appropriate for such legal provisions. The view prevailed that the word “shall” should be used.

Article 22. Confidentiality

140. Concern was expressed about the wording in paragraph (1), which permitted withholding information for reasons of public interest. The public interest exemption was considered to be excessively broad and open to abuse if no guidance as regards the definition of “public interest” were provided. It was suggested that, at a minimum, the accompanying Guide should make it clear that the procuring entity should be required to define the public interest with reference to objective standards set out in law or procurement regulations. It was noted that the same concern was valid with respect to article 23 (4) (a). The Secretariat was requested to redraft both provisions to make their intended content clearer.

141. The suggestion was made that the qualifier “essential” before the words “national security” or “national defence” in paragraph (1) should be deleted. The Secretariat was requested to align the wording in question with any equivalent wording in the WTO GPA used in the same context.

142. The preference was expressed for the first alternative wording in paragraph (2) and that the word “communications” should be used in paragraph (3) in consistent fashion. The need for consistency with the use of square or round brackets throughout the Model Law was noted.

Article 23. Documentary record of procurement proceedings

143. The Working Group recalled its decisions as regards article 23 (4) (a) made in the context of article 22 (see para. 140 above). It agreed to use the second alternative wording in paragraph (1) (i) and the first alternative wording in paragraph (2). It was the understanding that the other text in the article would be retained without square brackets, except for the provisions in paragraph (1) (t) that would be redrafted by the Secretariat in due course.

Article 23 bis. Code of conduct

144. The Working Group heard the suggestion that the words “unless addressed in other law” should be added in the beginning of the article or that the Guide should cross-refer to other law where codes of conduct might be located. The second approach to drafting was preferred, especially in the light of the end of the article, unless the entire article was to be redrafted.

145. The suggestion was that the Guide should address the “revolving door” concept. The alternative view was that article 23 bis itself should address this issue along with some other issues covered by the Convention against Corruption. The suggestion was made that the accompanying Guide should elaborate on aspects of a code of conduct not covered by the article, such as its application to private entities participating in the procurement and procurement-specific conflicts of interest. Reservations were expressed about the appropriateness of providing for a code of conduct for private entities. The Working Group agreed to reflect in the Guide that even though a code of conduct was addressed to public officials, it also indirectly established boundaries for the behaviour of private parties in their relation with public officials.

F. Chapter II. Methods of procurement and methods of solicitation and their conditions for use (A/CN.9/WG.I/WP.73/Add.3)

Article 24. Methods of procurement

146. The Working Group agreed to reinstate a footnote to article 18 of the 1994 Model Law as the footnote to the title of the article, modified to exclude any reference to open tendering.

Article 25. General rules applicable to the selection of a procurement method

147. The Working Group approved the article with paragraph (3) without square brackets.

Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)

148. The Working Group approved the article without change.

Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue and [request for proposals with consecutive negotiations])

149. The view was expressed that the grouping of procurement methods should be reconsidered. Reservations were expressed about any changes that would fundamentally amend the suggested structure of the Model Law. The Working Group heard suggestions that concerns about the current grouping of procurement methods could be addressed by less significant redrafting, such as the deletion of references to negotiations in the titles of chapters IV and V, and the formulation of separate conditions for use of some procurement methods currently grouped together with other procurement methods.

150. The location of the consecutive negotiations method and of two-stage tendering in article 27 was questioned in particular. It was noted that two-stage tendering did not involve bargaining, but rather discussions with the aim of refining the specifications and criteria, and thus should not be grouped with the request for proposals with dialogue that indeed involved bargaining. The alternative view, however, was that placing two-stage tendering in article 27 was appropriate in the light of the conditions for use it contained (which were applicable to both the request for proposals with dialogue and two-stage tendering procedures). It was suggested that paragraph (a) could be redrafted to allow more flexibility by replacing the inability to describe the subject matter of the procurement with the inability to describe the procuring entity's needs and solution thereto. An alternative suggestion was to leave paragraph (a) as drafted for the request for proposals with dialogue, but that a separate provision for two-stage tendering should make it clear that discussions with suppliers or contractors were needed to refine conceptual designs or functional specifications and not to define specifications. The Working Group agreed with the latter suggestion.

151. It was considered that conditions for use set out in paragraph (a) would not apply to request for proposals with consecutive negotiations. The suggestion was made that the conditions for use of that procurement method could draw on article 26 (3), and should make it clear that: (i) the negotiations were consecutive; (ii) the negotiations were intended to encompass only the financial aspects of the proposals for the purpose of arriving at a reasonable price; and (iii) the conditions for use of this procurement method should not merely describe the procedures at issue. Concerns about opening the use of the request for proposals without negotiations and with consecutive negotiations methods to all types of procurement were reiterated.

152. It was suggested that the suggested optional text of footnote 8 should be included in the beginning of both articles 27 and 27 bis. The alternative view was to retain the approach suggested in footnote 8. It was agreed that the text from footnote 8 should be put in square brackets in the beginning of article 27, with an understanding that enacting States could decide whether to retain or remove it in the text of the law. Opposition was expressed to inserting such a text in the beginning of article 27 bis. (For further consideration of this issue in the context of article 27 bis, see paras. 154 and 155 below.)

153. The Secretariat was requested to revise article 27 taking into account the deliberations at the session.

Article 27 bis. Conditions for use of competitive negotiations

154. The Working Group recalled its consideration of the suggestion to reflect the content of footnote 8 in square brackets in the beginning of both articles 27 and 27 bis. It also recalled that there was opposition to insert the content of that footnote in article 27 bis (see para. 152 above).

155. The Working Group further recalled that a decision on this issue had already been taken and there had also been an agreement not to reopen issues on which decisions had been taken. Concerns were also raised about requiring a higher-level approval in articles 27 and 27 bis procurement methods but not in other procurement methods to be used as exceptions to open tendering. The alternative suggestion was to include the suggested wording only in subparagraph (c). The Working Group deferred the consideration of the issue to a later date.

V. Other business

156. The Working Group considered its future work. It agreed that, at its nineteenth session (Vienna, 11-15 October 2010), it would focus on the remaining outstanding issues in chapters II, III and IV of the Model Law and drafting issues throughout the text with a view to finalizing the Model Law. The understanding was that informal consultations would be held to seek to advance the work on the Model Law in the interim.

157. It was recalled that the Working Group was expected to work subsequently on a draft revised Guide to Enactment. The Working Group noted that a draft revised Guide text that would be before the Working Group at its next session would incorporate provisions addressed to legislators. The Working Group further noted that a Guide for adoption by the Commission in 2011 might also contain a checklist of issues to be addressed in procurement regulations.

**D. Note by the Secretariat on possible revisions to the
UNCITRAL Model Law on Procurement of Goods, Construction
and Services - a revised text of the Model Law, submitted to the
Working Group on Procurement at its eighteenth session
(A/CN.9/WG.I/WP.73 and Add.1-8)**

[Original: English]

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Law”) (A/49/17 and Corr.1, annex I) is set out in paragraphs 8 to 91 of document A/CN.9/WG.I/WP.72, which is before the Working Group at its eighteenth session. The main task of the Working Group is to update and revise the Model Law, so as to take account of recent developments in public procurement.
2. At its seventeenth session, the Working Group, for the lack of time, was not able to consider the entire draft revised Model Law contained in document A/CN.9/WG.I/WP.71/Add.1-8 and the issues related thereto highlighted in a note by the Secretariat (A/CN.9/WG.I/WP.71). The Working Group requested the Secretariat to revise chapters I to IV and some provisions of chapter V that were considered at the session, in the light of its deliberations.
3. The present note sets out the table of contents of the draft revised Model Law contained in the addenda to this note (A/CN.9/WG.I/WP.73/Add.1-8). The provisions of chapters V to VIII that were not considered at the Working Group’s seventeenth session were further revised by the Secretariat in the light of the changes agreed to be made so far in the Model Law.
4. It is expected that at its eighteenth session, the Working Group will proceed with the consideration of those provisions of chapter V of the draft revised Model Law that the Working Group was not able to consider at its seventeenth session (article 44 on) and will subsequently take up the remaining chapters of the draft revised Model Law. The Working Group may wish to consider the provisions of those chapters in conjunction with the relevant issues set out in document A/CN.9/WG.I/WP.71. It is expected that other issues highlighted in document A/CN.9/WG.I/WP.71 that are not related to a particular provision of the draft revised Model Law would be considered separately after the Working Group has completed its reading of the entire draft revised Model Law.
5. In accordance with the agreement reached at the Working Group’s fifteenth session (A/CN.9/668, para. 280) and confirmed at the Working Group’s subsequent sessions, the documents for the session of the Working Group are posted on the UNCITRAL website upon their availability in various language versions.

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Chapter I. GENERAL PROVISIONS Articles 1-23 bis	Chapter I. GENERAL PROVISIONS	
Article 1. Scope of application	Article 1. Scope of application	Revisions to article 1 of the 1994 Model Law agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 16-17); further amendments in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 17)
Article 2. Definitions	Article 2. Definitions	Revisions to article 2 of the 1994 Model Law agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 272-274, and A/CN.9/687, paras. 19-29); proposals made at the Commission's forty-second session (A/64/17, paras. 51-74); and amendments proposed by the Secretariat further to the expert consultations
Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]	Revisions to article 3 of the 1994 Model Law agreed upon at the Commission's forty-second session (A/64/17, paras. 75-78)
Article 4. Procurement regulations	Article 4. Procurement regulations	Revisions to article 4 of the 1994 Model Law in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 31-32)
Article 5. Publication of legal texts	Article 5. Public accessibility of legal texts	Draft article 5 as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 30-34), except for its paragraph (3), which was included in a separate article 6 (see below). The draft article with this revision was approved at the Working Group's fifteenth session (A/CN.9/668, para. 32)
Article 6. Information on possible forthcoming procurement (new provisions)		Based on draft article 5, paragraph (3), as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 30-34), and revised at the Working Group's fifteenth session (A/CN.9/668, paras. 37-38), and at the Commission's forty-second session (A/64/17, paras. 80-87)

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 7. Communications in procurement	Replaced article 9. Form of communications	Article 5 bis as preliminarily approved by the Working Group at its twelfth session (A/CN.9/640, paras. 17-25) and as proposed to be revised at the Commission's forty-second session (A/64/17, paras. 121-143)
Article 8. Participation by suppliers or contractors	Article 8. Participation by suppliers or contractors	Amendments proposed by the Secretariat further to the expert consultations and in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 40-42)
Article 9. Qualifications of suppliers and contractors	Article 6. Qualifications of suppliers and contractors Article 10. Rules concerning documentary evidence provided by suppliers or contractors	Revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 73-76 and 109, and A/CN.9/687, paras. 43-50); amendments proposed by the Secretariat further to the expert consultations
Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement	Article 16. Rules concerning description of goods, construction or services	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 77-81) and proposals made at the Commission's forty-second session (A/64/17, paras. 144-148); amendments proposed by the Secretariat in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 51-52)
Article 11. Rules concerning evaluation criteria and procedures (new provisions based on the 1994 text)	Articles 27 (e), 34 (4), 38 (m), 39 and 48 (3) (basis of new provisions)	Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 82-87); proposals made at the Commission's forty-second session (A/64/17, paras. 149-174); and amendments proposed by the Secretariat further to the expert consultations and in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 53-62)
Article 12. Rules concerning estimation of the value of procurement (new provisions)		New provisions are proposed to be added in the light of the suggestions made by experts. They are based on the equivalent provisions of the WTO GPA (article II.2 and 3 of the 1994 version and article II.6 of the 2006 version); revised by the Secretariat in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 63-66)
Article 13. Rules concerning the language of documents	Article 17. Language Article 29. Language of tenders	Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 88 and 169)

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 13 bis. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or submissions (new provisions based on the 1994 text)	Articles 7 (3) (a) (iv) and 30 (2) to (4)	Proposed by the Secretariat
Article 14. Clarifications and modifications of solicitation documents	Article 28. Clarifications and modifications of solicitation documents	Proposed by the Secretariat to be moved from chapter III to chapter I
Article 15. Tender securities	Article 32. Tender securities	As approved at the Working Group's fifteenth session (A/CN.9/668, para. 91); minor amendments proposed by the Secretariat further to the expert consultations
Article 16. Prequalification proceedings	Article 7. Prequalification proceedings. Also articles 23, 24 and 25, provisions related to prequalification	Revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 93-110; and A/CN.9/687, paras. 72-76) and at the Commission's forty-second session (A/64/17, paras. 177-178); minor amendments proposed by the Secretariat further to the expert consultations
Article 17. Cancellation of the procurement	Article 12. Rejection of all tenders, proposals, offers or quotations	Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 111-117) and at the Commission's forty-second session (A/64/17, paras. 179-208) and agreed upon at the Working Group's seventeenth session (A/CN.9/687, paras. 77-81); and amendments proposed by the Secretariat further to the expert consultations
Article 18. Rejection of abnormally low submissions (new provisions)		Based on article 12 bis as preliminarily agreed upon by the Working Group at its twelfth session (A/CN.9/640, paras. 44-55) and proposals made at the Commission's forty-second session (A/64/17, paras. 209-212); minor amendments proposed by the Secretariat
Article 19. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest	Article 15. Inducements from suppliers or contractors	Conflicts of interest (A/CN.9/664, para. 116) A proposal by a delegation for a new paragraph 1 of the article; revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 121-125; and A/CN.9/687, paras. 83-90); proposals made at the Commission's forty-second session (A/64/17, paras. 213-222); and amendments proposed by the Secretariat further to the expert consultations

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 20. Acceptance of the successful submission and entry into force of the procurement contract	Article 13. Entry into force of the procurement contract Article 36. Acceptance of tender and entry into force of procurement contract	Standstill period (A/CN.9/664, paras. 45-55 and 72) Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 126-145; and A/CN.9/687, paras. 91-98) and at the Commission's forty-second session (A/64/17, paras. 223-247); amendments proposed by the Secretariat further to the expert consultations
Article 21. Public notice of awards of procurement contract and framework agreement	Article 14. Public notice of procurement contract awards	Revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 146-148; and A/CN.9/687, paras. 99-100), and amendments proposed by the Secretariat further to the expert consultations
Article 22. Confidentiality	Articles 45, 48 (7) and 49 (3)	Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 149-152; A/CN.9/687, paras. 101-103) and at the Commission's forty-second session (A/64/17, paras. 248-266); and amendments proposed by the Secretariat
Article 23. Documentary record of procurement proceedings	Article 11. Record of procurement proceedings	Revisions considered at the Working Group's ninth (A/CN.9/595, para. 49), eleventh (A/CN.9/623, para. 100), twelfth (A/CN.9/640, paras. 90-91), fifteenth (A/CN.9/668, paras. 153-157) and seventeenth sessions (A/CN.9/687, paras. 104-106) and at the Commission's forty-second session (A/64/17, paras. 267-280); and amendments proposed by the Secretariat further to the expert consultations
Article 23 bis. Code of conduct		Proposed by the Secretariat; based on provisions of draft article 4 (2) that were before the Working Group at its seventeenth session
Chapter II. METHODS OF PROCUREMENT AND METHODS OF SOLICITATION AND THEIR CONDITIONS FOR USE Articles 24-29 quinquies	Chapter II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE	Draft article 7. Rules concerning methods of procurement and type of solicitation in WP.69/Add.1 Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 39-70; and A/CN.9/687, paras. 107-131) and at the Commission's forty-second session (A/64/17, paras. 88-120) Amendments proposed by the Secretariat further to the expert consultations

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Section I. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE Articles 24-29 bis		Chapter II. METHODS OF PROCUREMENT AND THEIR CONDITIONS FOR USE, articles 24-29, as contained in document WP.71/Add.2 and considered at the Working Group's seventeenth session (A/CN.9/687, paras. 107-131). In the light of introduction of new provisions on methods of solicitation and their conditions for use in the chapter, the Secretariat proposed splitting the chapter into two sections.
Article 24. Methods of procurement (new provisions)		Proposed by the Secretariat further to the expert consultations held in autumn 2009; Revisions considered at the Working Group's seventeenth session (A/CN.9/687, paras. 107-109)
Article 25. General rules applicable to the selection of a procurement method	Article 18. Methods of procurement	Draft article 7 (1), (2) and (8) in WP.69/Add.1 as considered at the Working Group's fifteenth session (A/CN.9/668, paras. 40-45, 69); Revisions considered at the Working Group's seventeenth session (A/CN.9/687, paras. 110-112)
Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)	Articles 20, 21 and 42	Revisions considered at the Working Group's seventeenth session (A/CN.9/687, paras. 113-119)
Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue and [request for proposals with consecutive negotiations])	Article 19 (1)	As related to the new procurement method (request for proposals with dialogue), see para. 1 of a new article 40 proposed by delegations of Austria, France, UK and USA as considered at the Working Group's sixteenth session (A/CN.9/672, paras. 32-37) and revised in A/CN.9/XLII/CRP.2, para. 5 (a) Revisions considered at the Working Group's seventeenth session (A/CN.9/687, paras. 120-129) Amendments proposed by the Secretariat further to the expert consultations

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 27 bis. Conditions for use of competitive negotiations	Article 19 (2)	Amendments proposed by the Secretariat further to the expert consultations and in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 120-129)
Article 28. Conditions for use of an electronic reverse auction (new provisions)		Draft article 41 (1) in WP.69/Add.4 as approved at the Working Group's fifteenth session (A/CN.9/668, para. 216) Amendments proposed by the Secretariat further to the expert consultations
Article 29. Conditions for use of single-source procurement	Article 22	Draft article 7 (7) in WP.69/Add.1 as considered at the Working Group's fifteenth session (A/CN.9/668, paras. 51-64) and at the Commission's forty-second session (A/64/17, para. 119) A revision agreed to be made at the Working Group's seventeenth session (A/CN.9/687, para. 131)
Article 29 bis. Conditions for use of a framework agreement procedure		Moved from the chapter on framework agreement procedures of the draft considered by the Working Group at its fifteenth session (article 49) (A/CN.9/668, paras. 226-229)
Section II. METHODS OF SOLICITATION AND THEIR CONDITIONS FOR USE Articles 29 ter-29 quinquies		New provisions proposed by the Secretariat in the light of the deliberations at the Working Group's seventeenth session
Article 29 ter. Solicitation in open tendering, two-stage tendering and electronic reverse auctions as a stand-alone procurement method		
Article 29 quater. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement		
Article 29 quinquies. Solicitation in request for proposals proceedings		

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Chapter III. OPEN TENDERING Articles 30-38	Chapter III. TENDERING PROCEEDINGS	<p>As considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 159-166, and 170-182; and A/CN.9/687, paras. 132-158)</p> <p>Amendments proposed by the Secretariat further to the most recent changes throughout the draft revised Model Law and further to the expert consultations</p>
	<p>Article 23 deleted in the light of the newly proposed definition of "domestic procurement"</p>	
<p>Articles 30-33</p>	<p>Articles 24-27, with consequential changes</p>	<p>Revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 161-166; and A/CN.9/687, paras. 132-139)</p> <p>Amendments proposed by the Secretariat further to the expert consultations and as a result of the most recent changes throughout the draft revised Model Law</p>
	<p>Articles 28. Clarifications and modifications of solicitation documents was moved to chapter I (see above).</p> <p>Article 29. Language of tenders was deleted and its provisions merged with the proposed article 13. Rules concerning the language of documents, in chapter I.</p> <p>General provisions, in order to make them applicable to all procurement methods</p>	<p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, para. 169)</p>

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Articles 34-35	Articles 30-31, with consequential changes	<p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 170-172)</p> <p>Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 175-176; and A/CN.9/687, paras. 140-144)</p> <p>Amendments proposed by the Secretariat further to the expert consultations, the newly proposed article 13 bis and as a result of the most recent changes throughout the draft revised Model Law</p>
	Article 32. Tender securities became article 15. Submission securities and placed in chapter I. General provisions, in order to make it applicable to all procurement methods (see above)	
Articles 36-38	Articles 33-35, with consequential changes	<p>Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 177-182; and A/CN.9/687, paras. 145-158)</p> <p>Amendments proposed by the Secretariat further to the expert consultations and as a result of the most recent changes throughout the draft revised Model Law</p>
	Article 36. Acceptance of tender and entry into force of procurement contract became article 20 and placed in chapter I. General provisions, in order to make it applicable to all procurement methods	

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
CHAPTER IV. PROCUREMENT METHODS NOT INVOLVING NEGOTIATIONS (RESTRICTED TENDERING, REQUEST FOR QUOTATIONS AND REQUEST FOR PROPOSALS WITHOUT NEGOTIATION) Articles 39-41	Chapter IV, article 42 and other relevant provisions; and chapter V, articles 47 and 50	<p>Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 183-201; and A/CN.9/687, paras. 159-181)</p> <p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 202-208)</p> <p>Amendments proposed by the Secretariat further to the most recent changes throughout the draft revised Model Law</p>
Article 39. Restricted tendering	Article 47. Restricted tendering	<p>Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 183-192; and A/CN.9/687, paras. 159-169)</p> <p>Amendments proposed by the Secretariat in the light of the newly proposed section II of chapter II (see above)</p>
Article 40. Request for quotations	Article 50. Request for quotations	Revisions agreed upon at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 202-208; and A/CN.9/687, paras. 170-172)
Article 41. Request for proposals without negotiation	Article 42. Selection procedure without negotiation, and other relevant provisions of chapter IV. Principal method for procurement of services	Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 193-201; and A/CN.9/687, paras. 173-181)
CHAPTER V. PROCUREMENT METHODS INVOLVING NEGOTIATIONS (TWO-STAGE TENDERING, REQUEST FOR PROPOSALS WITH DIALOGUE, REQUEST FOR PROPOSALS WITH CONSECUTIVE NEGOTIATIONS, COMPETITIVE NEGOTIATIONS AND SINGLE-SOURCE PROCUREMENT) Articles 42-46	Chapter IV, articles 43 and 44 and other relevant provisions; chapter V, articles 46, 48, 49 and 51	<p>Revisions considered at the Working Group's fifteenth and seventeenth sessions (A/CN.9/668, paras. 209-212; and A/CN.9/687, paras. 182-210)</p> <p>Revisions considered at the Working Group's sixteenth session (A/CN.9/672)</p> <p>Amendments proposed by the Secretariat in the light of the newly proposed section II of chapter II (see above) and further to the most recent changes throughout the draft revised Model Law</p>

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 42. Two-stage tendering	Article 46. Two-stage tendering	<p>Revisions considered at the Working Group's seventeenth session (A/CN.9/687, paras. 182-191)</p> <p>Amendments proposed by the Secretariat in the light of the newly proposed section II of chapter II (see above)</p>
Article 43. Request for proposals with dialogue	Articles 43 and 48	<p>A new article proposed by delegations of Austria, France, UK and USA as considered at the Working Group's fifteenth and sixteenth sessions (A/CN.9/668, paras. 210-211, and A/CN.9/672, paras. 32-37). See also the revised proposal in A/CN.9/XLII/CRP.2</p> <p>Revisions to the article considered at the Working Group's seventeenth session (A/CN.9/687, paras. 192-208)</p> <p>Amendments proposed by the Secretariat in the light of the newly proposed section II of chapter II (see above) and further to the most recent changes throughout the draft revised Model Law</p>
Article 44. Request for proposals with consecutive negotiations	Article 44. Selective procedure with consecutive negotiations	Amendments proposed by the Secretariat further to the expert consultations
Article 45. Competitive negotiations	Article 49. Competitive negotiation	Amendments proposed by the Secretariat further to the expert consultations and in the light of the newly proposed section II of chapter II (see above)
Article 46. Single-source procurement	Article 51. Single-source procurement	
CHAPTER VI. ELECTRONIC REVERSE AUCTIONS Articles 47-51 (new provisions)		<p>Draft articles 22 bis and 51 bis to septies (see A/CN.9/WG.I/WP.59, A/CN.9/WG.I/WP.61, para. 17, and A/CN.9/640, paras. 56-89), subsequently replaced by articles 43-48 in WP.69/Add.4 that were considered at the Working Group's fifteenth session (A/CN.9/668, paras. 213-222)</p> <p>Amendments proposed by the Secretariat further to the expert consultations and as a result of the most recent changes throughout the draft revised Model Law</p>

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
CHAPTER VII. FRAMEWORK AGREEMENTS PROCEDURES Articles 52-57 (new provisions)		<p>Draft articles 22 ter and 51 octies to quindecies (see A/CN.9/WG.I/WP.62, and A/CN.9/664, paras. 75-110), subsequently replaced by draft articles 48-55 in WP.69/Add.4 considered at the Working Group's fifteenth session (A/CN.9/668, paras. 223-255; revisions agreed to be made as per paras. 230-233 and 239-255; other revisions considered are in paras. 226-229 and 235-237)</p> <p>Amendments proposed by the Secretariat further to the expert consultations and as a result of the most recent changes throughout the draft revised Model Law</p>
<i>Articles 58-60 are not used in the current draft</i>		
CHAPTER VIII. REVIEW Articles 61-66	Chapter VI. Review	<p>Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 19-74)</p> <p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 259-262 and 267-268)</p> <p>Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 264 and 267 (b))</p> <p>Amendments proposed by the Secretariat further to the expert consultations and as a result of the most recent changes throughout the draft revised Model Law</p>
Article 61. Right to review	Article 52. Right to review	<p>Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 19-27)</p> <p>The Working Group, at its fifteenth session, approved the draft article without change (A/CN.9/668, para. 257)</p> <p>Amendments proposed by the Secretariat further to the expert consultations</p>
Article 62. Review by the procuring entity or the approving authority	Article 53. Review by procuring entity (or by approving authority)	<p>Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 28-33)</p> <p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 259-260)</p> <p>Amendments proposed by the Secretariat further to the expert consultations</p>

Article in the revised Model Law	Corresponding provisions in the 1994 Model Law	New provisions considered or to be considered by the Working Group
Article 63. Review before an independent administrative body	Article 54. Administrative review	<p>Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 34-58)</p> <p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, para. 262)</p> <p>Revisions considered at the Working Group's fifteenth session (A/CN.9/668, paras. 263-264)</p> <p>Amendments proposed by the Secretariat further to the expert consultations</p>
Article 64. Certain rules applicable to review proceedings under articles [62 and 63]	Article 55. Certain rules applicable to review proceedings under article 53 [and article 54]	<p>Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 59-60)</p> <p>Revisions agreed upon at the Working Group's fifteenth session (A/CN.9/668, paras. 267-268)</p> <p>Revisions considered at the Working Group's fifteenth session (A/CN.9/668, para. 267 (b))</p> <p>Amendments proposed by the Secretariat further to the expert consultations</p>
Article 65. Suspension of procurement proceedings	Article 56. Suspension of procurement proceedings	Revisions considered at the Working Group's fourteenth session (A/CN.9/664, paras. 61-73)
Article 66. Judicial review	Article 57. Judicial review	

A/CN.9/WG.I/WP.73/Add.1 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its eighteenth session****ADDENDUM**

This note sets out a proposal for the Preamble and articles 1-13 of chapter I (General provisions) of the revised Model Law.

The Secretariat's comments are set out in the accompanying footnotes.

UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT¹**Preamble**

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate procurement so as to promote the objectives of:

- (a) Maximizing economy and efficiency in procurement;
- (b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors, especially where appropriate, participation by suppliers and contractors regardless of nationality, and thereby promoting international trade;
- (c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;
- (d) Providing for the fair and equitable treatment of all suppliers and contractors;
- (e) Promoting the integrity of, and fairness and public confidence in, the procurement process;
- (f) Achieving transparency in the procedures relating to procurement;

Be it therefore enacted as follows.

¹ At the Working Group's seventeenth session, the suggestion was made that an inconsistency between the title (which referred to "public procurement") and the rest of the draft revised Model Law (which referred to "procurement") should be clarified. The Secretariat was requested to amend article 1 or 2 (f) accordingly, as appropriate (A/CN.9/687, para. 17). The Secretariat suggests amending article 1 as in the current draft and introducing a definition of "public procurement" alongside the definition of "procurement" in article 2.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application²

This Law applies to all public procurement.

Article 2. Definitions³

For the purposes of this Law:

- (a) “Currency” includes monetary unit of account;
- (b) “Domestic procurement” means procurement limited to domestic suppliers or contractors pursuant to article [8];⁴
- (c) “Electronic reverse auction” means an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves presentation by suppliers or contractors of successively lowered bids during a scheduled period of time;
- (d) “Framework agreement procedure” means a procurement conducted in two stages: a first stage to select supplier(s) or contractor(s) to be the party or parties to a framework agreement with a procuring entity, and a second stage to award a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement;
 - (i) “Framework agreement” means an agreement or agreements between the procuring entity and the selected supplier(s) or contractor(s) concluded upon completion of the first stage of the framework agreement procedure;
 - (ii) “Closed framework agreement” means a framework agreement to which no supplier or contractor that is not initially a party to the framework agreement may subsequently become a party;
 - (iii) “Open framework agreement” means a framework agreement to which supplier(s) or contractor(s) in addition to the initial parties may subsequently become a party or parties;
 - (iv) “Framework agreement procedure with second stage competition” means a procedure under an open framework agreement or a closed framework agreement in which certain terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded are to be established or refined through the second stage competition;

² The accompanying Guide text will point out that States in situations of economic and financial crisis might exempt the application of the Model Law through legislative measures (which would themselves receive the scrutiny of the legislature) (A/CN.9/668, para. 63).

³ The article will be supplemented in the revised Guide to Enactment by a more comprehensive glossary of terms used in the Model Law.

⁴ Revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, paras. 19-20).

(v) “Framework agreement procedure without second stage competition” means a procedure under a closed framework agreement in which all terms and conditions of the procurement are established when the framework agreement is concluded;

(e) “Material change” means a change in the description of the subject matter of the procurement,⁵ in the criteria and procedures for examining, evaluating [and comparing]⁶ submissions and ascertaining the successful submission, in the relative weight of the evaluation criteria or in other terms and conditions of the procurement, as established by the procuring entity when first soliciting the participation of suppliers or contractors in procurement, that would make previously responsive submissions non-responsive, that would render previously non-responsive submissions responsive, that would change the status of suppliers or contractors with regard to their qualification or that would change the ranking of submissions;⁷

[(f) “Pre-qualification documents” means documents issued by the procuring entity that set out the terms and conditions of the pre-qualification proceedings in accordance with article [16] of this Law];⁸

(g) “Procurement” means the acquisition by any means of goods, construction or services (the “subject matter of the procurement”);⁹

(h) “Procurement contract” means a contract or contracts¹⁰ resulting from the procurement proceedings and made between the procuring entity and supplier(s) or contractor(s);

(i) “Procurement involving classified¹¹ information” means procurement in which the procuring entity may be authorized by the procurement regulations or by

⁵ As this is the first time the term “subject matter of the procurement” is used in an article of the Model Law, the accompanying Guide text will cross-refer to the definition of “procurement” where the term is defined.

⁶ The Working Group may wish to consider whether the term “evaluation” already encompasses the notion of “comparison” and therefore the use throughout the Model Law of the latter term alongside the term “evaluation” is superfluous. The Secretariat put it in square brackets in all instances for the Working Group’s consideration.

⁷ Revised in the light of the deliberations at the Working Group’s seventeenth session. It was the understanding in the Working Group that since the phrase “terms and conditions of the procurement” was not defined in the Model Law, that phrase should be explained in the Guide, in particular in relation to the sources where the terms and conditions of the procurement could be found, such as in the solicitation documents (A/CN.9/687, para. 22).

⁸ This new definition is added as suggested at the Working Group’s seventeenth session (A/CN.9/687, para. 50). The accompanying Guide text will note that for avoidance of doubt this definition encompasses the “pre-selection documents” in the relevant context.

⁹ The accompanying Guide text will set out the substance of the definitions of the goods, construction and services from the 1994 text (article 2 (c) to (e)). The Guide will explain that the words “by any means” in the definition should not be read as referring to unlawful acts but intended to indicate that procurement is carried out not only through acquisition by purchase but also by other means such as lease (equivalent terms in article I.2 of the WTO Agreement on Government Procurement (1994, GPA) and the provisionally agreed text of the revised GPA article II.2 (b) refer to “purchase, lease and rental or hire purchase, with or without an option to buy”) (A/CN.9/668, para. 273).

¹⁰ The accompanying Guide text will note that reference to contracts in plural intends to encompass inter alia split contracts awarded as a result of the same procurement proceedings.

other provisions of law of this State to take special measures and impose special requirements for the protection of classified information, including to determine which provisions of this Law calling for public disclosure shall not apply;¹²

(j) “Procurement regulations” means regulations to be enacted in accordance with article [4] of this Law;

(k) “Procuring entity” means:

(i) *Option I*

Any governmental department, agency, organ or other unit, or any subdivision thereof, in this State that engages in procurement, except ...; (and)

Option II

Any department, agency, organ or other unit, or any subdivision thereof, of the (“Government” or other term used to refer to the national Government of the enacting State) that engages in procurement, except ...; (and)

(ii) (The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs, other entities or enterprises, or categories thereof, to be included in the definition of “procuring entity”);¹³

(l) “Public procurement” means procurement carried out by a procuring entity;¹⁴

(m) “Socioeconomic policies”¹⁵ means environmental, social, economic and other policies of this State authorized or required by the procurement regulations or

¹¹ The accompanying Guide text will explain that the term “classified information” intends to refer to information designated as classified by an enacting State in accordance with the relevant national law, and that the provision does not intend to confer any discretion on the procuring entity to expand the definition of “classified information”. The Guide will also explain that the term “classified information” being understood in many jurisdictions as information to which access is restricted by law or regulation to particular classes of persons, and that the term does not intend to refer only to the procurement in the sectors where “classified information” is most commonly encountered, such as national security and defence, but also to procurement in any other sector where protection of certain information from public disclosure may be permitted by law, such as in the health sector (for example procurement of vaccines in the case of pandemics in order to avoid panic) or where sensitive medical research and experiments may be involved. Because of the risk of abuse of exceptions to transparency requirements, the Working Group may wish to recommend in the Guide that the issues pertaining to the treatment of “classified information” should be regulated at the level of statutes in order to ensure appropriate scrutiny by the legislature.

¹² The accompanying Guide text will note that the definition, where it is used in the Model Law, is supplemented by the requirement in the article on the documentary record of procurement proceedings to include in the record the reasons and circumstances on which the procuring entity relied to justify the measures and requirements imposed during the procurement proceedings for protection of classified information, such as exemptions from public disclosure.

¹³ The accompanying Guide text will note that this definition may be read as encompassing more than one procuring entity engaged in the same procurement. For example, in the context of framework agreement procedures, it is common in some jurisdictions that more than one State department, agency, organ or other unit, or any subdivision thereof, becomes party to the same framework agreement.

¹⁴ The accompanying Guide text will cross-refer to the definitions of “procurement” and “procuring entity”.

other provisions of law of this State [or by ... (the enacting State specifies the relevant organ)]¹⁶ to be taken into account by the procuring entity in the procurement proceedings. (The enacting State may expand this subparagraph by providing an illustrative list of such policies);¹⁷

(n) “Solicitation” means an invitation to participate in the procurement proceedings;¹⁸

[(i) “Direct solicitation”¹⁹ means the [exceptional]²⁰ solicitation addressed directly to one or a restricted number of suppliers or contractors. This excludes solicitation addressed to a restricted number of suppliers or contractors following pre-qualification or pre-selection proceedings];

(o) “Solicitation documents” means documents issued by the procuring entity, including any amendments thereto,²¹ that set out the terms and conditions of the given procurement;

(p) “Standstill period”²² means the period before the entry into force of the procurement contract, during which the suppliers or contractors whose submissions

¹⁵ The definition was revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, paras. 24-26).

¹⁶ The wording in square brackets appears in the light of the changes agreed to be made at the Working Group’s seventeenth session to the corresponding provisions in the article on evaluation criteria. The Working Group may wish to reconsider the inclusion of such wording since it is open to abuse unless appropriate safeguards are built in the administrative system of the enacting State to mitigate risks of such abuse. The aim of the provisions is to ensure that (a) socioeconomic policies are of the Government and not determined on an ad hoc basis by the procuring entity, and (b) applied across all government purchasing, so that their costs and benefits can be seen. If there is to be an organ with the authority to decide the socioeconomic policies, it should be operating under these constraints (and not allowing, for example, misuse and abuse through ad hoc adoption of policies, favouritism, etc.).

¹⁷ The accompanying Guide text will contain an illustrative list of such policies, such as that contained in the 1994 Model Law (article 34 (4) (c) (iii)). The Guide will also describe the costs to procurement that recourse to such policies can bring, and that they are commonly considered to be appropriate only for the purposes of assisting development, such as capacity-building.

¹⁸ This definition was revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, para. 19). The definition of “open solicitation” was removed because the term is not used in the current draft.

¹⁹ This definition was revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, para. 19).

²⁰ Although the suggestion was made at the Commission’s forty-second session to highlight the exceptional nature of direct solicitation in the definition (A/64/17, para. 63), the Working Group may consider that direct solicitation is exceptional when the procuring entity has a choice between open and direct solicitations, which in the current draft revised Model Law is only in the request for proposals procedures. Direct solicitation is inherent in other methods of procurement, such as restricted tendering, request for quotations, competitive negotiations or single-source procurement, and cannot therefore be considered exceptional in those methods. See further section II of chapter II of this draft.

²¹ The accompanying Guide text will need to explain the difference in the meaning of “solicitation documents” in various procurement methods. With respect to the amendments, it will cross-refer to the relevant provisions of the Model Law, such as articles 13 bis, 14, 42 and 43 of this Law.

²² This definition was revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, para 19).

have been examined may seek review of the anticipated²³ decision of the procuring entity to accept the successful submission;

(q) “Submission(s)” means tender(s), proposal(s), offer(s), quotation(s) and bid(s) referred to collectively or generically;

[(r) “Successful submission(s)” means ...;]²⁴

(s) “Supplier or contractor” means, according to the context, any potential party or any party to the procurement proceedings with the procuring entity;

(t) “Tender security”²⁵ means a security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation referred to in article [15 (1) (f)] and includes such arrangements as bank guarantees, surety bonds, standby letters of credit, cheques on which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract.

Article 3. International obligations of this State relating to procurement [and intergovernmental agreements within (this State)]²⁶

To the extent that this Law conflicts with an obligation of this State under or arising out of any

(a) Treaty or other form of agreement to which it is a party with one or more other State,

(b) Agreement entered into by this State with an intergovernmental international financing institution, or

[(c) Agreement between the federal Government of [name of federal State] and any subdivision or subdivisions of [name of federal State], or between any two or more such subdivisions,]

²³ Revised in the light of the deliberations at the Working Group’s seventeenth session (A/CN.9/687, para 28). The Guide will explain the phrase “anticipated decision” in the light of provisions of article 20.

²⁴ The definition is to be considered in the light of article 20 and the provisions of the Model Law defining the successful submission(s) in the context of various procurement methods and procedures. At the Working Group’s seventeenth session, the need for this definition was questioned (A/CN.9/687, para 29).

²⁵ The accompanying Guide text will explain that although the Model Law refers to “tender security”, as the commonly-used term in the relevant context, this should not imply that this type of security may be requested only in the tendering proceedings. It will also explain that the definition does not intend to imply that multiple tender securities can be requested by the procuring entity in any single procurement proceedings that involve presentation of revised proposals or bids (A/64/17, para. 57).

²⁶ The accompanying Guide text will explain that the texts in square brackets in this article are relevant to, and intended for consideration by, federal States. It will also alert enacting States that the provisions of the article might need to be adapted to constitutional requirements or should not be enacted at all if they conflict with the constitutional law of the enacting State (A/64/17, paras. 75-78).

the requirements of the treaty or agreement shall prevail; but in all other respects, the procurement shall be governed by this Law.

Article 4. Procurement regulations²⁷

The ... (the enacting State specifies the organ or authority authorized to promulgate the procurement regulations) is authorized to promulgate procurement regulations to fulfil the objectives and to carry out the provisions of this Law.²⁸

Article 5. Publication of legal texts

(1) Except as provided for in paragraph (2) of this article, the text of this Law, procurement regulations and other legal texts of general application in connection with procurement covered by this Law, and all amendments thereto, shall be promptly made accessible to the public and systematically maintained.

(2) Judicial decisions and administrative rulings with precedent value in connection with procurement covered by this Law shall be made available to the public and updated if need be.²⁹

Article 6. Information on possible forthcoming procurement

(1) Procuring entities may publish information regarding planned procurement activities for forthcoming months or years.³⁰

(2) Procuring entities may also publish an advance notice of possible future procurement.³¹

(3) Publication under this article does not constitute a solicitation, does not oblige the procuring entity to issue a solicitation and does not confer any rights on suppliers or contractors.³²

²⁷ The accompanying Guide text will contain a list of cross-references to all provisions of the Model Law where requirements about the content of the procurement regulations are found.

²⁸ The article was revised in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 31-32). The provisions on a code of conduct that were in this article in the earlier drafts were moved to a separate article 23 bis, in order to avoid giving impression that issues pertaining to conduct of procuring officers are necessarily always addressed in the procurement regulations.

²⁹ The accompanying Guide text will explain that laws and regulations of the enacting State will regulate which State agency is responsible for fulfilling the obligations under this article.

³⁰ The accompanying Guide text will emphasize the need for proper procurement planning.

³¹ The accompanying Guide text will explain that the reference to "an advance notice of possible future procurement" is made to enable procuring entities to assess the market for complex procurement, without using a term that might be confused with a notice seeking expressions of interest that is usually published in conjunction with request for proposals proceedings.

³² The accompanying Guide text will explain that the provisions of this article may be applied regardless of the procurement method, and will also highlight the importance of the provisions in the light of the United Nations Convention against Corruption (UNCAC), as ensuring transparency throughout the process and eliminating any advantageous position of suppliers or

Article 7. Communications in procurement

(1) Any document, notification, decision or any other information generated in the course of a procurement and communicated as required by this Law, including in connection with review proceedings under chapter [VIII] or in the course of a meeting, or forming part of the record of procurement proceedings under article [23], 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) Direct solicitation³³ and communication of information between suppliers or contractors and the procuring entity referred to in articles [15 (1) (d),³⁴ 16 (6) and (9),³⁵ 35 (2) (a),³⁶ 37 (1)³⁷ and 44 (...)³⁸]³⁹ may be made by means that do not provide a record of the content of the information on the condition that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the content of the information and that is accessible so as to be usable for subsequent reference.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall specify:

(a) Any requirement of form;

(b) In procurement involving classified information, if the procuring entity considers it necessary, measures and requirements needed to ensure the protection of classified information at the requisite level;

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

(d) The means to be used to satisfy all requirements under this Law for information to be in writing or for a signature; and

(e) The means to be used to hold any meeting of suppliers or contractors.

(4) The procuring entity may use only those means of communication that are in common use by suppliers or contractors in the context of the particular procurement. In any meeting held with suppliers or contractors, the procuring entity shall use only

contractors that otherwise may gain access to procurement planning phases in a non-transparent manner. The Guide will also explain the media where the type of information covered by the article is usually published (A/CN.9/687, para. 37).

³³ Corresponds to references in article 9 of the 1994 Model Law to articles 37 (3) and 47 (1) of that text.

³⁴ Id., as regards reference to article 32 (1) (d) of the 1994 text.

³⁵ Id., as regards reference to article 7 (4) and (6) of the 1994 text.

³⁶ Id., as regards reference to article 31 (2) (a) of the 1994 text.

³⁷ Id., as regards reference to article 34 (1) of the 1994 text.

³⁸ The missing reference should correspond to article 44 (b) to (f) of the 1994 text (selection procedure with consecutive negotiation). It will be updated in the light of the revisions to chapter V.

³⁹ It was decided that the other references in the 1994 text (to articles 36 (1) (notice of acceptance of the successful tender), and to article 12 (3) (notice of the rejection of all submissions)) would be deleted (A/64/17, para. 122).

those means that ensure in addition that suppliers or contractors can fully and contemporaneously participate in the meeting.⁴⁰

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

Article 8. Participation by suppliers or contractors⁴¹

(1) Suppliers or contractors shall be permitted to participate in procurement proceedings without regard to nationality, except:

(a) Where the value of the procurement is less than the threshold set out in procurement regulations authorizing the procuring entity to have recourse to domestic procurement;⁴²

(b) Where the procuring entity decides to limit participation in procurement proceedings on the basis of nationality on other grounds specified in the procurement regulations or according to other provisions of law of this State.⁴³

(2) Except when required to do so by the procurement regulations or according to other provisions of law of this State,⁴⁴ the procuring entity shall establish no other requirement aimed at limiting participation of suppliers or contractors in

⁴⁰ The changes to this paragraph are intended to make it clear that the requirements as to communications are obligatory (including where there is a meeting with suppliers and contractors), but that there is no obligation to hold such a meeting. The earlier wording of this paragraph inadvertently conveyed an obligation to hold meetings with suppliers or contractors.

⁴¹ The article was revised pursuant to the consideration at the Working Group's seventeenth session (A/CN.9/687, paras. 19-20 and 40-42).

⁴² This provision is new and is based on the part of the definition of the "domestic procurement" in article 2 that was before the Working Group at its seventeenth session and agreed to be moved from that definition to the relevant substantive provisions of the revised Model Law (A/CN.9/687, paras. 20 and 42). Some experts expressed concern that low-value procurement as a justification for the domestic procurement will be abused in order to avoid international procurement. The Working Group may wish to consider whether (a) to retain the 1994 approach that provides that the procurement below the threshold as established in the procurement regulations automatically authorizes the procuring entity to have recourse to the domestic procurement; or (b) add some value judgement, in which case the use of discretion may give rise to liability on the part of the procuring entity.

⁴³ The accompanying Guide text will explain the difference between subparagraphs (a) and (b) by pointing out that whereas subparagraph (a) covers domestic procurement, subparagraph (b) may deal not only with cases of domestic procurement (e.g. to cover situations where nationalities subject to international or bilateral sanctions are excluded). Although socioeconomic policies would most likely justify recourse to exceptions provided for in this subparagraph, the reference only to the socioeconomic policies of an enacting State was not considered sufficient since limiting participation in procurement proceedings on the basis of nationality may occur on grounds other than socioeconomic policies of this State, such as safety and security.

⁴⁴ The accompanying Guide text will explain that this paragraph intends to cover situations when limitation of participation in procurement proceedings is not on the basis of nationality or not solely on that basis (e.g. set-aside programs in some jurisdictions for small and medium enterprises or coming from disadvantaged areas). The paragraph may cover, as paragraph (1) (b) does, domestic procurement (e.g. procurement with participation of only suppliers or contractors coming from disadvantaged areas within the same State) or international procurement limited to certain groups of suppliers or contractors (e.g. persons with disabilities).

procurement proceedings that discriminates⁴⁵ against or among suppliers or contractors or against categories thereof.

(3) The procuring entity, when first soliciting the participation of suppliers or contractors in the procurement proceedings, shall declare whether participation of suppliers or contractors in the procurement proceedings is limited pursuant to this article and on which ground. Any such declaration may not later be altered.⁴⁶

(4) [A procuring entity that decides to limit participation of suppliers or contractors in procurement proceedings pursuant to this article shall include in the record of the procurement proceedings a statement of the reasons and circumstances on which it relied.]⁴⁷

(5) The procuring entity shall make available to any member of the general public, upon request, its reasons for limiting participation of suppliers or contractors in the procurement proceedings pursuant to this article.⁴⁸

Article 9. Qualifications of suppliers and contractors

(1) This article applies to the ascertainment by the procuring entity of the qualifications of suppliers or contractors at any stage of the procurement proceedings.

(2) [In order to be awarded the procurement contract],⁴⁹ suppliers or contractors must meet such of the following criteria as the procuring entity considers appropriate and relevant⁵⁰ in the circumstances of the particular procurement:⁵¹

⁴⁵ The accompanying Guide text will explain that, apart from clearly discriminatory measures, in practice some measures may be taken that produce inadvertently discriminatory effect on suppliers or contractors.

⁴⁶ The accompanying Guide text would specify the media where the declaration would be published.

⁴⁷ At the Working Group's seventeenth session, the suggestion was made that this type of provisions should be moved from articles where they were found and that they should be instead consolidated in the article on documentary records of procurement proceedings. It was also suggested that the Guide to the articles from where these provisions would be moved might cross-refer to the relevant requirement found in the article on documentary records of procurement proceedings (A/CN.9/687, para. 91). The Working Group did not make a decision on this suggestion. The Secretariat retained the provisions in square brackets for further consideration by the Working Group. From the standpoint of the users of the revised Model Law, it may be helpful to follow the 1994 approach by keeping the record-related provisions not only in the article on the documentary record of procurement proceedings but also in the relevant articles.

⁴⁸ It is suggested that the Guide text that will discuss transparency requirements of the Model Law should list separately all public disclosure requirements found in the Model Law.

⁴⁹ This opening phrase is suggested to be added as a result of consultations with experts. It replaces the 1994 opening phrase reading: "In order to participate in procurement proceedings". The Working Group may wish to consider whether the new wording is adequate to describe also situations where suppliers or contractors are qualified or disqualified very early in the process, such as at the pre-qualification stage, and thus not allowed to participate or further participate in the procurement proceedings. The previous draft did not contain any opening phrase.

⁵⁰ The words "and relevant" were added pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 46).

- (i) That they have the necessary professional, technical and environmental qualifications, professional and technical competence, financial resources, equipment and other physical facilities,⁵² managerial capability, reliability, experience and the personnel, and that they meet applicable ethical and other standards,⁵³ to perform the procurement contract;⁵⁴
 - (ii) That they have legal capacity to enter into the procurement contract;
 - (iii) That they are not insolvent, in receivership, bankrupt or being wound up, their affairs are not being administered by a court or a judicial officer, their business activities have not been suspended, and they are not the subject of legal proceedings for any of the foregoing;
 - (iv) That they have fulfilled their obligations to pay taxes and social security contributions in this State;⁵⁵
 - (v) That they have not, and their directors or officers have not, been convicted of any criminal offence related to their professional conduct or the making of false statements or misrepresentations as to their qualifications to enter into a procurement contract within a period of ... years (the enacting State specifies the period of time) preceding the commencement of the procurement proceedings, or have not been otherwise disqualified pursuant to administrative suspension or debarment proceedings.⁵⁶
- (3) Subject to the right of suppliers or contractors to protect their intellectual property or trade secrets, the procuring entity may require suppliers or contractors participating in procurement proceedings to provide appropriate documentary

⁵¹ The phrase “in the circumstances of the particular procurement” replaced the phrase used in the 1994 Model Law “in the particular procurement proceedings”, to align with the wording used in the similar context throughout the draft revised Model Law.

⁵² At the Working Group’s seventeenth session, it was agreed that the Guide to these provisions should explain that the requirement that suppliers or contractor must possess the “necessary equipment and other physical facilities” was not intended to restrict inadvertently participation of small and medium enterprises in public procurement. The Guide will note that often such enterprises would not themselves possess the required equipment and other physical facilities but rather ensure through their subcontractors that the required equipment and facilities were made available for the implementation of the procurement contract (A/CN.9/687, para. 45).

⁵³ The provisions were revised in the relevant part pursuant to the deliberations at the Working Group’s seventeenth session (A/CN.9/687, paras. 43-44). The Guide to these provisions would explain with reference to “other standards” that the procuring entity should be entitled for example to satisfy itself that suppliers or contractors have all the required insurances, and to impose security clearances or consider environmental aspects where necessary (A/CN.9/687, paras. 44 and 49).

⁵⁴ The word “references” was deleted in this paragraph, pursuant to the deliberations at the Working Group’s seventeenth session (A/CN.9/687, paras. 46-48).

⁵⁵ The accompanying Guide text will explain the effect of this provision on foreign suppliers or contractors, with a cross-reference to article 8 that prevents imposing requirements other than those stipulated in the procurement regulations or other provisions of law of the enacting State, to deter participation in the procurement proceedings by foreign suppliers or contractors.

⁵⁶ It was suggested that the accompanying Guide text should refer to the World Bank’s guidelines on suspension procedures (A/CN.9/687, para. 50).

evidence or other information to satisfy itself that the suppliers or contractors are qualified in accordance with the criteria referred to in paragraph (2).⁵⁷

(4) Any requirement established pursuant to this article shall be set out in the pre-qualification documents, if any, and in the solicitation documents, and shall apply equally to all suppliers or contractors. A procuring entity shall impose no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors other than those provided for in this Law.

(5) The procuring entity shall evaluate the qualifications of suppliers or contractors in accordance with the qualification criteria and procedures set out in the pre-qualification documents, if any, and in the solicitation documents.

(6) Other than any criterion, requirement or procedure that is imposed by the procuring entity in accordance with article [8] of this Law, the procuring entity shall establish no criterion, requirement or procedure with respect to the qualifications of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof, or that is not objectively justifiable.⁵⁸

(7) Notwithstanding paragraph (6) of this article, the procuring entity may require the legalization of documentary evidence provided by the supplier or contractor presenting the successful submission to demonstrate its qualifications for the particular procurement. In doing so, the procuring entity shall not impose any requirements as to the legalization of the documentary evidence other than those provided for in the laws of this State relating to the legalization of documents of the type in question.

(8) (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false;

(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete;

(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity;

(d) The procuring entity may require a supplier or contractor that was pre-qualified in accordance with article [16] of this Law to demonstrate its qualifications again in accordance with the same criteria used to pre-qualify such supplier or contractor. The procuring entity shall disqualify any supplier or contractor that fails to demonstrate its qualifications again if requested to do so. The

⁵⁷ At the Working Group's seventeenth session, it was agreed that the accompanying Guide text should explain the interaction between paragraphs (3) and (2), in particular paragraph (2) (i), of this article (A/CN.9/687, para. 48).

⁵⁸ The accompanying Guide text will note that, despite this statement in the Model Law, some practical measures, such as a choice of the language, although objectively justifiable, may lead to discrimination against or among suppliers or contractors or against categories thereof.

procuring entity shall promptly notify each supplier or contractor requested to demonstrate its qualifications again as to whether or not the supplier or contractor has done so to the satisfaction of the procuring entity.⁵⁹

Article 10. Rules concerning description of the subject matter of the procurement, and the terms and conditions of the procurement contract or framework agreement⁶⁰

(1) The procuring entity shall set out in the pre-qualification documents, if any, and in the solicitation documents the description of the subject matter of the procurement that it will use in the examination of submissions, including the minimum requirements that submissions must meet in order to be considered responsive and the manner in which those minimum requirements are to be applied.⁶¹

(2) Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with article [8] of this Law, no description of the subject matter of a procurement that creates an obstacle to the participation of suppliers or contractors in the procurement proceedings, including any obstacle based on nationality, shall be included or used in the pre-qualification documents, if any, or in the solicitation documents.

(3) The description of the subject matter of the procurement may include specifications, plans, drawings, designs, requirements, including concerning testing and test methods,⁶² packaging, marking or labelling or conformity certification, and symbols and terminology.

(4) To the extent practicable, any description of the subject matter of the procurement shall be objective, functional and generic, and shall set out the relevant technical and quality characteristics or the performance characteristics⁶³ of that subject matter. There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer unless there is no sufficiently precise or intelligible way of describing the characteristics of the subject matter of the procurement and provided that words such as “or equivalent” are included.

⁵⁹ The Guide to these provisions may note that in most procurement (with the exception perhaps of complex procurement requiring long negotiations), these provisions should be limited to the winner as envisaged in article 37 (6) and (7) and in the context of electronic reverse auctions.

⁶⁰ At the Working Group's seventeenth session, it was agreed that the Guide to this article should elaborate the way the socioeconomic factors can be taken into account in setting out the description of the subject matter of the procurement and the terms and conditions of the procurement contract or a framework agreement (A/CN.9/687, para. 51).

⁶¹ The accompanying Guide text will explain that the minimum requirements intend also to cover thresholds referred to in the provisions on request for proposals without negotiation and consecutive negotiations.

⁶² The accompanying Guide text will explain that the requirements may include those relevant to environment protection or other socioeconomic policies of the enacting State.

⁶³ The accompanying Guide text will explain that the relevant technical and quality characteristics or the performance characteristics may also cover characteristics relevant to environment protection or other socioeconomic policies of the enacting State.

(5) (a) Standardized features, requirements, symbols and terminology relating to the technical and quality characteristics of the subject matter of the procurement shall be used, where available, in formulating any description of the subject matter of the procurement to be included in the pre-qualification documents, if any, and in the solicitation documents;

(b) Due regard shall be had for the use of standardized trade terms, where available, in formulating the terms and conditions of the procurement and the procurement contract or the framework agreement to be entered into as a result of the procurement proceedings, and in formulating other relevant aspects of the pre-qualification documents, if any, and solicitation documents.

Article 11. Rules concerning evaluation criteria and procedures⁶⁴

(1) Except for the criteria set out in paragraph (4) below, the evaluation criteria shall relate to the subject matter of the procurement.

(2) The evaluation criteria may include:

(a) The price;

(b) The cost of operating, maintaining and repairing goods or construction, the time for delivery of goods, completion of construction or provision of services, the characteristics of the subject matter of the procurement, such as the functional characteristics of goods or construction and the environmental characteristics of the subject matter,⁶⁵ the terms of payment and of guarantees in respect of the subject matter of the procurement;

(c) Where relevant in procurement conducted in accordance with [request for proposals procurement, add appropriate cross-references], experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement;

(3) All non-price evaluation criteria shall, to the extent practicable, be objective, quantifiable and expressed in monetary terms.⁶⁶

(4) In addition to the criteria set out in paragraph (2), the evaluation criteria may include:

(a) Any criteria that the procurement regulations or other provisions of law of this State authorize or require to be taken into account [subject to approval by ... (the enacting State designates an organ to issue the approval)];

⁶⁴ The entire article was revised in the light of the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 24-26 and 53-62).

⁶⁵ The Guide would explain that this paragraph allows the procuring entity to include characteristics such as the environmental character of the production line. More generic socioeconomic policy considerations are addressed in articles 8, 9 and 10 and para. (4) of this article.

⁶⁶ The accompanying Guide text will explain that expressing all non-price evaluation criteria in monetary terms in competitive dialogue would not be practicable.

(b) If authorized or required by the procurement regulations or other provisions of law of this State [or by ... (the enacting State designates an organ)]⁶⁷ [and subject to approval by ... (the enacting State designates an organ to issue the approval)], a margin of preference for the benefit of submissions for construction by domestic contractors, for the benefit of submissions for domestically produced goods or for the benefit of domestic suppliers of services.⁶⁸ The margin of preference shall be calculated in accordance with the procurement regulations.⁶⁹

(5) The procuring entity shall set out in the solicitation documents:⁷⁰

(a) Whether the successful submission will be ascertained on the basis of price or of price and other criteria;⁷¹

(b) All evaluation criteria established pursuant to this article, including the price subject to any margin of preference, expressed to the extent practicable in monetary terms;

(c) Where any criteria other than price are to be used in the evaluation procedure, the relative weights of price subject to any applicable margin of preference and of the evaluation criteria other than price, except where the procurement is conducted under article [43], in which case the procuring entity shall list all evaluation criteria in descending order of importance;⁷²

⁶⁷ The issue of the text put in square brackets has been raised in the context of the similar provisions found in the definition of “socioeconomic policies” in article 2. The Working Group may wish to consider whether this text should be deleted with the result that the issue of granting margins of preference would have to be regulated in law or regulations and not merely dealt with on an ad hoc basis by a State agency. However, the approval requirement might be useful to avoid low-value price-only procurement being subject to socioeconomic factors at the desire of the procuring entity.

⁶⁸ The Working Group may wish to consider whether the provisions should be expanded to apply in the context of other socioeconomic policies of the enacting State by permitting granting a margin of preference for example to small and medium enterprises or suppliers coming from disadvantaged groups or areas. The Working Group may also wish to consider whether the provisions should be based on a broader notion of “domestic content”.

⁶⁹ The Working Group may wish to consider whether margins of preference are applicable to both price and non-price evaluation criteria listed in paragraph 2 (a) to (c) above (the 1994 text restricted application of the margin of preference to price) and are relevant in all procurement methods (some experts in particular questioned how margins of preference could operate in competitive dialogue). The accompanying Guide text will cross-refer to the article regulating the documentary record of procurement proceeding that require putting on the record the relevant information on the use of a margin of preference in the given procurement.

⁷⁰ The accompanying Guide text will cross-refer to the corresponding provisions in the articles regulating the contents of solicitation documents in the context of each procurement method.

⁷¹ The accompanying Guide text would explain that the solicitation documents must make it clear whether the selection will be on the basis of the lowest priced submission, the most advantageous submission, the proposal that best meets the needs of the procuring entity, etc., as appropriate.

⁷² This formulation is intended to reflect the general transparency approach that suppliers should be able to see how their submissions will be evaluated. The Secretariat’s understanding is that the basket of non-price criteria will include some quantifiable and objective criteria (such as maintenance costs) and some subjective elements (the relative value that the procuring entity places on speedy delivery or green production lines, for example), amalgamated into an overall quality ranking. It is to that ranking that the price including any margin of preference is applied to identify the successful submission. Thus for procurement not involving negotiations, the

(d) The manner of application of the criteria in the evaluation procedure.

(6) In evaluating submissions and determining the successful submission, the procuring entity shall use only those criteria and procedures that have been set out in the solicitation documents, and shall apply those criteria and procedures in the manner that has been disclosed in those solicitation documents. No criterion or procedure shall be used that has not been set out in accordance with this provision.⁷³

Article 12. Rules concerning estimation of the value of procurement⁷⁴

(1) A procuring entity shall neither divide its procurement nor use a particular valuation method for estimating the value of procurement so as to limit competition among suppliers or contractors or otherwise avoid obligations under this Law.⁷⁵

(2) In estimating the value of procurement, the procuring entity shall include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers or contractors, taking into account all forms of remuneration.⁷⁶

Article 13. Rules concerning the language of documents

(1) The pre-qualification documents, if any, and the solicitation documents shall be formulated in ... (the enacting State specifies its official language or languages) (and in a language customarily used in international trade unless decided otherwise by the procuring entity in a domestic procurement).

(2) Applications to pre-qualify, if any, and submissions may be formulated and presented in the language of the pre-qualification documents, if any, and solicitation documents, respectively, or in any other language permitted by those documents.

procuring entity has to disclose both how the non-price basket factors will weigh, and how the basket will weigh against price. However, the provisions do not discuss the level of detail of the evaluation criteria, which accords some flexibility to the procuring entity. The accompanying Guide text will explain this approach, and will cross-refer to the provisions of article 43 that require listing the evaluation criteria in descending order of importance in competitive dialogue proceedings where it is often not possible to establish the relative weight of evaluation criteria at the outset of the procurement.

⁷³ A/64/17, paras. 152-156.

⁷⁴ The accompanying Guide text will explain that the provisions of the article are in particular relevant in the context of low-value procurement thresholds envisaged by the Model Law for recourse to domestic procurement under article 8, restricted tendering or request for quotations proceedings (A/CN.9/687, paras. 63 and 66).

⁷⁵ The provisions were revised pursuant to the consideration at the Working Group's seventeenth session (A/CN.9/687, para. 64).

⁷⁶ The accompanying Guide text will explain that in the procurement that provides for the possibility of option clauses, the estimated value under the article will refer to the estimated maximum total value of the procurement, inclusive of optional purchases, as this is regulated in the respective provisions of the WTO GPA (article II.2 and 3 of the 1994 version and article II.6 of the 2006 version) (A/CN.9/687, para. 65).

A/CN.9/WG.I/WP.73/Add.2 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its eighteenth session****ADDENDUM**

This note sets out a proposal for articles 13 bis-23 bis of chapter I (General provisions).

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER I. GENERAL PROVISIONS
*(continued)***Article 13 bis. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or submissions¹**

(1) The manner, place and deadline for presenting applications to pre-qualify shall be set out in the invitation to pre-qualify and the pre-qualification documents. The manner, place and deadline for presenting submissions shall be set out in the solicitation documents.

(2) The deadlines for presenting applications to pre-qualify or submissions shall be expressed as a specific date and time and shall allow sufficient time for suppliers or contractors to prepare and present their applications or submissions, taking into account the reasonable needs of the procuring entity.

(3) If the procuring entity issues a clarification or modification of the pre-qualification or solicitation documents, it shall, prior to the deadline for presenting applications to pre-qualify or submissions, extend the deadline if necessary to afford suppliers or contractors reasonable time to take the clarification or modification into account in their applications or submissions.

(4) The procuring entity may, in its absolute discretion, prior to the deadline for presenting applications to pre-qualify or submissions, extend the deadline if it is not possible for one or more suppliers or contractors to present their applications or submissions by the deadline owing to any circumstance beyond their control.

(5) Notice of any extension of the deadline shall be given promptly to each supplier or contractor to which the procuring entity provided the pre-qualification or solicitation documents.

¹ New article proposed to be added to consolidate in one article repetitive provisions found throughout the Model Law on deadlines and their extension and to make the resulting provisions applicable to all procurement methods. In the 1994 text, the issues related to deadlines and their extension were addressed only in the context of the pre-qualification and tendering proceedings.

Article 14. Clarifications and modifications of solicitation documents²

(1) A supplier or contractor may request a clarification of the solicitation documents from the procuring entity. The procuring entity shall respond to any request by a supplier or contractor for clarification of the solicitation documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting submissions. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely presentation of submissions and shall, without identifying the source of the request, communicate the clarification to all suppliers or contractors to which the procuring entity has provided the solicitation documents.

(2) At any time prior to the deadline for presenting submissions, the procuring entity may, for any reason, whether on its own initiative or as a result of a request for clarification by a supplier or contractor, modify the solicitation documents by issuing an addendum. The addendum shall be communicated promptly to all suppliers or contractors to which the procuring entity has provided the solicitation documents and shall be binding on those suppliers or contractors.

(3) If the procuring entity convenes a meeting of suppliers or contractors, it shall prepare minutes of the meeting containing the requests submitted at the meeting for clarification of the solicitation documents, and its responses to those requests, without identifying the sources of the requests. The minutes shall be provided promptly to all suppliers or contractors to which the procuring entity provided the solicitation documents, so as to enable those suppliers or contractors to take the minutes into account in preparing their submissions.

Article 15. Tender securities³

(1) When the procuring entity requires suppliers or contractors presenting submissions to provide a tender security:

(a) The requirement shall apply to all suppliers or contractors;

(b) The solicitation documents may stipulate that the issuer of the tender security and the confirmer, if any, of the tender security, as well as the form and terms of the tender security, must be acceptable to the procuring entity. In cases of

² The accompanying Guide text will make it clear that any obligation of the procuring entity to debrief individual suppliers or contractors would arise to the extent that the identities of the suppliers or contractors are known to the procuring entity (A/CN.9/668, para. 168).

³ The accompanying Guide text will refer to the use in some jurisdictions of alternatives to a tender security, such as a bid securing declaration that the procuring entity may, in appropriate cases, require all suppliers or contractors to sign in lieu of requiring them to furnish tender securities. Under this type of declaration, the supplier or contractor agrees to submit to sanctions, such as disqualification from subsequent procurement, for the contingencies that normally are secured by a tender security. Sanctions, however, should not include debarment since the latter should not be concerned with commercial failures. These alternatives aim at promoting more competition in procurement, by increasing participation in particular of small and medium enterprises that otherwise might be prevented from participation because of formalities and expenses involved in connection with presentation of a tender security.

domestic procurement, the solicitation documents may in addition stipulate that the tender security shall be issued by an issuer in this State;

(c) Notwithstanding the provisions of subparagraph (b) of this paragraph, a tender security shall not be rejected by the procuring entity on the grounds that the tender security was not issued by an issuer in this State if the tender security and the issuer otherwise conform to requirements set out in the solicitation documents, unless:

(i) The acceptance by the procuring entity of such a tender security would be in violation of a law of this State; or

(ii) The procuring entity in cases of domestic procurement requires a tender security to be issued by an issuer in this State;⁴

(d) Prior to presenting a submission, a supplier or contractor may request the procuring entity to confirm the acceptability of a proposed issuer of a tender security, or of a proposed confirmer, if required; the procuring entity shall respond promptly to such a request;

(e) Confirmation of the acceptability of a proposed issuer or of any proposed confirmer does not preclude the procuring entity from rejecting the tender security on the ground that the issuer or the confirmer, as the case may be, has become insolvent or otherwise lacks creditworthiness;

(f) The procuring entity shall specify in the solicitation documents any requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required tender security; any requirement that refers directly or indirectly to conduct by the supplier or contractor presenting the submission may relate only to:⁵

(i) Withdrawal or modification of the submission after the deadline for presenting submissions, or before the deadline if so stipulated in the solicitation documents;

(ii) Failure to sign the procurement contract if required by the procuring entity to do so;

(iii) Failure to provide a required security for the performance of the contract after the successful submission has been accepted or to comply with any other condition precedent to signing the procurement contract specified in the solicitation documents.

(2) The procuring entity shall make no claim to the amount of the tender security, and shall promptly return, or procure the return of, the security document after whichever of the following that occurs earliest:

(a) The expiry of the tender security;

⁴ Paragraph (c) was amended to make the drafting clearer by splitting its provisions into the chapeau provisions and subparagraphs (i) and (ii). The wording in subparagraph (ii) has been included to reflect a cross-reference in article 23 of the 1994 Model Law. That article has been deleted, and its provisions included within various articles, for ease of reading.

⁵ Amended to make the drafting clearer. The phrase “may relate only to” replaced the phrase in the 1994 text “shall not relate to conduct other than”.

(b) The entry into force of a procurement contract and the provision of a security for the performance of the contract, if such a security is required by the solicitation documents;

(c) The termination of the procurement proceedings without the entry into force of a procurement contract;

(d) The withdrawal of the submission prior to the deadline for presenting submissions, unless the solicitation documents stipulate that no such withdrawal is permitted.

Article 16. Pre-qualification proceedings

(1) The procuring entity may engage in pre-qualification proceedings with a view to identifying, prior to the solicitation, suppliers and contractors that are qualified. The provisions of article [9] shall apply to pre-qualification proceedings.

(2) If the procuring entity engages in pre-qualification proceedings, it shall cause an invitation to pre-qualify to be published in ... (the enacting State specifies the official gazette or other official publication in which the invitation to pre-qualify is to be published).⁶ Unless decided otherwise by the procuring entity in domestic procurement,⁷ the invitation to pre-qualify shall also be published, in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.

(3) The invitation to pre-qualify shall include the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, in conformity with article [9];

(d) A declaration to be made in accordance with article [8];

⁶ The accompanying Guide text to these and similar provisions throughout the Model Law will note that reference to the official gazette shall be interpreted according to the principle of the functional equivalence between paper- and non-paper means and media of information and thus may encompass any non-paper official gazette used in an enacting State or group of States, such as in the European Union. The Guide will cross-refer in this respect to the relevant discussion that will accompany article 5 on publication of legal texts.

⁷ This opening phrase corresponds to the relevant cross-reference in article 23 of the 1994 Model Law that was deleted in the draft revised Model Law.

(e) The means of obtaining the pre-qualification documents and the place where they may be obtained;⁸

(f) The price, if any, charged by the procuring entity for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents;⁹

(g) If the price is charged, the means of payment for the pre-qualification documents and, subsequent to pre-qualification, for the solicitation documents, and the currency of payment [unless the procuring entity decides that the indication of the currency is not necessary in domestic procurement];¹⁰

(h) The language or languages in which the pre-qualification documents and, subsequent to pre-qualification, the solicitation documents are available [unless the procuring entity decides that this information is not necessary in domestic procurement];¹¹

(i) The manner, place¹² and deadline for presenting applications to pre-qualify and, if already known, the manner, place and deadline for presenting submissions, in conformity with article [13 bis] of this Law.

(4) The procuring entity shall provide a set of pre-qualification documents to each supplier or contractor that requests them in accordance with the invitation to pre-qualify and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the pre-qualification documents shall reflect only the cost of providing them to suppliers or contractors.¹³

(5) The pre-qualification documents shall include the following information:

(a) Instructions for preparing and presenting pre-qualification applications;

(b) Any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;

(c) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the pre-qualification proceedings, without the intervention of an intermediary;

⁸ This provision was revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 72).

⁹ The accompanying Guide text to this and similar provision throughout the Model Law will make it clear that development costs (including consultancy fees and advertising costs) are not to be recovered through this provision and that the costs should be limited to the minimal charges of providing the documents (and printing them, where appropriate) (A/CN.9/687, para. 134).

¹⁰ The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

¹¹ Id. The Working Group may in addition wish to consider that indication of the language or languages may be important even in domestic procurement in some multilingual countries.

¹² This provision was revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 72).

¹³ See *supra*, footnote 9.

(d) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the pre-qualification proceedings and the place¹⁴ where these laws and regulations may be found;

(e) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of applications to pre-qualify and to the pre-qualification proceedings.

(6) The procuring entity shall respond to any request by a supplier or contractor for clarification of the pre-qualification documents that is received by the procuring entity within a reasonable time prior to the deadline for presenting applications to pre-qualify. The procuring entity shall respond within a reasonable time so as to enable the supplier or contractor to make a timely presentation of its application to pre-qualify. The response to any request that might reasonably be expected to be of interest to other suppliers or contractors shall, without identifying the source of the request, be communicated to all suppliers or contractors to which the procuring entity has provided the pre-qualification documents.

(7) The procuring entity shall take a decision with respect to the qualifications of each supplier or contractor presenting an application to pre-qualify. In reaching that decision, the procuring entity shall apply only the criteria and procedures set out in the invitation to pre-qualify and in the pre-qualification documents.

(8) Only suppliers or contractors that have been pre-qualified are entitled to participate further in the procurement proceedings.

(9) The procuring entity shall promptly notify each supplier or contractor presenting an application to pre-qualify whether or not it has been pre-qualified. It shall also make available to any member of the general public, upon request, the names of all suppliers or contractors that have been pre-qualified.¹⁵

(10) The procuring entity shall promptly communicate to each supplier or contractor that has not been pre-qualified the reasons therefor.¹⁶

¹⁴ Reference to the place was added by the Secretariat in this and similar provision throughout the Model Law further to the suggestions made by experts. The accompanying Guide text will explain that the place refers not to the physical location but rather to an official publication, portal, etc. where authoritative texts of laws and regulations of the enacting State are made available to the public and systematically maintained.

¹⁵ The paragraph was redrafted pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 73, 91 and 102). The accompanying Guide text will cross-refer to the article on confidentiality that contains exceptions to the public disclosure.

¹⁶ The words "upon request" were deleted in this provision, pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 76).

Article 17. Cancellation of the procurement¹⁷

(1) The procuring entity may cancel the procurement at any time [prior to the acceptance of the successful submission].¹⁸ The procuring entity shall not open any tenders or proposals after taking a decision to cancel the procurement.

(2) The decision of the procuring entity to cancel the procurement and reasons for the decision shall be [recorded in the record of the procurement proceedings and]¹⁹ promptly communicated to any supplier or contractor that presented a submission. The procuring entity shall in addition promptly publish a notice of the cancellation of the procurement in the same manner and place in which any solicitation or notice of the procurement was published, and return any tenders or proposals that remain unopened at the time of the decision to the suppliers or contractors that presented them.

(3) Unless the cancellation of the procurement was a consequence of irresponsible or dilatory conduct on the part of the procuring entity, the procuring entity shall incur no liability, solely by virtue of its invoking paragraph (1) of this article, towards suppliers or contractors that have presented submissions.²⁰

Article 18. Rejection of abnormally low submissions

(1) The procuring entity may reject a submission if the procuring entity has determined that the price in combination with other constituent elements of the

¹⁷ The article was revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 78-80). The accompanying Guide text will explain that the purpose of the article is to draw the right balance between the discretion of the procuring entity to cancel the procurement at any stage of the procurement process covered by the Model Law [prior to the acceptance of the successful submission] and the need to accord appropriate protection to the market against irresponsible acts by the procuring entities, such as the abuse of discretion to cancel procurements to investigate market conditions (A/CN.9/687, para. 81). It will also state that, although the article does not address issues of damages and other remedies, it has implications for the review provisions in chapter VIII of the Model Law.

¹⁸ The Working Group may wish to consider the appropriateness of the phrase put in square brackets in the light of the provisions of article 20 (8) that envisage the possibility of cancelling the procurement after the acceptance of the successful submission if the supplier or contractor whose submission has been accepted fails to sign any written procurement contract required, or fails to provide any required security for the performance of the contract.

¹⁹ At the Working Group's seventeenth session, the suggestion was made that provisions of this type should be moved from articles where they were found and that they should be instead consolidated in the article on documentary records of procurement proceedings. It was also suggested that the Guide to the articles from where these provisions would be moved might cross-refer to the relevant requirement found in the article on documentary records of procurement proceedings (A/CN.9/687, para. 91). The Working Group did not make a decision on this suggestion and may therefore consider it in the context of these and other similar provisions put in square brackets.

²⁰ The accompanying Guide text will explain that the opening phrase also covers unforeseeable events and that liability will arise in exceptional circumstances. It will also explain that the procuring entity may face liability for cancelling the procurement under other branches of law and that, although suppliers or contractors present their submissions at their own risk, and bear the related expenses, cancellation may give rise to liability towards suppliers or contractors whose submissions have been opened.

submission is abnormally low in relation to the subject matter of the procurement and raise concerns with the procuring entity as to the ability of the supplier or contractor that presented that submission to perform the procurement contract, provided that the procuring entity has taken the following actions:

(a) The procuring entity has requested in writing from the supplier or contractor details of the submission that gives rise to concerns as to the ability of the supplier or contractor to perform the procurement contract;

(b) The procuring entity has taken account of any information provided by the supplier or contractor following this request, and the information included in the submission, but continues, on the basis of all such information, to hold concerns; and

(c) The procuring entity has recorded the concerns and its reasons for holding them, and all communications with the supplier or contractor under this article, in the record of the procurement proceedings.

(2) The decision of the procuring entity to reject a submission in accordance with this article and reasons for the decision shall be [recorded in the record of the procurement proceedings and] promptly communicated to the supplier or contractor concerned.

Article 19. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest²¹

(1) A procuring entity shall exclude a supplier or contractor from the procurement proceedings if:

(a) The supplier or contractor offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any

²¹ The accompanying Guide text will explain that the provisions of the article are subject to other branches of law of an enacting State where the issues of anti-corruption are regulated and are also without prejudice to any other sanctions, such as debarment, that may be applied to the supplier or contractor. The Guide in this context will cross-refer to article 3 of the Model Law. While emphasizing the need to cross-refer to other branches of law in order to avoid unnecessary confusion, inconsistencies and wrong perceptions about anti-corruption policies of an enacting State, the Guide will caution that such cross-referencing should not inadvertently convey the erroneous meaning that a criminal conviction would be a pre-requisite for exclusion of the supplier or contractor under this article (A/CN.9/687, para. 85). The Guide will also address: (i) applicable standards (e.g. consultants involved in drafting the solicitation documents should be prohibited from participating in the procurement proceedings where those documents are used); (ii) difficulties with establishing the fact of corruption as opposed to a bribe as the former might consist of a chain of actions over time rather than a single action; (iii) that combining provisions on conflicts of interest (which refer to a situation) and corruption (which is a wrongdoing) may lead to confusion, and should be avoided; and (iv) how the situation of a subsidiary would be treated (A/CN.9/687, para. 90).

other thing of service or value, so as to influence²² an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings;

(b) The supplier or contractor has an unfair competitive advantage or a conflict of interest in violation of applicable standards.²³

(2) The exclusion of a supplier or contractor from the procurement proceedings under this article and the reasons therefor shall be [recorded in the record of the procurement proceedings and] promptly communicated to the supplier or contractor concerned.

Article 20. Acceptance of the successful submission and entry into force of the procurement contract

(1) The procuring entity shall accept the successful submission unless the procurement is cancelled in accordance with article [17] or the supplier or contractor presenting the successful submission is disqualified in accordance with article [9] of this Law.

(2) The procuring entity shall promptly notify each supplier or contractor whose submission was examined of its anticipated decision to accept the successful submission. The notice shall contain, at a minimum, the following information:

(a) The name and address of the supplier or contractor presenting the successful submission;

(b) The contract price or, where the successful submission was ascertained on the basis of price and other criteria, the contract price and a summary of other characteristics and relative advantages of the successful submission;²⁴ and

(c) The duration of the standstill period as set out in the solicitation documents, [which shall be at least ([...] (a specific number of days is to be determined by an enacting State))] [reasonable in the circumstances of the given procurement],²⁵ and shall run from the date of the dispatch of the notice under this paragraph to all suppliers or contractors whose submissions were examined.

²² Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 87).

²³ The accompanying Guide text will explain the reference to standards and stress that those standards evolve over time. The Guide will also address issues of unjustified rejection and the need for the establishment of a process including a dialogue between the procuring entity and an affected supplier or contractor to discuss potential conflicts of interest, drawing on the provisions of article 18 regulating procedures for investigating abnormally low submissions.

²⁴ The accompanying Guide text will cross-refer to the discussion in the Guide on debriefing of unsuccessful suppliers or contractors. The Guide text on debriefing will explain reasons for addressing the issues of debriefing only in the Guide but not in the Model Law, in particular that debriefing procedures vary significantly not only from jurisdiction to jurisdiction but also from procurement to procurement, and that provisions on debriefing are not easily enforceable (A/CN.9/687, para. 93).

²⁵ The wording in the second set of square brackets reflects the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 92). The Secretariat suggests considering alternatives in the light of potential challenges that the standstill period as set out in the

(3) Paragraph (2) of this article shall not apply to awards of procurement contracts:

(a) Under framework agreements not involving the second stage competition;²⁶

(b) Where the contract price is less than [...];²⁷ or

(c) Where the procuring entity determines that urgent public interest considerations require the procurement to proceed without a standstill period.²⁸ The decision of the procuring entity that such urgent considerations exist and the reasons for the decision [shall be recorded in the record of the procurement proceedings and] shall be conclusive with respect to all levels of review under chapter VIII of this Law except for judicial review.

(4) Upon expiry of the standstill period, or where there is none, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission, unless a competent court or ... (the enacting State designates the relevant organ) orders otherwise.

(5) Unless a written procurement contract and/or approval by a higher authority is/are required, a procurement contract in accordance with the terms and conditions of the successful submission enters into force when the notice of acceptance is dispatched to the supplier or contractor concerned, provided that the notice is dispatched while the submission is still in force.

(6) Where the solicitation documents require the supplier or contractor whose submission has been accepted to sign a written procurement contract conforming to the terms and conditions of the accepted submission:

(a) The procuring entity and the supplier or contractor concerned shall sign the procurement contract within a reasonable period of time after the notice of acceptance is dispatched to the supplier or contractor concerned;

(b) Unless the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract enters into

solicitation documents by the procuring entity is of unreasonable duration. If the first alternative is retained, the Guide may explain considerations that should be taken into account in establishing the minimum duration of the standstill period in the Law, including the impact that the duration of the standstill period would have on overall objectives of the revised Model Law as regards transparency, accountability, efficiency and equitable treatment of suppliers or contractors and the impact of a lengthy standstill period on the costs that would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate.

²⁶ A/CN.9/687, para. 96.

²⁷ The accompanying Guide text will draw the attention of an enacting State to the thresholds found in other provisions of the Model Law referring to low-value procurement, such as those justifying recourse to domestic procurement or to request for quotations proceedings. The threshold in this provision may be aligned with them.

²⁸ In the light of the similar provisions found in chapter VIII in the context of the suspension of the procurement proceedings (article 65), the Working Group may consider whether the Guide should elaborate on whether the same or different considerations might be involved to justify an exemption under this provision and under article 65.

force when the contract is signed by the supplier or contractor concerned and by the procuring entity. Between the time when the notice of acceptance is dispatched to the supplier or contractor concerned and the entry into force of the procurement contract, neither the procuring entity nor that supplier or contractor shall take any action that interferes with the entry into force of the procurement contract or with its performance.

(7) Where the solicitation documents stipulate that the procurement contract is subject to approval by a higher authority, the procurement contract shall not enter into force before the approval is given. The solicitation documents shall specify the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval. A failure to obtain the approval within the time specified in the solicitation documents shall not extend the period of effectiveness of submissions specified in the solicitation documents or the period of effectiveness of the tender security required under article [15] of this Law.

(8) If the supplier or contractor whose submission has been accepted fails to sign any written procurement contract required, or fails to provide any required security for the performance of the contract, the procuring entity may cancel the procurement or may decide to award the procurement contract to the next submission still in force which the procuring entity ascertains to be successful in accordance with the criteria and procedures set out in this Law and in the solicitation documents. In the case of the award of the procurement contract to the next successful submission, the provisions of this article shall apply *mutatis mutandis* to such submission.

(9) The notices under this article are dispatched when they are promptly and properly addressed or otherwise directed and transmitted to the supplier or contractor, or conveyed to an appropriate authority for transmission to the supplier or contractor, by any reliable means specified in accordance with article [7] of this Law.

(10) Upon the entry into force of the procurement contract and, if required, the provision by the supplier or contractor of a security for the performance of the contract, notice of the procurement contract shall be given promptly to other suppliers or contractors, specifying the name and address of the supplier or contractor that has entered into the contract and the contract price.

Article 21. Public notice of awards of procurement contract and framework agreement

(1) Upon the entry into force of the procurement contract or conclusion of a framework agreement, the procuring entity shall promptly publish notice of the award of the procurement contract or the framework agreement, specifying the name(s) of the supplier(s) or contractor(s) to whom the procurement contract or the framework agreement was awarded.

(2) Paragraph (1) is not applicable to awards where the value of procurement is less than [...] (the enacting State includes a minimum amount).²⁹ The procuring entity shall publish a cumulative notice of such awards from time to time but at least once a year.

(3) The procurement regulations [may][shall]³⁰ provide for the manner of publication of the notices required by this article.

Article 22. Confidentiality

(1) In its communications with suppliers or contractors or the general public, the procuring entity shall not disclose any information if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition³¹ or would compromise essential national security or essential national defence, unless disclosure of that information is ordered by the competent court or ... (the enacting State designates the relevant organ) and in such case, subject to the conditions of such an order.

(2) [Other than when providing or publishing information pursuant to] [Without prejudice to] articles [20 (2), 21, 23 and 36] of this Law, the procuring entity shall treat applications to pre-qualify and submissions in such a manner as to avoid the disclosure of their contents to competing suppliers or contractors or to any other person not authorized to have access to this type of information.³²

(3) Any discussions, [communications,] negotiations and dialogue between the procuring entity and a supplier or contractor pursuant to articles [insert cross-references to the relevant provisions in chapter V] of this Law shall be confidential. Unless required by law or ordered by the competent court or ... (the enacting State designates the relevant organ)³³ or permitted in the solicitation documents, no party to any discussions, communications, negotiations or dialogue shall disclose to any other person any technical, price or other information relating to these discussions, [communications,] negotiations or dialogue without the consent of the other party.³⁴

²⁹ The accompanying Guide text may suggest that the enacting State may alternatively decide to refer to the procurement regulations where such amount will be set out.

³⁰ The Working Group may wish to consider that the provisions should require, not simply suggest as the 1994 text does, that the procurement regulations should set out the manner of publication. The accompanying Guide text may suggest minimum standards for publication of this type of information.

³¹ The accompanying Guide text will explain that the phrase “to impede fair competition” should be interpreted as encompassing the risks of hampering competition not only in the procurement proceedings in question but also in subsequent procurements (A/CN.9/668, para. 131).

³² A/64/17, paras. 248, 249. Reference to any other person not authorized to have access to this type of information is proposed to be added further to the results of the Secretariat’s consultations with experts. This addition is in line with similar provisions found in article 34 (8) of the 1994 Model Law (article 37 (8) of the present draft). The Guide would explain the ambit of this reference as referring to any third party outside the procuring entity (including a member of a bid committee), other than any oversight, review or other competent body authorized to have access to information in question under applicable provisions of law of the enacting State.

³³ A/CN.9/687, para. 103.

³⁴ A/64/17, paras. 250-252.

(4) In procurement involving classified information, the procuring entity may decide or may be required to:

- (a) Withhold classified information from public disclosure;
- (b) Impose on suppliers or contractors requirements aimed at protecting classified information; and
- (c) Demand that suppliers or contractors ensure compliance with requirements aimed at protecting classified information by their subcontractors.³⁵

Article 23. Documentary record of procurement proceedings³⁶

(1) The procuring entity shall maintain a record of the procurement proceedings that includes³⁷ the following information:

- (a) A brief description of the subject matter of the procurement;
- (b) The names and addresses of suppliers or contractors that presented submissions, and the name(s) and address(es) of the supplier(s) or contractor(s) with whom the procurement contract is entered into and the contract price (in the case of a framework agreement procedure, in addition the name(s) and address(es) of the supplier(s) or contractor(s) with whom the framework agreement is concluded);³⁸
- (c) A statement of the reasons and circumstances relied upon by the procuring entity for the decision as regards means of communication and any requirement of form;
- (d) In the procurement proceedings in which the procuring entity, in accordance with article [8], limits participation of suppliers or contractors, a statement of the reasons and circumstances relied upon by the procuring entity for imposing the limitation;
- (e) If the procuring entity uses a method of procurement other than open tendering, a statement of the reasons and circumstances relied upon by the procuring entity for the use of such other method;
- [(f) In the case of the use of a chapter V procurement method, the statement of the reasons and circumstances relied upon by the procuring entity for the use of the specific procurement method under that chapter;]³⁹
- (g) In the case of procurement including an electronic reverse auction, a statement of the reasons and circumstances relied upon by the procuring entity for the use of the auction, information about the date and time of the opening and

³⁵ A/64/17, paras. 248, 253-266.

³⁶ The entire article was considerably redrafted further to the suggestions made at the Commission's forty-second session (A/64/17, paras. 267-280) and the Secretariat's consultations with experts. The title of the article was changed in the light of the new paragraph (5).

³⁷ A/CN.9/687, para. 104.

³⁸ A/64/17, para. 267 (a).

³⁹ Reproduces article 11 (1) (j) of the 1994 Model Law. To be considered together with chapter V, A/64/17, para. 267 (e).

closing of the auction, and the reasons and circumstances on which the procuring entity relied to justify any rejection of bids presented during the auction;⁴⁰

(h) If the procurement is cancelled⁴¹ [pursuant to article [17] of this Law],⁴² a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision to cancel the procurement;

(i) [If, in procurement proceedings involving methods of procurement other than open tendering, those proceedings]⁴³ [If the procurement proceedings] did not result in a procurement contract, a statement to that effect and of the reasons therefor;

(j) If the procurement proceedings resulted in the award of a procurement contract to the next successful submission in accordance with article [20 (8)], a statement to that effect and of the reasons therefor;

(k) A summary of any requests for clarification of the pre-qualification documents, if any, or solicitation documents, the responses thereto, as well as a summary of any modification of those documents;

(l) Information relative to the qualifications, or lack thereof, of suppliers or contractors that presented applications to pre-qualify, if any, or submissions;

(m) The price, or the basis for determining the price, and a summary of the other principal terms and conditions of each submission and of the procurement contract, where these are known to the procuring entity (in the case of the framework agreement procedure, in addition a summary of the principal terms and conditions of the framework agreement);

(n) A summary of the evaluation [and comparison] of submissions, including the application of any margin of preference pursuant to article [11 (4) (b)];

(o) If any socioeconomic factors were considered in the procurement proceedings, information about such factors and the manner in which they were applied;⁴⁴

(p) If the submission is rejected pursuant to article [18] or the supplier or contractor is excluded from the procurement proceedings pursuant to article [19], a statement to that effect and the reasons and circumstances relied upon by the procuring entity for its decision;

⁴⁰ A/64/17, para. 267 (d).

⁴¹ A/64/17, para. 267 (c).

⁴² The cross-reference is to be reconsidered in the light of the footnote to article 17 (1) and article 20 (8) of the present draft.

⁴³ The Working Group may wish to consider whether the 1994 exemption of the open tendering from this requirement should be retained. Under draft article 27 (d), which is based on article 19 (1) (d) of the 1994 Model Law, the failure of open tendering justifies recourse to procurement methods involving negotiations. It should therefore be important to put on the record the reasons for the failure to conclude the procurement contract as a result of the open tendering. In the light of these considerations, the Secretariat therefore proposes the alternative text in the second set of square brackets.

⁴⁴ Added pursuant to A/64/17, paras. 165 and 267 (b).

(q) If no standstill period was applied, a statement of the reasons and circumstances relied upon by the procuring entity for non-application of a standstill period in accordance with article [20 (3)];

(r) In the case of review in conjunction with the procurement proceedings under chapter VIII of this Law, a summary of the complaint, review proceedings and decision taken at each level of the review;

(s) In procurement involving classified information, a statement of the reasons and circumstances relied upon by the procuring entity for measures and requirements taken for the protection of the classified information, including any exemptions from the provisions of this Law calling for public disclosure;

(t) [Other information required to be included in the record in accordance with the provisions of this Law is to be added (e.g. recourse to direct solicitation where there is an option between open and direct solicitation (article 11 (1) (k) of the 1994 Model Law))].⁴⁵

(2) The portion of the record referred to in subparagraphs [(a) to (f)]⁴⁶ of paragraph (1) of this article shall, on request, be made available to any person after [the successful submission has been accepted] [entry into force of the procurement contract] or after procurement proceedings have been terminated without resulting in a procurement contract (in the case of a framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement).

(3) Except when disclosed pursuant to article [36 (3)], the portion of the record referred to in subparagraphs [(g) to (p)] of paragraph (1) of this article shall, on request, be made available to suppliers or contractors that presented submissions, or applied for pre-qualification, after [the successful submission has been accepted] [entry into force of the procurement contract] or procurement proceedings have been terminated without resulting in a procurement contract (in the case of the framework agreement procedure, after the procurement proceedings have been terminated without resulting in a framework agreement). Disclosure of the portion of the record referred to in subparagraphs [(k) to (n)] may be ordered at an earlier stage only by a competent court or ... (the enacting State designates the relevant organ).⁴⁷

⁴⁵ The Working Group may wish to include further specific provision, such as the decision and reasons for limiting participation in electronic reverse auctions and open framework agreements on the ground of technological constraints. In addition, some other information not listed in the 1994 Model Law may be added. See, in this regard, the issues raised in A/CN.9/WG.I/WP.68/Add.1, section H. The Working Group may also wish to consider including a “catch-all” provision in the end of the list in paragraph (1) that would ensure that all significant decisions in the course of the procurement proceedings and reasons therefor would have to be put on the record, even if no specific record requirement with respect to them exists in the Model Law.

⁴⁶ The scope of information from the record that can be disclosed to the public is proposed to be expanded further to the results of the Secretariat’s consultations with experts. The cross-reference to article 36 (3) was deleted in this paragraph as not applicable to general public.

⁴⁷ A/CN.9/687, para. 103.

(4) Except when ordered to do so by a competent court or ... (the enacting State designates the relevant organ),⁴⁸ and subject to the conditions of such an order, the procuring entity shall not disclose:

[(a) Information from the record of the procurement proceedings⁴⁹ if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition or would compromise essential national security or essential national defence;]⁵⁰

(b) Information relating to the examination, evaluation [and comparison] of submissions, and submission prices, other than the summary referred to in paragraph [(1) (n)] of this article.

(5) The procurement entity shall record, file and preserve all documents relating to the procurement proceedings according to procurement regulations or other provisions of law.⁵¹

Article 23 bis. Code of conduct

A code of conduct for officers or employees of procuring entities, enacted pursuant to laws of this State and addressing, inter alia, the prevention of conflicts of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements, shall be promptly made accessible to the public and systematically maintained.⁵²

⁴⁸ A/CN.9/687, para. 103.

⁴⁹ A/64/17, para. 275.

⁵⁰ The Working Group may wish to consider that this provision is unnecessary in the light of the proposed article 22 (1).

⁵¹ The accompanying Guide text will explain that the provisions intend to reflect a requirement in the United Nations Convention against Corruption that States parties must “take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of [their] domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents” (article 9 (3)). The Guide will also explain the need for preservation of documents, and cross-refer to any applicable rules on documentary records and archiving. If the enacting State considers that applicable internal rules and guidance should also be stored with the documents for a particular procurement, it could include those items in the regulations.

⁵² New provisions suggested to be added by the Secretariat. They are based on the provisions that were initially suggested to be made a part of the article on procurement regulations. At the Working Group’s seventeenth session, concern was expressed, however, that the location of the provisions on a code of conduct in that article might give the wrong impression that issues pertaining to a code of conduct of procurement officers were always to be regulated in procurement regulations. It was noted that in some jurisdictions those issues were regulated at the level of statutory law. The Working Group entrusted the Secretariat with redrafting the provisions so that different approaches to regulating these issues in various jurisdictions could be appropriately accommodated (A/CN.9/687, paras. 31-32). The accompanying Guide text will cross-refer to article 5 (1) of this Law that addresses publicity of legal texts.

A/CN.9/WG.I/WP.73/Add.3 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL
Model Law on Procurement of Goods, Construction and Services
— a revised text of the Model Law, submitted to the Working
Group on Procurement at its eighteenth session****ADDENDUM**

This note sets out a proposal for chapter II (Methods of procurement and methods of solicitation) of the revised Model Law (chapter II comprises articles 24-29 quinquies) and for chapter III (Open tendering) of the revised Model Law, comprising articles 30-38.

The Secretariat's comments are set out in the accompanying footnotes.

**CHAPTER II. METHODS OF PROCUREMENT AND
METHODS OF SOLICITATION AND THEIR
CONDITIONS FOR USE****Section I. METHODS OF PROCUREMENT AND
THEIR CONDITIONS FOR USE****Article 24. Methods of procurement**

- (1) The procuring entity may conduct procurement by means of:
 - (a) Open tendering;
 - (b) Restricted tendering;
 - (c) Request for quotations;
 - (d) Request for proposals without negotiation;
 - (e) Two-stage tendering;
 - (f) Request for proposals with dialogue;
 - (g) Request for proposals with consecutive negotiations;
 - (h) Competitive negotiation;
 - (i) Electronic reverse auction;
 - (j) Single-source procurement.
- (2) The procuring entity may engage in a framework agreement procedure in accordance with the provisions of chapter VII.

Article 25. General rules applicable to the selection of a procurement method

- (1) Except as otherwise provided for in articles [26 to 29] of this Law, a procuring entity shall conduct procurement by means of open tendering.
- (2) A procuring entity may use a method of procurement other than open tendering only in accordance with articles [26 to 29], and shall select the other method of procurement to accommodate the circumstances of the procurement concerned, and shall seek to maximize competition to the extent practicable.
- [(3) If the procuring entity uses a method of procurement other than open tendering, it shall include in the record required under article [23] a statement of the reasons and circumstances upon which it relied to justify the use of that method.]¹

Article 26. Conditions for use of methods of procurement under chapter IV of this Law (restricted tendering, request for quotations and request for proposals without negotiation)

- (1) The procuring entity may engage in procurement by means of restricted tendering in accordance with article [39] when:
- (a) The subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors; or
- (b) The time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.²
- (2) A procuring entity may engage in procurement by means of a request for quotations in accordance with article [40] for the procurement of readily available goods or services that are not specially produced or provided to the particular description of the procuring entity and for which there is an established market, so long as the estimated value of the procurement contract is less than the threshold amount set out in the procurement regulations.
- (3) The procuring entity may engage in procurement by means of request for proposals without negotiation in accordance with article [41] where the procuring entity needs to³ consider the financial⁴ aspects of proposals separately and only

¹ At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

² Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 113-115).

³ Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 174).

⁴ Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 119 and 176).

after completion of examination and evaluation of quality and technical aspects of the proposal.⁵

Article 27. Conditions for use of methods of procurement under chapter V of this Law (two-stage tendering, request for proposals with dialogue and [request for proposals with consecutive negotiations])⁶

A procuring entity may engage in procurement by means of two-stage tendering in accordance with article [42], request for proposals with dialogue in accordance with article [43] [or request for proposals with consecutive negotiations⁷ in accordance with article [44] in the following circumstances:⁸

(a) It is not feasible for the procuring entity to formulate a detailed⁹ description of the subject matter of the procurement in accordance with article [10] and it engages in the method concerned after an assessment that the discussion, dialogue or negotiation is needed to¹⁰ obtain the most satisfactory solution to its procurement needs;

(b) When the procuring entity seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes

⁵ The Working Group may wish to consider whether this procurement method should be treated separately as appropriate only for procurement of advisory or consultancy services (A/CN.9/687, para. 128) and whether there should be a separate method for those services.

⁶ The Working Group agreed to address at a later stage whether all the methods envisaged in the article should be retained, and whether some should be reserved for particular types of procurement, such as advisory or consultancy services, when considering the procedures for each procurement method, and in conjunction with the appropriate conditions for use of each method, but confirmed its understanding that in principle all procurement methods were available for all types of procurement (A/CN.9/687, para. 128). It was suggested that the accompanying Guide text would explain that the conditions for use in this article could not entirely address the considerations raised by the selection of the procurement method, and indeed that it might not be appropriate for them to do so. The selection may in practice not be amenable to challenge, and the main issue should be to enable structured decision-making on the part of the procuring entity and to manage the risks that such decisions may entail. The Guide will provide detailed commentary addressing the issues in selecting between the methods listed in articles 26 and 26 and among the methods listed in article 26, from the perspective both of legislators and of procuring entities. In addition, the guidance will address the elements of that choice that could not be addressed in a legislative text and will draw on real-life examples (A/CN.9/687, paras. 121-127).

⁷ The Working Group may wish to consider whether this procurement method should be treated separately as appropriate only for procurement of advisory or consultancy services (A/CN.9/687, para. 128) and whether there should be a separate method for those services.

⁸ The accompanying Guide text will alert the enacting State that, in the light of the risks involved in the procurement methods involving negotiations, the enacting State may require that recourse to them should be subject to approval by a higher-level authority. In such case, the enacting State may wish to amend paragraph (1) of this article by inserting the following opening phrase "Subject to approval by ... (the enacting State designates an organ to issue the approval)" (A/CN.9/687, para. 193).

⁹ Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 122).

¹⁰ Revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, para. 193).

the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs;

(c) In the case of procurement for reasons of essential national defence or essential national security, where the procuring entity determines that the selected method is the most appropriate method of procurement; or

(d) When open tendering was engaged in but no tenders were presented or the procurement was cancelled by the procuring entity [pursuant to article [17]] or all tenders were rejected under article [37 (3)],¹¹ and when, in the judgement of the procuring entity, engaging in new open tendering proceedings or a procurement method under chapter IV would be unlikely to result in a procurement contract.

Article 27 bis. Conditions for use of competitive negotiations

A procuring entity may engage in competitive negotiations, in accordance with the provisions of article [45] of this Law, in the following circumstances:

(a) There is an urgent need for the subject matter of the procurement, and engaging in open tendering proceedings or any other method of procurement because of the time involved in using those methods would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;

(b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, making it impractical to use open tendering or any other method of procurement because of the time involved in using those methods; and

(c) In the case of procurement for reasons of essential national defence or essential national security, where the procuring entity determines that the use of any other method of procurement is not appropriate.¹²

Article 28. Conditions for use of an electronic reverse auction

A procuring entity may engage in procurement by means of an electronic reverse auction, or may use an electronic reverse auction as a phase preceding the award of the procurement contract in [other procurement methods, as appropriate][restricted tendering, two-stage tendering, ...] or a framework agreement procedure with

¹¹ Corresponding to cross-references in article 19 (1) (d) of the 1994 Model Law to articles 12, 15 and 34 (3) of that text.

¹² The accompanying Guide will explain that the provisions in subparagraphs (a) to (c) are without prejudice to the general principle contained in article 25 (2) according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to competitive negotiation, such as restricted tendering or request for quotations, is appropriate, the procuring entity must select such an alternative procurement method that would ensure most competition in the circumstances of the given procurement without jeopardizing other not less important considerations, such as urgency of delivery of the subject matter of the procurement.

second stage competition,¹³ in accordance with the provisions of chapter VI of this Law, under the following conditions:

- (a) Where it is feasible for the procuring entity to formulate a detailed and precise description of the subject matter of the procurement;
- (b) Where there is a competitive market of suppliers or contractors anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured; and
- (c) Where the criteria to be used by the procuring entity in determining the successful submission are quantifiable and can be expressed in monetary terms.

Article 29. Conditions for use of single-source procurement¹⁴

A procuring entity may engage in single-source procurement in accordance with the provisions of article [46] of this Law in the following exceptional circumstances:

- (a) The subject matter of the procurement is available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the subject matter of the procurement, such that no reasonable alternative or substitute exists, and the use of any other procurement method would therefore not be possible;
- (b) Owing to a catastrophic event, there is an urgent need for the subject matter of the procurement, and engaging in open tendering or any other method of procurement would be impractical because of the time involved in using those methods;¹⁵

¹³ The previous wording that read “in other methods of procurement, as appropriate, in order to determine the successful submission” has been changed to refer to a phase preceding the award of the procurement contract. The previous wording implied that the auction can be used for the award of a framework agreement rather than a procurement contract under the framework agreement with second stage competition. The Secretariat does not think that it would be appropriate to hold an auction for the award of any framework agreement. The suggestion is also made, instead of including an ambiguous statement “in other methods of procurement, as appropriate”, to specify in which procurement methods or procedures under the Model Law the auction can be used as a phase. The Working Group may wish to consider these provisions after it finalized the consideration of articles setting out procedures for each procurement method. The Secretariat is of the view that conditions for use, procedures and requirements of most procurement methods are not compatible with those of the auction.

¹⁴ The Working Group may wish to consider whether this method should also be available for the procurement of subject matters of a very low value established by the procurement regulations.

¹⁵ Revised pursuant to the deliberations at the Working Group’s seventeenth session (A/CN.9/687, paras. 129 and 131). The accompanying Guide text will explain that this provision is without prejudice to the general principle contained in article 25 (2) according to which the procuring entity must seek to maximize competition to the extent practicable when it selects a procurement method. It is therefore understood that when an alternative to single-source procurement, such as competitive negotiation, restricted tendering or request for quotations, is appropriate, the procuring entity must select such an alternative procurement method that would ensure most competition in the circumstances of the given procurement without jeopardizing, however, other not less important considerations, such as urgency of delivery of subject matter of the procurement.

(c) The procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies must be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;

(d) In the case of procurement for reasons of essential national defence or essential national security,¹⁶ where the procuring entity determines that the use of any other method of procurement is not appropriate; or¹⁷

(e) Subject to approval by ... (the enacting State designates an organ to issue the approval), and following public notice and adequate opportunity to comment, where procurement from a particular supplier or contractor is necessary in order to implement a socioeconomic policy of this State set out in the procurement regulations, provided that procurement from no other supplier or contractor is capable of promoting that policy.

Article 29 bis. Conditions for use of a framework agreement procedure¹⁸

(1) A procuring entity may engage in a framework agreement procedure in accordance with chapter VII where it determines that:

(a) The need for the subject matter of the procurement is expected to arise on a [repeated or indefinite]¹⁹ basis during a given period of time; or

(b) By virtue of the nature of the subject matter of the procurement, the need for it may arise on an urgent basis during a given period of time; or

[(c) Other grounds and circumstances that justify recourse to a framework agreement procedure.]²⁰

¹⁶ A/64/17, para. 119.

¹⁷ A/CN.9/687, para. 131.

¹⁸ The article has been moved from chapter VII.

¹⁹ One of the issues deferred by the Working Group was a proposal presented at the fifteenth session to reconsider the inclusion and extent of conditions for use of framework agreements (A/CN.9/668, paras. 227-229). The alternatives in square brackets were provided by participants at the session to the Secretariat, for further consideration by the Working Group, with the comment that the term “indefinite” indicates unknown timing and/or unknown quantities. The informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, recommended that the Guide to Enactment should explain that a procuring entity should offer estimates of future quantities in the solicitation documents, in part to guide prospective vendors as to the government’s likely requirements. The Guide to Enactment should also explain why the Model Law refers to indefinite quantities, e.g. because it is possible that an item may be ordered only once.

²⁰ At the Working Group’s fifteenth session, it was alternatively suggested that an additional open-ended subparagraph (c) could be included, which would allow the procuring entity to have recourse to framework agreement procedures subject to the justification of its decision in the

[(2) The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify the recourse to a framework agreement procedure and the type of framework agreement selected.]²¹

SECTION II. METHODS OF SOLICITATION AND THEIR CONDITIONS FOR USE

Article 29 ter. Solicitation in open tendering, two-stage tendering and electronic reverse auctions as a stand-alone procurement method

(1) In open tendering, two-stage tendering and electronic reverse auctions as a stand-alone procurement method, a procuring entity shall solicit submissions by publishing the solicitation in ... (the enacting State specifies the official gazette or other official publication in which the solicitation is to be published).

(2) Unless decided otherwise by the procuring entity in the case of a domestic procurement, the solicitation shall also be published in a language customarily used in international trade, in a newspaper of wide international circulation or in a relevant trade publication or technical or professional journal of wide international circulation.²²

(3) The provisions of this article shall not apply in the case of pre-qualification in accordance with article [16] or in the case of pre-selection in accordance with article [43].

Article 29 quater. Solicitation in restricted tendering, request for quotations, competitive negotiations and single-source procurement

(1) In restricted tendering, request for quotations and competitive negotiations, a procuring entity shall solicit submissions directly from a sufficient number of suppliers or contractors to ensure effective competition. In single-source procurement under the circumstances set out in article [29], the procuring entity may solicit a proposal or price quotation from a single supplier or contractor.

(2) In restricted tendering, competitive negotiations and single-source procurement,²³ the procuring entity shall publish a notice of the procurement in ...

record of the procurement proceedings (A/CN.9/668, para. 228). The informal drafting party, July 2009, recommended that the Guide to Enactment should give examples of what these circumstances might be.

²¹ At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

²² The Guide will explain that international advertisement is on the increase to promote regional trade and cross-border protests.

²³ The Working Group, at its seventeenth session, decided that the requirement of publishing the notice of procurement should not apply to request for quotations proceedings (A/CN.9/687,

(the enacting State specifies the official gazette or other official publication in which the solicitation is to be published). The notice shall contain at a minimum the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract or the framework agreement to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) A declaration pursuant to article [8]; and

(d) The method of procurement to be used.

(3) The provisions of paragraph (2) shall not apply to procurement involving classified information, where the procuring entity withholds publication in order to protect classified information, or in the case of urgency as referred to in articles [27 bis and 29 (b)]. [The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify an exemption from the requirement of publication of the notice of the procurement under paragraph (2) of this article.]²⁴

Article 29 quinquies. Solicitation in request for proposals proceedings

(1) Article [29 ter] shall apply *mutatis mutandis* to solicitation of proposals in request for proposals without negotiation, request for proposals with dialogue²⁵ and request for proposals with consecutive negotiations proceedings, except where the direct solicitation is required in those procurement proceedings because:

(a) The subject matter to be procured is available only from a limited number of suppliers or contractors, provided that the procuring entity solicits proposals from all those suppliers or contractors; or

(b) The time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the subject matter to be procured, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or

para. 171). The accompanying Guide text would need to set out reasons for this exemption (A/CN.9/687, para. 171).

²⁴ At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

²⁵ The Secretariat's understanding is that although the original intention of the Working Group was to envisage in this procurement method open solicitation in all cases, that intention was superseded by the subsequent consideration in the Working Group of the conditions justifying recourse to the direct solicitation, such as in the procurement involving classified information.

(c) The procurement involves classified information, provided that the procuring entity solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.²⁶

(2) [The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify recourse to the direct solicitation.]²⁷

(3) The provisions of article [29 quater (2)] shall apply to the direct solicitation in request for proposals proceedings under this article, except where the procurement involves classified information, and the procuring entity withholds publication of the notice of the procurement in order to protect classified information. [The procuring entity shall include in the record required under article [23] of this Law a statement of the reasons and circumstances upon which it relied to justify an exemption from the requirement of publication of the notice of the procurement.]²⁸

CHAPTER III. OPEN TENDERING

SECTION I. SOLICITATION OF TENDERS

Article 30. Procedures for soliciting tenders

The procuring entity shall solicit tenders by issuing an invitation to tender in accordance with the provisions of article [29 ter].

Article 31. Contents of invitation to tender

The invitation to tender shall include²⁹ the following information:

(a) The name and address of the procuring entity;

(b) A summary of the principal required terms and conditions of the procurement contract to be entered into as a result of the procurement proceedings, including the nature and quantity, and place of delivery of the goods to be supplied, the nature and location of the construction to be effected, or the nature of the services and the location where they are to be provided, as well as the desired or required time for the supply of the goods or for the completion of the construction, or the timetable for the provision of the services;

(c) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors, and any documentary evidence or other information that must be submitted by suppliers or contractors to demonstrate their qualifications, in conformity with article [9];

²⁶ Based on provisions of article 37 (3) of the 1994 Model Law and A/64/17, para. 265.

²⁷ At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

²⁸ Id.

²⁹ A/CN.9/687, para. 133.

- (d) A declaration pursuant to article [8];
- (e) The means of obtaining the solicitation documents and the place where they may be obtained;³⁰
- (f) The price, if any, charged by the procuring entity for the solicitation documents;
- (g) If a price is charged for the solicitation documents, the means and currency of payment [unless in a domestic procurement the procuring entity decides that the indication of the currency is not necessary];³¹
- (h) The language or languages in which the solicitation documents are available [unless in a domestic procurement the procuring entity decides that this information is not necessary];³²
- (i) The manner, place and deadline for presenting tenders.

Article 32. Provision of solicitation documents

The procuring entity shall provide the solicitation documents to each supplier or contractor that responds to the invitation to tender in accordance with the procedures and requirements specified therein. If pre-qualification proceedings have been engaged in, the procuring entity shall provide a set of solicitation documents to each supplier or contractor that has been pre-qualified and that pays the price, if any, charged for those documents. The price that the procuring entity may charge for the solicitation documents shall reflect only the cost of providing them to suppliers or contractors.

Article 33. Contents of solicitation documents

The solicitation documents shall include³³ the following information:

- (a) Instructions for preparing tenders;
- (b) The criteria and procedures, in conformity with the provisions of article [9], that will be applied in the ascertainment of the qualifications of suppliers or contractors and in any further demonstration of qualifications pursuant to article [37 (6)];
- (c) The requirements as to documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications;
- (d) The description of the subject matter of the procurement, in conformity with article [10]; the quantity of the goods;³⁴ services to be performed; the location

³⁰ A/CN.9/687, para. 72.

³¹ The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

³² Id. The Working Group may in addition wish to consider that indication of the language or languages may be important even in the domestic procurement in some multilingual countries.

³³ A/CN.9/687, para. 133.

where the goods are to be delivered, construction is to be effected or services are to be provided; and the desired or required time, if any, when goods are to be delivered, construction is to be effected or services are to be provided;³⁵

(e) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;³⁶

(f) If alternatives to the characteristics of the subject matter of the procurement, contractual terms and conditions or other requirements set out in the solicitation documents are permitted, a statement to that effect, and a description of the manner in which alternative tenders are to be evaluated [and compared];

(g) If suppliers or contractors are permitted to present tenders for only a portion of the subject matter of the procurement, a description of the portion or portions for which tenders may be presented;

(h) The manner in which the tender price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(i) The currency or currencies in which the tender price is to be formulated and expressed [unless in a domestic procurement the procuring entity decides that the indication of the currency is not necessary];³⁷

(j) The language or languages, in conformity with article [13], in which tenders are to be prepared [unless in a domestic procurement the procuring entity decides that this information is not necessary];³⁸

(k) Any requirements of the procuring entity with respect to the issuer and the nature, form, amount and other principal terms and conditions of any tender security to be provided by suppliers or contractors presenting tenders in accordance with article [15], and any such requirements for any security for the performance of the procurement contract to be provided by the supplier or contractor that enters into the procurement contract, including securities such as labour and material bonds;

(l) If a supplier or contractor may not modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security, a statement to that effect;

(m) The manner, place and deadline for presenting tenders, in conformity with article [13 bis];³⁹

³⁴ The accompanying Guide text will explain that in some cases this may refer to an estimated quantity, with cross-references to the relevant provisions in the chapter on framework agreements.

³⁵ A/CN.9/687, para. 136.

³⁶ The accompanying Guide text will explain the meaning of the term “contract form” in this provision as distinct from contract form requirements found in subparagraph (x) of this article.

³⁷ The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

³⁸ Id. The Working Group may in addition wish to consider that indication of the language or languages may be important even in the domestic procurement in some multilingual countries.

(n) The means by which, pursuant to article [14], suppliers or contractors may seek clarifications of the solicitation documents, and a statement as to whether the procuring entity intends, at this stage, to convene a meeting of suppliers or contractors;

(o) The period of time during which tenders shall be in effect, in conformity with article [35];

(p) The manner, place, date and time for the opening of tenders, in conformity with article [36];⁴⁰

(q) Information about the criteria and procedure for the examination of tenders as against the description of the subject matter of the procurement;

(r) Information about the criteria and procedure for evaluation of tenders in accordance with article [11];

(s) The currency that will be used for the purpose of evaluating [and comparing] tenders pursuant to article [37 (5)] and either the exchange rate that will be used for the conversion of tenders into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used, [unless in a domestic procurement the procuring entity decides that this information is not necessary];⁴¹

(t) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place⁴² where these laws and regulations may be found;

(u) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(v) Any commitments to be made by the supplier or contractor outside the procurement contract;⁴³

(w) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(x) Any formalities that will be required once a successful tender has been accepted for a procurement contract to enter into force, including, where applicable,

³⁹ A/CN.9/687, para. 139.

⁴⁰ A/CN.9/687, para. 139.

⁴¹ The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

⁴² Reference to the place was added by the Secretariat further to the suggestions of experts. The accompanying Guide text will explain that the place refers not to the physical location but rather an official publication, portal etc. where authoritative texts of laws and regulations of the enacting State are made available to the public and systematically maintained.

⁴³ A/CN.9/687, para. 139.

the execution of a written procurement contract pursuant to article [20], and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(y) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of tenders and to other aspects of the procurement proceedings.⁴⁴

SECTION II. PRESENTATION OF TENDERS

Article 34. Presentation of tenders

[The old paras. 1 to 4 were deleted in the light of the newly proposed article 13 bis.]

(1) Tenders shall be presented in the manner, at the place and by the deadline specified in the solicitation documents.

(2) (a) A tender shall be presented 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 in the solicitation documents, which ensure at least a similar degree of authenticity, security, integrity and confidentiality;

(b) The procuring entity shall provide to the supplier or contractor a receipt showing the date and time when its tender was received;⁴⁵

(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.

(3) A tender received by the procuring entity after the deadline for presenting tenders shall not be opened and shall be returned unopened to the supplier or contractor that presented it.

Article 35. Period of effectiveness of tenders; modification and withdrawal of tenders

(1) Tenders shall be in effect during the period of time specified in the solicitation documents.

⁴⁴ In the context of the discussion at the Working Group's seventeenth session of correction of arithmetical errors (draft article 37 (1)), a query was raised as to whether it might be useful to require the solicitation documents to specify the manner in which arithmetical errors would be corrected (A/CN.9/687, para. 151). The Working Group may wish therefore consider whether the article should be amended to provide for such a requirement.

⁴⁵ The accompanying Guide text will discuss the nature of the receipt to be provided, and will state that the certification of receipt provided by the procuring entity would be conclusive (A/CN.9/668, para. 173).

(2) (a) Prior to the expiry of the period of effectiveness of tenders, the procuring entity may request suppliers or contractors to extend the period for an additional specified period of time. A supplier or contractor may refuse the request without forfeiting its tender security;⁴⁶

(b) Suppliers or contractors that agree to an extension of the period of effectiveness of their tenders shall extend or procure an extension of the period of effectiveness of tender securities provided by them or provide new tender securities to cover the extended period of effectiveness of their tenders. A supplier or contractor whose tender security is not extended, or that has not provided a new tender security, is considered to have refused the request to extend the period of effectiveness of its tender.

(3) Unless otherwise stipulated in the solicitation documents, a supplier or contractor may modify or withdraw its tender prior to the deadline for presenting tenders without forfeiting its tender security. The modification or notice of withdrawal is effective if it is received by the procuring entity prior to the deadline for presenting tenders.

SECTION III. EVALUATION [AND COMPARISON] OF TENDERS

Article 36. Opening of tenders

(1) Tenders shall be opened at the time specified in the solicitation documents as the deadline for presenting tenders.⁴⁷ They shall be opened at the place and in accordance with the manner and procedures specified in the solicitation documents.⁴⁸

(2) All suppliers or contractors that have presented 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.⁴⁹

⁴⁶ The accompanying Guide text will explain that in such case the effectiveness of the tender of the supplier or contractor will terminate upon the expiry of the original period of effectiveness specified in the solicitation documents (A/CN.9/687, para. 143).

⁴⁷ The words “or at the deadline specified in any extension of the deadline” were deleted in the light of the definition of solicitation documents as incorporating any amendments thereto: any extension of the deadline originally set out in the solicitation documents will be considered the amendments to the originally issued solicitation documents.

⁴⁸ The accompanying Guide text will explain risks of departing from the requirements of the Model Law that tenders must be opened at the time specified in the solicitation documents as the deadline for presenting tenders, and practical considerations that should be taken into account in implementing that requirement (A/CN.9/687, para. 150).

⁴⁹ The accompanying Guide text will highlight that the place, manner and procedures for the opening of tenders established by the procuring entity should allow for the presence of suppliers or contractors (A/CN.9/668, para. 178). The Guide will also elaborate on “deemed” present or “virtual” presence of suppliers or contractors at the opening of tenders.

(3) The name and address of each supplier or contractor whose tender is opened and the tender price shall be announced to those persons present at the opening of tenders, communicated on request to suppliers or contractors that have presented tenders but that are not present or represented at the opening of tenders, and recorded immediately in the record of the tendering proceedings required by article [23].⁵⁰

Article 37. Examination, evaluation [and comparison] of tenders

(1) (a) The procuring entity may ask a supplier or contractor for clarifications of its tender in order to assist in the examination, evaluation [and comparison] of tenders;

(b) The procuring entity shall correct purely arithmetical errors that are discovered during the examination of tenders. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that presented the tender;⁵¹

(c) No change in a matter of substance in the tender, including changes in price and changes aimed at making an unresponsive tender responsive, shall be sought, offered or permitted.⁵²

(2) (a) Subject to subparagraph (b) of this paragraph, the procuring entity shall regard a tender as responsive if it conforms to all requirements set out in the solicitation documents in accordance with article [10] of this Law;

(b) The procuring entity may regard a tender as responsive even if it contains minor deviations that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents or if it contains errors or oversights that are capable of being corrected without touching on the substance of the tender. Any such deviations shall be quantified, to the extent possible, and appropriately taken account of in the evaluation [and comparison] of tenders.

(3) The procuring entity shall reject a tender:

(a) If the supplier or contractor that presented the tender is not qualified;

(b) If the supplier or contractor that presented the tender does not accept a correction of an arithmetical error made pursuant to paragraph (1) (b) of this article;

(c) If the tender is not responsive;

(d) In the circumstances referred to in articles [18 and 19].

⁵⁰ The accompanying Guide text will explain that any late tenders would be returned unopened, and their (late) submission would be noted in the record.

⁵¹ The accompanying Guide text will explain the rules and principles applicable to the correction by the procuring entity of arithmetical errors.

⁵² The paragraph was redrafted to make the requirement of subparagraph (c) applicable to both subparagraphs (a) and (b). In the 1994 text, this requirement was found only in subparagraph (a), raising questions on the extent of the permissible corrections of arithmetical errors under subparagraph (b). The Secretariat's understanding is that under both subparagraphs (a) and (b), no change can be made in a matter of substance of the tender.

(4) (a) The procuring entity shall evaluate [and compare] the tenders that have not been rejected in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the procedures and criteria set out in the solicitation documents. No criterion shall be used that has not been set out in the solicitation documents;

(b) The successful tender shall be:

(i) Where price is the only award criterion, the tender with the lowest tender price;⁵³ or

(ii) Where there are price and other award criteria, the most advantageous tender⁵⁴ ascertained on the basis of the criteria and procedures for evaluating tenders specified in the solicitation documents in accordance with article [11].

(5) When tender prices are expressed in two or more currencies, for the purpose of evaluating and comparing tenders the tender prices of all tenders shall be converted to the currency specified in the solicitation documents according to the rate specified in those documents, pursuant to article [33 (s)].⁵⁵

(6) Whether or not it has engaged in pre-qualification proceedings pursuant to article [16], the procuring entity may require the supplier or contractor presenting the tender that has been found to be the successful tender pursuant to paragraph (4) (b) of this article to demonstrate its qualifications again, in accordance with the criteria and procedures conforming to the provisions of article [9]. The criteria and procedures to be used for such further demonstration shall be set out in the solicitation documents. Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.

(7) If the supplier or contractor presenting the successful tender is requested to demonstrate its qualifications again in accordance with paragraph (6) of this article but fails to do so, the procuring entity shall reject that tender and shall select a successful tender, in accordance with paragraph (4) of this article, from among the remaining tenders still in force, subject to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)].

(8) Information relating to the examination, clarification, evaluation [and comparison] of tenders shall not be disclosed to suppliers or contractors or to any other person not involved officially in the examination, evaluation [or comparison] of tenders or in the decision on which tender should be accepted, except as provided in articles [20, 22 and 23].⁵⁶

⁵³ A/CN.9/687, para. 153.

⁵⁴ A/CN.9/687, paras. 153 and 155. The Guide will elaborate on evolution of procurement practices since 1994 that justified the replacement of the term the “lowest evaluated tender” used in this context in the 1994 Model Law.

⁵⁵ A/CN.9/687, para. 157.

⁵⁶ The Working Group may wish to consider this provision in conjunction with the newly proposed article 22 and article 23 (4) (b), in particular whether all these connected provisions should be consolidated in article 22.

Article 38. Prohibition of negotiations with suppliers or contractors

No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender presented by the supplier or contractor.

A/CN.9/WG.I/WP.73/Add.4 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its eighteenth session****ADDENDUM**

This note sets out a proposal for chapter IV (Procurement methods not involving negotiations (restricted tendering, request for quotations and request for proposals without negotiation)) of the revised Model Law, comprising articles 39-41.

The Secretariat's comments are set out in the accompanying footnotes.

Chapter IV. Procurement methods not involving negotiations (restricted tendering, request for quotations and request for proposals without negotiation)**Article 39. Restricted tendering¹**

(1) The procuring entity shall solicit tenders in accordance with the provisions of articles [29 quater] and paragraph (2) of this article.

(2) (a) When the procuring entity engages in restricted tendering on the grounds that the subject matter of the procurement, by reason of its highly complex or specialized nature, is available only from a limited number of suppliers or contractors,² it shall solicit tenders from all suppliers and contractors from whom the subject matter of the procurement is available;

(b) When the procuring entity engages in restricted tendering on the grounds that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement, it shall select suppliers or contractors from whom to solicit tenders in a non-discriminatory manner, and it shall select a sufficient number of suppliers or contractors to ensure effective competition.

(3) The provisions of chapter III of this Law shall apply to restricted tendering proceedings, except to the extent that those provisions are derogated from in this article.

¹ The article was revised pursuant to the deliberations at the Working Group's seventeenth session and in the light of the newly proposed section II of chapter II (A/CN.9/687, paras. 159-169). In particular, provisions on a pre-selection procedure have been deleted.

² The accompanying Guide text will provide examples of the exceptional cases in which these grounds will apply (A/CN.9/687, paras. 159-160).

Article 40. Request for quotations

- (1) The procuring entity shall request quotations from as many suppliers or contractors as practicable, but from at least three. Each supplier or contractor from whom a quotation is requested shall be informed whether any elements other than the charges for the subject matters of the procurement themselves, such as any applicable transportation and insurance charges, customs duties and taxes, are to be included in the price.
- (2) Each supplier or contractor is permitted to give only one price quotation and is not permitted to change its quotation. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a quotation presented by the supplier or contractor.
- (3) The successful quotation shall be the lowest-priced quotation meeting the needs of the procuring entity as set out in the request for quotations.³

Article 41. Request for proposals without negotiation

- (1) Except in the cases of direct solicitation under article [29 quinquies], the procuring entity shall issue an invitation to participate in the procurement proceedings in accordance with article [29 ter].
- (2) The invitation shall include:
 - (a) The name and address of the procuring entity;
 - (b) A description of the subject matter of the procurement, including the technical, quality and other characteristics to which the proposal must conform and the desired or required time and location for the provision of such subject matter;
 - (c) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
 - (d) A declaration pursuant to article [8];
 - (e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article [9];
 - (f) The criteria and procedures for opening the proposals and for examining and evaluating the proposals in accordance with articles [10 and 11], including the minimum requirements with respect to technical and quality characteristics of proposals, and a statement that proposals that fail to meet those requirements will be rejected as non-responsive;
 - (g) The means of obtaining the request for proposals and the place where they may be obtained;

³ A/CN.9/687, para. 170.

(h) The price, if any, charged by the procuring entity for the request for proposals;

(i) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals, [unless in a domestic procurement the procuring entity decides that an indication of the currency is not necessary];⁴

(j) The language or languages in which the requests for proposals are available [unless in domestic procurement the procuring entity decides that this information is not necessary];⁵

(k) The manner, place and deadline for presenting proposals.

(3) The procuring entity shall issue the request for proposals:

(a) Where the invitation to participate in the procurement proceedings has been issued, to each supplier or contractor that responds to the invitation in accordance with the procedures and requirements specified therein;

(b) In the case of direct solicitation, to the suppliers or contractors selected by the procuring entity.⁶

(4) The request for proposals shall include, in addition to the information referred to in paragraphs (2)(a) to (f) and (k) of this article, the following information:

(a) Instructions for preparing and presenting proposals, including instructions to suppliers or contractors to present simultaneously to the procuring entity proposals in two envelopes: one envelope containing the technical and quality characteristics of the proposal and the other envelope containing the financial aspects of the proposal;

(b) The currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used,⁷ [unless in a domestic procurement the procuring entity decides that this information is not necessary];⁸

(c) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost

⁴ The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

⁵ Id. The Working Group may in addition wish to consider that indication of the language or languages may be important even in the domestic procurement in some multilingual countries.

⁶ It is the Secretariat's understanding that provisions on pre-selection of article 43 would not be applicable to this procurement method.

⁷ Based on article 38 (j) and (n) of the 1994 Model Law.

⁸ The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;⁹

(d) The means by which suppliers or contractors may seek clarifications of the request for proposals;¹⁰

(e) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place¹¹ where these laws and regulations may be found;¹²

(f) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;¹³

(g) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of a standstill period and, if none will apply, a statement to that effect and reasons therefor;¹⁴

(h) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;¹⁵

(i) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of proposals and to the procurement proceedings.¹⁶

(5) Before opening the envelopes containing the financial aspects of the proposals, the procuring entity shall examine and evaluate the technical and quality characteristics of proposals in accordance with the criteria and procedures specified in the request for proposals.

(6) The results of the examination and evaluation of the technical and quality characteristics of the proposals shall be immediately recorded in the record of the procurement proceedings.

⁹ Based on article 38 (k) of the 1994 Model Law.

¹⁰ Based on article 38 (q) of the 1994 Model Law.

¹¹ Reference to the place was added by the Secretariat further to the suggestions of experts. The accompanying Guide text will explain that the place refers not to the physical location but rather an official publication, portal, etc. where authoritative texts of laws and regulations of the enacting State are made available to the public and systematically maintained.

¹² Based on article 38 (s) of the 1994 Model Law, and reflecting the proposed amendment to the corresponding provisions in the article applicable to the open tendering (article 33 (t) of the current draft).

¹³ Based on article 38 (p) of the 1994 Model Law.

¹⁴ Based on article 38 (t) of the 1994 Model Law, and reflecting the proposed amendment to the corresponding provisions in the article applicable to the open tendering (article 33 (w) of the current draft).

¹⁵ Based on article 38 (u) of the 1994 Model Law.

¹⁶ Based on article 38 (v) of the 1994 Model Law.

(7) The proposals whose technical and quality characteristics fail to meet the relevant minimum requirements shall be considered to be non-responsive and shall be rejected on that ground. The notice of rejection and reasons for rejection,¹⁷ together with an unopened envelope containing the financial aspects of the proposal, shall be promptly dispatched to each respective supplier or contractor whose proposal was rejected.

(8) The proposals whose technical and quality characteristics meet or exceed the relevant minimum requirements shall be considered to be responsive. The procuring entity shall promptly communicate to each supplier or contractor presenting such a proposal the score of the technical and quality characteristics of its respective proposal. The procuring entity shall invite all such suppliers or contractors to the opening of the envelopes containing the financial aspects of their proposals.

(9) The score of the technical and quality characteristics of each responsive proposal and the corresponding financial aspect of that proposal shall be read out in the presence of the suppliers or contractors invited in accordance with paragraph (8) of this article to the opening of the envelopes containing the financial aspects of the proposals.

(10) The procuring entity shall compare the financial aspects of the responsive proposals and on that basis identify the successful proposal in accordance with the criteria and the procedure set out in the request for proposals. The successful proposal shall be the proposal with the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price.¹⁸

¹⁷ A/CN.9/687, para. 178.

¹⁸ A/CN.9/687, paras. 179-181. The article is designed for the award of the contract on the basis of the best combined evaluation in terms of the criteria other than price specified in the request for proposals and the price. The accompanying Guide text will explain that the procuring entity can award on the basis of the lowest price alone if it sets out sufficiently high the relevant threshold for the minimum quality and technical characteristics of the proposals. In such case, the procuring entity, before opening the envelopes containing the financial aspects of the proposals, would examine the technical and quality characteristics of proposals and reject non-responsive ones. No evaluation of quality and technical characteristics of responsive proposals would take place and thus no scores or ratings would be assigned since scores or ratings would not be relevant where the award is made to the responsive proposal with the lowest price.

A/CN.9/WG.I/WP.73/Add.5 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its eighteenth session****ADDENDUM**

This note sets out a proposal for chapter V of the revised Model Law (Procurement methods involving negotiations (two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement)), comprising articles 42-46.

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER V. PROCUREMENT METHODS INVOLVING NEGOTIATIONS (TWO-STAGE TENDERING, REQUEST FOR PROPOSALS WITH DIALOGUE, REQUEST FOR PROPOSALS WITH CONSECUTIVE NEGOTIATIONS, COMPETITIVE NEGOTIATIONS AND SINGLE-SOURCE PROCUREMENT)**Article 42. Two-stage tendering¹**

- (1) The provisions of chapter III of this Law shall apply to two-stage tendering proceedings, except to the extent those provisions are derogated from in this article.
- (2) The solicitation documents shall call upon suppliers or contractors to present, in the first stage of the two-stage tendering proceedings, initial tenders containing their proposals without a tender price. The solicitation documents may solicit proposals relating to the technical, quality or other characteristics of the subject matter of the procurement as well as to contractual terms and conditions of supply, and, where relevant, the professional and technical competence and qualifications of the suppliers or contractors.
- (3) The procuring entity may, in the first stage, engage in discussions² with suppliers or contractors whose tender have not been rejected pursuant to provisions

¹ The accompanying Guide text will note that variants of the two-stage tendering are used in practice, and may set out some of such variants. The Guide will further explain that the article of the Model Law focus on the essential characteristics of this method that intend to accommodate all these variants (A/CN.9/687, para. 182). The Guide will further explain the relevant risks, in particular high risk of collusion, posed by this procurement method (A/CN.9/687, para. 186).

² A/CN.9/687, para. 184.

of this Law³ concerning any aspect of their tenders. When the procuring entity engages in discussions with any supplier or contractor, it shall extend an equal opportunity to participate in discussions to all suppliers or contractors.⁴

(4) (a) In the second stage of the two-stage tendering proceedings, the procuring entity shall invite all suppliers or contractors whose tenders have not been rejected⁵ to present final tenders with prices with respect to a single description of the subject matter of the procurement.

(b) In formulating that description, the procuring entity may delete or modify any aspect of the technical or quality characteristics of the subject matter of the procurement as set out in the solicitation documents and add any new characteristic that conforms to the requirements of this Law.⁶

(c) The procuring entity may delete or modify any criterion for examining or evaluating tenders set out in the solicitation documents and may add any new criterion that conforms to the requirements of this Law, to the extent only that the deletion or modification is required as a result of changes made in the technical or quality characteristics of the subject matter of the procurement.⁷

(d) Any deletion, modification or addition made pursuant to subparagraphs (b) or (c) above shall be communicated to suppliers or contractors in the invitation to present final tenders.

(e) A supplier or contractor not wishing to present a final tender may withdraw from the tendering proceedings without forfeiting any tender security that the supplier or contractor may have been required to provide.⁸

(f) The final tenders shall be evaluated [and compared] in order to ascertain the successful tender as defined in article [37 (4) (b)].

³ The accompanying Guide text will cross-refer to the relevant provisions, highlighting that this procedure involves an assessment of responsiveness.

⁴ A/CN.9/687, para. 183.

⁵ The accompanying Guide text will explain that the wording used in these provisions should not give impression that rejection of tenders is possible subsequent to discussions referred to in paragraph (3) of the article.

⁶ The accompanying Guide text will explain that the aim of the changes is to enhance precision in the description of the subject matter of the procurement (A/CN.9/687, para. 186).

⁷ A/CN.9/687, paras. 188-190. The accompanying Guide text will explain that changes to technical or quality characteristics may necessarily require changes to the examination and/or evaluation criteria, as otherwise the examination and/or evaluation criteria at the second stage would not reflect the applicable technical and quality criteria.

⁸ The accompanying Guide text will explain the application of the article on tender securities in the context of two-stage proceedings, in particular at which stage of the proceedings tender securities may be required.

Article 43. Request for proposals with dialogue^{9, 10}

(1) Except in the cases of direct solicitation under article [29 quinquies] or pre-selection, the procuring entity shall issue an invitation to participate in the procurement proceedings in accordance with article [29 ter].

(2) The invitation shall include:

(a) The name and address of the procuring entity;

(b) A description of the subject matter of the procurement to the extent known, and the desired or required time and location for the provision of such subject matter;

(c) The intended stages of the procedure;

(d) The minimum requirements established by the procuring entity¹¹ and a statement that proposals that fail to achieve these minimum requirements shall be regarded as non-responsive and rejected from the procedure;

(e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications, in conformity with article [9];

(f) A declaration pursuant to article [8];

(g) The means of obtaining the request for proposals and the place where they may be obtained;

(h) The price, if any, charged by the procuring entity for the request for proposals;

⁹ The article was revised pursuant to the deliberations at the Working Group's seventeenth session (A/CN.9/687, paras. 192-208) and the newly proposed section II of chapter II.

¹⁰ This procurement method is available for all types of procurement, including the procurement of non-quantifiable advisory services. However, the Working Group's attention is drawn to the discussion in A/CN.9/WG.I/WP.71 regarding the particular features of such procurement. The Working Group is invited to consider whether a dedicated procurement method for it would be required in the revised Model Law. Alternatively, the Guide to Enactment might explain that in such type of procurement, regulations could provide additional steps or provisions. For example, proposals need not contain financial elements or prices where the cost is not an evaluation criterion or not a significant evaluation criterion, proposals could be presented in two envelopes with technical and financial aspects in different envelopes, and an additional step could include a public opening of the envelopes in one or two sittings. As regards evaluation criteria in such type of procurement, the Guide could explain that for non-quantifiable advisory services, relevant issues may include (i) cost, (ii) the service-provider's experience for the specific assignment, (iii) the quality of the understanding of the assignment under consideration and of the methodology proposed, (iv) the qualifications of the key staff proposed, (v) transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the description of the assignment, and (vi) when applicable, the extent of participation by nationals among key staff in the performance of the services.

¹¹ The Working Group may wish to include a cross-reference to article [10] so that the objectivity provisions of that article would apply to the description of the subject matter and minimum requirements.

(i) If a price is charged for the request for proposals, the means and currency of payment for the request for proposals, [unless in a domestic procurement the procuring entity decides that an indication of the currency is not necessary];¹²

(j) The language or languages in which the requests for proposals are available [unless in domestic procurement the procuring entity decides that this information is not necessary];¹³

(k) The manner, place and deadline for presenting proposals.

(3) For the purpose of limiting the number of suppliers or contractors from whom to request proposals, the procuring entity may engage in pre-selection proceedings. The provisions of article [16] of this Law shall apply *mutatis mutandis* to the pre-selection proceedings except to the extent that those provisions are derogated from in this paragraph:

(a) The procuring entity shall specify in the pre-selection documents that it will request proposals only from a limited number of pre-selected suppliers or contractors that best meet the qualification criteria specified in the pre-selection documents;

(b) The pre-selection documents shall set out the maximum number of pre-selected suppliers or contractors from whom the proposals will be requested and the manner in which the selection of that number will be carried out. In establishing such a number the procuring entity shall bear in mind the need to ensure the effective competition;

(c) The procuring entity shall rate the suppliers or contractors that meet the qualifications criteria specified in the pre-selection documents according to the manner of rating that is set out in the invitation to pre-selection and the pre-selection documents.

(d) The procuring entity shall pre-select suppliers or contractors that acquired the best rating up to the maximum number indicated in the pre-selection documents but at least three if possible;

(e) The procuring entity shall promptly notify each supplier or contractor whether or not it has been pre-selected and shall upon request communicate to suppliers or contractors that have not been pre-selected the reasons therefor. It shall make available to any member of the general public, upon request, the names of all suppliers or contractors that have been pre-selected.

(4) The procuring entity shall issue the request for proposals:

(a) Where the invitation to participate in the procurement proceedings has been issued, to each supplier or contractor that responds to the invitation in accordance with the procedures and requirements specified therein;

¹² The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

¹³ Id. The Working Group may in addition wish to consider that indication of the language or languages may be important even in the domestic procurement in some multilingual countries.

(b) Where pre-selection proceedings have been engaged in, to each pre-selected supplier or contractor in accordance with the procedures and requirements specified in the pre-selection documents;

(c) In the case of direct solicitation, to the suppliers or contractors selected by the procuring entity.

(5) The request for proposals shall include, in addition to the information referred to in paragraphs (2)(a) to (e) and (k) of this article, the following information:

(a) Instructions for preparing and presenting proposals;

(b) The terms and conditions of the procurement contract, to the extent that they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;¹⁴

(c) If suppliers or contractors are permitted to present proposals for only a portion of the subject matter of the procurement, a description of the portion or portions for which proposals may be presented;¹⁵

(d) The currency or currencies in which the proposal price is to be formulated or expressed, and the currency that will be used for the purpose of evaluating proposals, and either the exchange rate that will be used for the conversion of proposal prices into that currency or a statement that the rate published by a specified financial institution prevailing on a specified date will be used,¹⁶ [unless in a domestic procurement the procuring entity decides that this information is not necessary];¹⁷

(e) The manner in which the proposal price is to be formulated or expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement, such as reimbursement for transportation, lodging, insurance, use of equipment, duties or taxes;¹⁸

(f) The means by which suppliers or contractors may seek clarifications of the request for proposals;¹⁹

(g) Any elements of the description of the subject matter of the procurement or term or condition of the procurement that will not be the subject of dialogue during the procedure;

(h) Where the procuring entity intends to fix the number of suppliers or contractors that it will invite to participate in the dialogue, the minimum number of suppliers or contractors, which shall be not lower than three, if possible, and, where appropriate, the maximum number;

(i) The criteria and procedure for evaluating the proposals in accordance with article [11];²⁰

¹⁴ Based on article 38 (r) of the 1994 Model Law.

¹⁵ Based on article 38 (i) of the 1994 Model Law.

¹⁶ Based on article 38 (j) and (n) of the 1994 Model Law.

¹⁷ The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

¹⁸ Based on article 38 (k) of the 1994 Model Law.

¹⁹ Based on article 38 (q) of the 1994 Model Law.

(j) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place²¹ where these laws and regulations may be found;²²

(k) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;²³

(l) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of a standstill period and, if none will apply, a statement to that effect and reasons therefor;²⁴

(m) Any formalities that will be required once the proposal has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract, and approval by a higher authority or the Government and the estimated period of time following dispatch of the notice of acceptance that will be required to obtain the approval;²⁵

(n) Any other requirements that may be established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of proposals and to the procurement proceedings,²⁶ [including any relevant timetables applicable in respect of the procurement process.]

(6) The procuring entity shall examine all proposals received against the established minimum requirements and shall reject each proposal that fails to meet these minimum requirements on the grounds that it is non-responsive. The notice of rejection and reasons for rejection shall be promptly communicated to each supplier or contractor whose proposal was rejected.

(7) The procuring entity shall invite each supplier or contractor that presented a responsive proposal, to participate in dialogue. The procuring entity shall ensure that the number of suppliers invited to participate in the dialogue is sufficient to ensure effective competition, and shall be at least three, if possible.

²⁰ Based on article 38 (m) of the 1994 Model Law. The Guide to Enactment would address the question of sub-criteria and provide the guidance that would be needed to ensure that a true picture of the evaluation criteria is given. Different procurements might require different levels of flexibility in this regard.

²¹ Reference to the place was added by the Secretariat further to the suggestions of experts. The accompanying Guide text will explain that the place refers not to the physical location but rather an official publication, portal, etc. where authoritative texts of laws and regulations of the enacting State are made available to the public and systematically maintained.

²² Based on article 38 (s) of the 1994 Model Law, and reflecting the proposed amendment to the corresponding provisions in the article applicable to the open tendering (article 33 (t) of the current draft).

²³ Based on article 38 (p) of the 1994 Model Law.

²⁴ Based on article 38 (t) of the 1994 Model Law, and reflecting the proposed amendment to the corresponding provisions in the article applicable to the open tendering (article 33 (w) of the current draft).

²⁵ Based on article 38 (u) of the 1994 Model Law.

²⁶ Based on article 38 (v) of the 1994 Model Law.

(8) The dialogue shall be conducted by the same representatives of the procuring entity on a concurrent basis.

(9) [During the course of the dialogue,²⁷ the procuring entity shall not modify the subject matter of the procurement, nor any qualification, or evaluation criterion, nor any element of the procurement that is not subject to the dialogue as notified in the request for proposals].²⁸

(10) Any requirements, guidelines, documents, clarifications or other information generated during the dialogue that are communicated by the procuring entity to a supplier or contractor shall be communicated at the same time on an equal basis to all other participating suppliers or contractors, unless they are specific or exclusive to that supplier or contractor, or such communication would be in breach of the confidentiality provisions of article [22] of this Law.²⁹

(11) Following the dialogue, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present a best and final offer with respect to all aspects of their proposals. The request shall be in writing, and shall specify the manner, place and deadline for presenting best and final offers.

(12) The successful offer shall be the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals.

Article 44. Request for proposals with consecutive negotiations³⁰

(1) The provisions of article [43 (1)-(6) and (9)]³¹ of this Law shall apply mutatis mutandis to procurement conducted by means of request for proposals with consecutive negotiations except to the extent those provisions are derogated from in this article.

(2) The procuring entity shall rate each responsive proposal in accordance with the criteria and procedure for evaluating proposals as set out in the request for proposals, and shall:

²⁷ A/CN.9/687, para. 198.

²⁸ Ibid., para. 207. No consensus was reached as regards this wording proposed at the Working Group's seventeenth session. The Working Group may wish to consider whether the amended wording of this paragraph corresponds to the definition of the "material change" in article 2 and if so, whether the paragraph could be substantially shortened by including the prohibition of material change in the course of the dialogue.

²⁹ The accompanying Guide text will cross-refer to article 22 that addresses consent to disclosure of the confidential information among suppliers.

³⁰ Based on article 44 of the 1994 Model Law, and the method set out in draft article 43 above. The Working Group is still to consider whether this procurement method should be limited to advisory services (see the relevant footnote to article 27 of this draft). If the decision is to retain this procurement method for all types of procurement, the accompanying Guide text may explain that the procedural and substantive differences between the methods in articles 43 and 44 should guide a procuring entity in the selection of one method over the other. The accompanying Guide text may elaborate on those differences (A/CN.9/687, para. 197).

³¹ The Working Group may wish to consider whether provisions on pre-selection procedures of article 43 should be applicable to this procurement method.

(a) Invite for negotiations [on the price of its proposal]³² the supplier or contractor that has attained the best rating in accordance with those criteria and procedure; and

(b) Inform other suppliers or contractors that presented responsive proposals that they may be considered for negotiation if the negotiations with the suppliers or contractors with better ratings do not result in a procurement contract.

(3) If it becomes apparent to the procuring entity that the negotiations with the supplier or contractor invited pursuant to paragraph (2)(a) of this article will not result in a procurement contract, the procuring entity shall inform that supplier or contractor that it is terminating the negotiations.

(4) The procuring entity shall then invite for negotiations the supplier or contractor that attained the second best rating; if the negotiations with that supplier or contractor do not result in a procurement contract, the procuring entity shall invite the other suppliers or contractors still participating in the procurement proceedings for negotiations on the basis of their ranking until it arrives at a procurement contract or rejects all remaining proposals.

[(5) The procuring entity cannot reopen negotiations with the supplier or contractor with whom it had already terminated negotiations.]³³

Article 45. Competitive negotiations³⁴

(1) In competitive negotiations, the procuring entity shall engage in negotiations with a sufficient number of suppliers or contractors to ensure effective competition. The provisions of article 29 quater shall apply to the procedures preceding the negotiations.

(2) Any requirements, guidelines, documents, clarifications or other information relative to the negotiations that are communicated by the procuring entity to a supplier or contractor before or during the negotiations shall be communicated on an equal basis to all other suppliers or contractors engaging in negotiations with the procuring entity relative to the procurement.

³² The 1994 Model Law permits holding consecutive negotiations only on price (article 44 (b)). Experts consulted by the Secretariat questioned advisability of imposing such a restriction. The Working Group may wish therefore consider whether in this procurement method negotiations should also be permitted on non-price criteria.

³³ No such explicit prohibition appears in the 1994 text. The 1994 Guide text to the relevant provisions of the Model Law discussed advantages and disadvantages of such an explicit prohibition in this procurement method. The provisions in square brackets were put by the Secretariat in the light of the deliberations at the Working Group's seventeenth session. The concerns about this procurement method expressed at that session of the Working Group were based on the understanding that the Model Law indeed prohibited reopening negotiations with the supplier or contractor with whom the procuring entity had already terminated negotiations. In response, the positive impact of such a prohibition on the negotiating discipline of both sides of the negotiations was emphasized (A/CN.9/687, paras. 209-210).

³⁴ Based on article 49 of the 1994 Model Law, with the addition of a notice requirement suggested to be included further to the results of the Secretariat's consultations with experts (see the newly proposed section II of chapter II of this draft). The Working Group may wish to consider when the use of competitive negotiations is appropriate by reference to the draft conditions for use in article 27 bis of chapter II.

(3) Following completion of negotiations, the procuring entity shall request all suppliers or contractors remaining in the proceedings to present, by a specified date, a best and final offer with respect to all aspects of their proposals.

(4) The successful offer shall be the offer that best meets the needs of the procuring entity.

Article 46. Single-source procurement

The procuring entity may solicit a proposal or price quotation from a single supplier or contractor in accordance with article 29 quater.

A/CN.9/WG.I/WP.73/Add.6 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its eighteenth session****ADDENDUM**

This note sets out a proposal for chapter VI (Electronic reverse auctions) of the revised Model Law, comprising articles 47 to 51.

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER VI. ELECTRONIC REVERSE AUCTIONS¹**Article 47. Procedures for soliciting participation in electronic reverse auctions as a stand-alone procurement method**

- (1) Where an electronic reverse auction is to be used as a stand-alone procurement method, the procuring entity shall solicit bids by issuing an invitation to participate in the procurement proceedings in accordance with the provisions of article [29 ter].
- (2) The invitation to participate in the procurement proceedings shall include:
 - (a) The name and address of the procuring entity;
 - (b) A description of the subject matter of the procurement, and the desired or required time and location for the provision of such subject matter;
 - (c) The terms and conditions of the procurement contract, to the extent they are already known to the procuring entity, and the contract form, if any, to be signed by the parties;
 - (d) A declaration pursuant to article [8];
 - (e) The criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article [9];
 - (f) The information required under article [11 (5)], the mathematical formula that will be used in the evaluation procedure during the auction and an indication of any criteria that cannot be varied during the auction;
 - (g) If suppliers or contractors are permitted to present bids for only a portion of the subject matter of the procurement, a description of the portion or portions for which bids may be presented;

¹ The entire chapter has been revised in the light of the changes agreed to be made to the Model Law so far.

(h) The manner in which the bid price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;

(i) The currency or currencies in which the bid price is to be formulated and expressed [unless in a domestic procurement the procuring entity decides that an indication of the currency is not necessary];²

(j) A statement as to whether the invitation to participate in the procurement proceedings serves as an invitation to register for the auction, or whether an additional invitation to register for the auction will be issued;

(k) The minimum number of suppliers or contractors required to register for the auction in order for the auction to be held, which shall be sufficient to ensure effective competition;³

(l) Any maximum number of suppliers or contractors to be invited to register for the auction and the criteria and procedure that will be followed in selecting that maximum number;

(m) The manner and, if already determined, deadline by which the suppliers and contractors shall register for the auction;

(n) An invitation to present initial bids, where the auction is to be preceded by an examination or evaluation of initial bids, in accordance with paragraph (5) of this article, together with the following information:

[(i) Instructions for preparing initial bids, including the language or languages, in conformity with article [13], in which initial bids are to be prepared [unless in a domestic procurement the procuring entity decides that this information is not necessary];⁴

(ii) Information about the criteria and procedure for examination, and where applicable evaluation, of initial bids;

(iii) The manner, place and deadline for presenting initial bids];⁵

(o) How the electronic reverse auction can be accessed, and information about the electronic equipment being used and technical specifications for connection;⁶

² The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide.

³ The accompanying Guide text will address the issues of fairness of treatment, as was suggested in the Working Group.

⁴ The words in square brackets correspond to the relevant cross-reference in article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide. The Working Group may in addition wish to consider that indication of the language or languages may be important even in the domestic procurement in some multilingual countries.

⁵ The Working Group may wish to consider that information in square brackets in subparagraphs (i) to (iii) of this paragraph could be included in the accompanying Guide text rather than in the Model Law as unnecessarily detailed.

(p) Criteria governing the closing of the auction and, if already determined, the date and time of the opening of the auction;

(q) 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);

(r) Other 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, the language in which it will be provided and the conditions under which the bidders will be able to bid;

(s) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(t) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary;

(u) Any commitments to be made by the supplier or contractor outside the procurement contract;

(v) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefor;

(w) Any formalities that will be required once a successful bid has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article [20], and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

(x) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of bids and to other aspects of the procurement proceedings.

(3) The invitation to participate in the procurement proceedings shall serve as an invitation to register for the auction and shall so provide, unless:

(a) A maximum number of bidders has been imposed; or

(b) The auction is to be preceded by the examination or evaluation⁷ of initial bids.

(4) (a) The procuring entity may impose a maximum number of suppliers or contractors to be invited to register for the auction for technical reasons or capacity limitations.

⁶ The Working Group may wish to consider that the paragraph could be shortened by referring generally to information regarding technical aspects of the auction. The details of technical aspects may be specified in the accompanying Guide text.

⁷ It is the Secretariat's understanding that "evaluation" necessarily encompasses "examination".

(b) [The procuring entity shall include a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum in the record required under article [23] of this Law.]⁸

(c) Where the number of suppliers or contractors responding to the invitation to participate in the procurement proceedings exceeded the maximum number, the procuring entity shall issue the invitation to register for the auction in accordance with article [49] of this Law to all suppliers or contractors up to the maximum selected in accordance with the criteria and procedure specified in the invitation to participate in the procurement proceedings.

(5) (a) The auction is always to be preceded by an examination [and] [or]⁹ evaluation¹⁰ of initial bids where the procurement contract is to be awarded to the [lowest evaluated bid] [best evaluated bid] [most advantageous bid].¹¹

(b) Where the procurement contract is to be awarded to the lowest priced bid, the auction may be preceded by the examination or evaluation of initial bids if so decided by the procuring entity in the light of the circumstances of the given procurement.

(c) Where the auction has been preceded by the examination or evaluation of initial bids, the procuring entity shall promptly after the completion of the examination or evaluation of initial bids:

(i) Dispatch the notice of rejection and reasons for rejection¹² to each supplier or contractor whose initial bid was rejected;

(ii) Issue an invitation to register for the auction in accordance with article [49] of this Law to each supplier or contractor whose initial bid is responsive. Where an evaluation of initial bids has taken place, each invitation

⁸ At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

⁹ The Working Group may wish to consider that in some simple auctions where the award is to the most advantageous bid no evaluation may need to take place. The ascertainment of responsiveness of initial bids without assigning any ratings/scores or ranking would be sufficient.

¹⁰ If the Working Group decides to provide for a choice between examination and evaluation, the accompanying Guide text would have to explain that that choice is not discretionary but will be dictated by the circumstances of the given procurement.

¹¹ At the Working Group's fifteenth session, it was suggested that the term "the lowest evaluated bid" should be replaced with the term "the best evaluated bid", since in practice it was the highest or the best, not the lowest, evaluated bid that was accepted. The Working Group deferred the consideration of the issue to a later stage (A/CN.9/668, paras. 220 and 222). The informal drafting party, July 2009, comprising Angola, Austria, the Czech Republic, France, Germany, Morocco, Nigeria, Senegal, Turkey, the United Kingdom and the United States of America, supported the use of the term "best" rather than the term "lowest", with the Guide to Enactment carefully explaining the meaning of the term "best" in the special circumstances of reverse auctions. The Working Group may wish to recall in this regard that at its seventeenth session it agreed in the context of tendering to replace the "lowest evaluated tender" with the "most advantageous tender". It may therefore wish to use the term the "most advantageous bid" in the context of electronic reverse auctions.

¹² A/CN.9/687, para. 178.

to register for the auction shall be accompanied by the outcome of the evaluation as relevant to the supplier or contractor to which the invitation is addressed.¹³

(6) The procuring entity shall ensure that the number of suppliers or contractors invited to register for the auction in accordance with paragraphs (4) and (5) of this article is sufficient to ensure effective competition.

Article 48. Specific requirements for solicitation of participation in procurement proceedings involving an electronic reverse auction as a phase preceding the award of the procurement contract

(1) Where an electronic reverse auction is to be used as a phase preceding the award of the procurement contract in [other procurement methods, as appropriate][restricted tendering, two-stage tendering, ...] or a framework agreement procedure with second stage competition, the procuring entity shall notify suppliers and contractors when first soliciting their participation in the procurement proceedings that an electronic reverse auction will be held and shall provide at a minimum the following information about the auction:

(a) The mathematical formula that will be used in the evaluation procedure during the auction and an indication of any criteria that cannot be varied during the auction;

(b) How the electronic reverse auction can be accessed, and the electronic equipment being used and technical specifications for connection.

(2) Before the auction is held, the procuring entity shall issue an invitation to register for the auction to all suppliers or contractors remaining in the proceedings in accordance with article [49] of this Law.

Article 49. Registration for the auction and timing of holding of the auction

(1) The invitation to register for the auction shall include, in addition to any other information required to be included under provisions of this Law:¹⁴

(a) The manner and deadline by which the invited suppliers and contractors shall register for the auction;

(b) The date and time of the opening of the auction and criteria governing the closing of the auction;

(c) The requirements for registration and identification of bidders at the opening of the auction;

¹³ The Guide will address the extent of the information on the outcome of the full evaluation that should be provided.

¹⁴ The accompanying Guide text will cross-refer to the provisions of article 47 (5) that requires including in the invitation to register for the auction the outcome of evaluation of initial bids where applicable.

(d) How the electronic reverse auction can be accessed, and information about the electronic equipment being used and technical specifications for connection;

(e) 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

(f) Other 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 fact of the registration for the auction shall be promptly confirmed individually to each registered supplier or contractor.

(3) If the number of suppliers or contractors registered for 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 cancellation of the auction shall be communicated promptly to each registered supplier or contractor.

(4) The period of time between the issuance of the invitation to register for the auction and the auction shall be sufficiently long to allow suppliers or contractors to prepare for the auction, taking into account the reasonable needs of the procuring entity.

Article 50. Requirements during the auction

(1) The electronic reverse auction shall be based on:

(a) Price, where the procurement contract is to be awarded to the lowest priced bid; or

(b) Prices and other criteria specified to bidders under articles [11] and [47 to 49] of this Law, as applicable, where the procurement contract is to be awarded to the [lowest evaluated bid] [best evaluated bid] [most advantageous bid].

(2) During an electronic reverse auction:

(a) All bidders shall have an equal and continuous opportunity to present their bids;

(b) There shall be automatic evaluation of all bids in accordance with the criteria and other relevant information specified to bidders under articles [47 to 49] of this Law, as applicable;

(c) Each bidder must receive, instantaneously and on a continuous basis during the auction, sufficient information allowing it to determine the standing of its bid vis-à-vis other bids;¹⁵

(d) There shall be no communication between the procuring entity and the bidders or among the bidders, other than as provided for in subparagraphs (a) and (c) of this paragraph.

¹⁵ The accompanying Guide text will highlight the risks of collusion that might arise where information about other bids is provided, and will provide examples of existing good practices to mitigate these risks.

- (3) The procuring entity shall not disclose the identity of any bidder during the auction.
- (4) The auction shall be closed in accordance with the criteria specified to bidders under articles [47 to 49] of this Law, as applicable.
- (5) The procuring entity shall suspend or terminate the electronic reverse auction in the case of failures in its communication system that risk the proper conduct of the auction or for other reasons stipulated in the rules for the conduct of the electronic reverse auction. The procuring entity shall not disclose the identity of any bidder in the case of suspension or termination of the auction.

Article 51. Requirements after the auction

- (1) The bid that at the closure of the auction was the lowest priced bid or the [lowest evaluated bid] [best evaluated bid] [most advantageous bid], as applicable, shall be the successful bid.
 - (2) Whether or not it has engaged in pre-qualification proceedings pursuant to article [16], the procuring entity may require the bidder presenting the bid that has been found at the closure of the auction to be the successful bid to demonstrate its qualifications in accordance with criteria and procedures conforming to the provisions of article [9]. If the bidder fails to do so, the procuring entity shall disqualify that supplier or contractor and, without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)], [shall][may] select the bid that at the closure of the auction was the next lowest priced or next [lowest evaluated bid] [best evaluated bid] [most advantageous bid], provided that the bidder that presented that bid can demonstrate its qualifications if required to do so.
 - (3) Where it has not examined initial bids prior to the auction, the procuring entity shall assess after the auction the responsiveness of the bid that at the closure of the auction has been found to be the successful bid. The procuring entity shall reject the bid if that bid is found to be unresponsive and, without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)], [shall][may] select the bid that at the closure of the auction was the next lowest priced or next [lowest evaluated bid] [best evaluated bid] [most advantageous bid], provided that that bid is found to be responsive.
 - (4) Where the bid that at the closure of the auction has been found to be the successful bid appears to the procuring entity to be abnormally low and gives rise to concerns of the procuring entity as to the ability of the bidder that presented it to perform the procurement contract, the procuring entity may engage in procedures described in article [18]. If the procuring entity rejects the bid as abnormally low under article [18], it [shall][may] select the bid that at the closure of the auction was the next lowest priced or next [lowest evaluated bid] [best evaluated bid] [most advantageous bid]. This provision is without prejudice to the right of the procuring entity to cancel the procurement in accordance with article [17 (1)].
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A/CN.9/WG.I/WP.73/Add.7 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its eighteenth session****ADDENDUM**

This note sets out a proposal for chapter VII (Framework agreements procedures) of the revised Model Law, comprising articles 53 to 57.

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER VII. FRAMEWORK AGREEMENTS PROCEDURES¹**Article 52. Award of a closed framework agreement**

(1) The procuring entity shall award a closed framework agreement:

(a) By means of open tendering proceedings, in accordance with provisions of chapter III of this Law, except to the extent that those provisions are derogated from in this chapter; or

(b) By means of other procurement methods in accordance with the relevant provisions of chapters II, IV and V except to the extent that those provisions are derogated from in this chapter;²

(c) In the case of a framework agreement concluded with one supplier or contractor only, by means of single-source procurement under the conditions set out in article [29].³

(2) The provisions of this Law regulating the contents of the solicitation in the context of the procurement methods referred to in paragraph (1) (a) and (b) of this article shall apply mutatis mutandis to the information to be provided to suppliers or contractors when first soliciting their participation in a closed framework agreement procedure. The procuring entity shall in addition specify at that stage:

(a) That the procurement will be conducted as a framework agreement procedure, leading to a closed framework agreement;

(b) Whether the framework agreement is to be concluded with one or more than one supplier or contractor;

¹ The entire chapter has been revised in the light of the changes agreed to be made to the Model Law so far particularly as regards the location of definitions and conditions for use.

² The Working Group may wish to consider whether the use of any procurement methods should be excluded.

³ The accompanying Guide will cross-refer to the definition of the closed framework agreement in article 2 that specifies that in this type of agreement no supplier or contractor who is not initially a party to the framework agreement may subsequently become a party.

(c) If the framework agreement will be concluded with more than one supplier or contractor, any minimum or maximum number of suppliers or contractors that will be parties thereto;

(d) Other terms and conditions of the framework agreement, including the form, terms and conditions of the framework agreement in accordance with article [53].

(2) The provisions of article 20 shall apply *mutatis mutandis* to the award of a closed framework agreement.

Article 53. Requirements of closed framework agreements

(1) A closed framework agreement may be concluded between [one or more]⁴ procuring entities and one or more suppliers or contractors as selected in accordance with the criteria and procedures specified when first soliciting their participation in the framework agreement procedure.

(2) A closed framework agreement shall be concluded in writing and shall set out:

(a) The duration of the framework agreement, which shall not exceed [the enacting State specifies a maximum] years;⁵

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement established when the framework agreement is concluded;

(c) To the extent that they are known, estimates of the terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded;

(d) Whether in a closed framework agreement concluded with more than one supplier or contractor there will be a second stage competition to award a procurement contract under the framework agreement and, if so:

(i) A statement of the terms and conditions that are to be established or refined through second stage competition;

(ii) The procedures for and the [anticipated][possible] frequency⁶ of any second stage competition and envisaged deadlines for presenting second stage submissions;⁷

⁴ The Working Group may wish to consider whether this addition is necessary or the issue may be discussed only in the Guide text that would accompany the definition of the procuring entity as proposed in the current draft.

⁵ The accompanying Guide text will highlight the danger of closed framework agreements of long duration, in the light of their potentially anticompetitive nature (A/CN.9/668, para. 244).

⁶ At the Working Group's fifteenth session, it was agreed that the reference to the "envisaged frequency" should be replaced with a reference to the "possible frequency" (A/CN.9/668, para. 240).

⁷ At the Working Group's fifteenth session, the view was expressed that information about tentative deadlines within which second stage submissions would have to be presented was to be disclosed to suppliers or contractors in advance. That information was considered to be important for suppliers or contractors to decide whether to become parties to the framework

- (iii) Whether the award of a procurement contract under the framework agreement will be to the lowest priced or to the [lowest evaluated submission] [best evaluated submission] [most advantageous submission];
 - (iv) The procedures and criteria to be applied during the second stage competition, including the relative weight of such criteria and the manner in which they will be applied, in accordance with articles [10 and 11] of this Law. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second stage competition.⁸
- (3) A closed framework agreement with more than one supplier or contractor shall be concluded as one agreement between all parties unless:
- (a) The procuring entity determines that it is in the interests of either party that separate agreements with each supplier or contractor party to the framework agreement be concluded;⁹ and
 - [(b) The procuring entity includes in the record required under article [23] a statement of the reasons and circumstances on which it relied to justify the conclusion of separate agreements]; and
 - (c) Any variation in the terms and conditions of the separate agreements for a given procurement is minor and concerns only those provisions that justify the conclusion of separate agreements.
- (4) If the procuring entity is to maintain a closed framework agreement electronically, the framework agreement shall in addition to information specified elsewhere in this article contain all information necessary to allow the effective operation of the electronic framework agreement, including information on how the agreement and notifications of forthcoming procurement contracts there under, the [electronic] equipment being used, and technical specifications for connection.

Article 54. Establishment of an open framework agreement

- (1) The procuring entity shall establish and maintain an open framework agreement in electronic form.¹⁰
- (2) The procuring entity shall solicit participation in the open framework agreement by issuing an invitation to become a party to the open framework agreement in accordance with articles 29 quater of this Law.
- (3) The invitation to become a party to the open framework agreement shall include the following information:

agreement. The suggestion was made that the Guide will explain that information provided was intended to be indicative rather than binding on the procuring entity (A/CN.9/668, para. 248).

⁸ The Guide to Enactment would cross-refer to the provisions of article 55 prohibiting material change to the procurement during the operation of the framework agreement.

⁹ The Working Group may wish to consider whether this provision should be retained here or, as suggested at the Working Group's seventeenth session, appear only in the article on the documentary record of the procurement proceedings.

¹⁰ A/CN.9/664, para. 91.

(a) The name and address of the procuring entity [that establishes and maintains the open framework agreement and the name and address of any other procuring entities that will have the right to award procurement contracts under the framework agreement];¹¹

(b) That the procurement will be conducted as a framework agreement procedure leading to an open framework agreement;

(c) That it is an open framework agreement that is to be concluded;

(d) The language or languages of the open framework agreement and all information about the operation of the agreement, including how the agreement and notifications of forthcoming procurement contracts under the agreement can be assessed, the electronic equipment being used and the technical specifications for connection;

(e) The terms and conditions for suppliers or contractors to be admitted to the open framework agreement, including:

(i) A declaration pursuant to article [8];

(ii) If any limitation on a number of suppliers or contractors that are parties to the open framework agreement is imposed in accordance with paragraph (7) of this article, the maximum number of suppliers or contractors that may be parties to the open framework agreement;

(iii) Instructions for preparing and presenting indicative submissions necessary to become a party to the open framework agreement, including the currency(ies) and the language(s) to be used [unless the procuring entity decides that this information is not necessary in domestic procurement],¹² as well as the criteria and procedures to be used for ascertaining the qualifications of suppliers or contractors and any documentary evidence or other information that must be presented by suppliers or contractors to demonstrate their qualifications in conformity with article [9];

(iv) An explicit statement that suppliers or contractors may apply to become parties to the framework agreement at any time during the period of its operation by presenting indicative submissions, subject to any maximum number of suppliers, if any, and any declaration made pursuant to article [8];

(f) Other terms and conditions of the open framework agreement, including all information required to be set out in the open framework agreement in accordance with article [55];

¹¹ Proposed wording by the informal drafting party, July 2009. It was explained that the proposed language was offered so that framework agreements can be used by other agencies, and not only by the procuring entity that entered into the framework agreement. This approach — centralized procurement facilitated by framework agreements — makes it easier to consolidate government demand, and thus to increase the government's negotiating leverage in the marketplace. However, the Working Group may wish to consider whether so doing would be inconsistent with the notion of a defined procuring entity under the Model Law.

¹² Corresponds to article 23 of the 1994 Model Law. The Working Group may wish to consider that the content of the wording put in square brackets may be reflected more appropriately in the Guide. The Working Group may in addition wish to consider that indication of the language or languages may be important even in the domestic procurement in some multilingual countries.

(g) References to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;

(h) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the procurement proceedings, without the intervention of an intermediary.

(4) Suppliers and contractors may apply to become a party or parties to the framework agreement at any time during its operation by presenting indicative submissions to the procuring entity in compliance with the requirements of the invitation to become a party to the framework agreement.

(5) The procuring entity shall examine all indicative submissions received during the period of operation of the framework agreement within a maximum of [...] days in accordance with the procedures set out in the invitation to become a party to the framework agreement.

(6) The framework agreement shall be concluded with all suppliers or contractors that presented submissions unless their submissions have been rejected on the grounds specified in the invitation to become a party to the framework agreement.

(7) The procuring entity may impose a maximum number of parties to the open framework agreement for technical reasons or capacity limitations. The procuring entity shall set out any such maximum number in the invitation to become a party to the framework agreement. [The procuring entity shall include a statement of the reasons and circumstances upon which it relied to justify the imposition of such a maximum in the record required under article [23] of this Law].¹³

(8) The procuring entity shall promptly notify the suppliers or contractors whether they have become parties to the framework agreement and of the reasons for the rejection of their indicative submissions if they have not.

Article 55. Requirements of open framework agreements

(1) An open framework agreement shall provide for second stage competition for the award of a procurement contract under the agreement and shall include:

(a) The duration of the framework agreement;

(b) The description of the subject matter of the procurement and all other terms and conditions of the procurement known when the open framework agreement is established;

(c) Any terms and conditions that may be refined through second stage competition;

¹³ The Working Group may wish to consider whether this provision should be retained here or, as suggested at the Working Group's seventeenth session, appear only in the article on the documentary record of the procurement proceedings.

(d) The procedures and the [anticipated][possible] frequency¹⁴ of second stage competition;

(e) Whether the award of a procurement contract under the framework agreement will be to the lowest priced or the most advantageous submission;

(f) The procedures and criteria to be applied during the second stage competition, including the relative weight of the evaluation criteria and the manner in which they will be applied, in accordance with articles [10 and 11] of this Law. The framework agreement may specify a range within which the relative weights of the evaluation criteria may be varied during second stage competition.¹⁵

(2) The procuring entity shall, during the entire period of operation of the open framework agreement, republish at least annually the invitation to become a party to the open framework agreement and shall in addition ensure unrestricted, direct and full access to the terms and conditions of the framework agreement and to any other necessary information relevant to its operation.¹⁶

Article 56. Second stage of a framework agreement procedure

(1) Any procurement contract under a framework agreement shall be awarded in accordance with the terms and conditions of the framework agreement and the provisions of this article.

(2) A procurement contract under a framework agreement may only be awarded to a supplier or contractor that is a party to the framework agreement.

(3) The provisions of article 20 of this Law, except for its paragraph (2),¹⁷ shall apply to the acceptance of the successful submission under framework agreements without second stage competition.

(4) In a closed framework agreement with second stage competition and in an open framework agreement, the following procedures shall apply to the award of a procurement contract:

(a) The procuring entity [for the procurement contract]¹⁸ shall issue a written invitation to present submissions individually and simultaneously to all suppliers or contractors that are parties to the framework agreement, or only those

¹⁴ At the Working Group's fifteenth session, it was agreed that the reference to the "envisaged frequency" should be replaced with a reference to the "possible frequency" (A/CN.9/668, para. 240).

¹⁵ The Guide to Enactment would cross-refer to the provision of article 55 prohibiting material change to the procurement during the operation of the framework agreement.

¹⁶ The accompanying Guide text will explain that republication and maintenance of the relevant information shall be at the place where the original invitation was published or at the place (website or other electronic address) set out in the original invitation (article 53 (3) (d)).

¹⁷ The accompanying Guide text will explain reasons why provisions on the standstill period of article 20 do not apply to framework agreements without second stage competition.

¹⁸ Amendment proposed by the informal drafting party, July 2009, to be considered in conjunction with the changes proposed by that informal drafting party to articles 53 (3) (a) and 54 (1) (a) above, to allow a centralized procurement entity or more than one procuring entities to become a party to the framework agreement and conclude procurement contracts under it.

then capable of meeting the needs of that procuring entity in the subject matter of the procurement;

(b) The invitation to present submissions shall include the following information:

- (i) A restatement of the existing terms and conditions of the framework agreement to be included in the anticipated procurement contract, set out the terms and conditions that are to be subject to the second stage competition and provide further detail of the terms and conditions where necessary;
- (ii) A restatement of the procedures and criteria for the award of the anticipated procurement contract (including their relative weight and the manner of their application);
- (iii) Instructions for preparing submissions;
- (iv) The manner, place and deadline for presenting submissions;¹⁹
- (v) If suppliers or contractors are permitted to present submissions for only a portion of the subject matter of the procurement, a description of the portion or portions for which submissions may be presented;
- (vi) The manner in which the submission price is to be formulated and expressed, including a statement as to whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, customs duties and taxes;
- (vii) Reference to this Law, the procurement regulations and other laws and regulations directly pertinent to the procurement proceedings, including those applicable to procurement involving classified information, and the place where these laws and regulations may be found;
- (viii) The name, functional title and address of one or more officers or employees of the procuring entity who are authorized to communicate directly with and to receive communications directly from suppliers or contractors in connection with the second stage competition, without the intervention of an intermediary;
- (ix) Any commitments to be made by the supplier or contractor outside the procurement contract;
- (x) Notice of the right provided under article [61] of this Law to seek review of non-compliance with the provisions of this Law together with information about duration of the applicable standstill period and, if none will apply, a statement to that effect and reasons therefore;
- (xi) Any formalities that will be required once a successful submission has been accepted for a procurement contract to enter into force, including, where applicable, the execution of a written procurement contract pursuant to article [20], and approval by a higher authority or the Government and the estimated period of time following the dispatch of the notice of acceptance that will be required to obtain the approval;

¹⁹ Amendment proposed by the informal drafting party, July 2009.

(xii) Any other requirements established by the procuring entity in conformity with this Law and the procurement regulations relating to the preparation and presentation of submissions and to other aspects of the second stage competition;

(c) The procuring entity [for the procurement contract] shall evaluate all submissions received and determine the successful submission in accordance with the evaluation criteria and the procedures set out in the invitation to present submissions;

(d) The procuring entity shall accept the successful submission in accordance with article 20.

Article 57. No material change during the operation of a framework agreement²⁰

During the operation of a framework agreement, no material change to the procurement shall be permitted.

[Articles 58-60 are not used]

²⁰ The Working Group, at its fifteenth session, agreed to remove to article 2 the definition of “material change” proposed to be included in this article in the note by the Secretariat (A/CN.9/WG.I/WP.66/Add.4) (A/CN.9/668, paras. 235-237 and 273 (f)). The Working Group deferred the consideration of the revised draft article (A/CN.9/668, paras. 235-237).

A/CN.9/WG.I/WP.73/Add.8 (Original: English)**Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services — a revised text of the Model Law, submitted to the Working Group on Procurement at its eighteenth session****ADDENDUM**

This note sets out a proposal for chapter VIII (Review) of the revised Model Law, comprising articles 61 to 66.

The Secretariat's comments are set out in the accompanying footnotes.

CHAPTER VIII. REVIEW**Article 61. Right to review**

A supplier or contractor that claims to have suffered or claims that it may suffer, loss or injury due to alleged non-compliance with the provisions of this Law may seek review of the alleged non-compliance under articles [62 to 66] of this Law or under other provisions of applicable law of this State, including of any alleged non-compliant actions or decisions taken pursuant to review proceedings.

Article 62. Review by the procuring entity or the approving authority¹

(1) Without prejudice to the right of suppliers or contractors to seek review directly before an independent administrative body in accordance with article [63] of this Law or judicial review, a supplier or contractor entitled under article [61] to seek review may submit a complaint to the procuring entity or where applicable to the approving authority.²

(2) The complaints shall be submitted in writing within the following time periods:

(a) Complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting submissions;

¹ The Working Group, at its fifteenth session, approved the article as revised at that session (A/CN.9/668, paras. 259-260). In particular, it was agreed that the provisions should not fix any deadlines in terms of a specific number of days but leave this information in square brackets to be filled in by an enacting State. It was also agreed that the Guide should in this respect bring to the attention of enacting States the time period specified in the WTO Agreement on Government Procurement.

² The paragraph was redrafted further to the suggestion at the Working Group's fifteenth session to make the provisions of the proposed article less ambiguous as regards the optional nature of the review under article 62 (A/CN.9/668, para. 259).

(b) All other complaints arising from the procurement proceedings shall be submitted within [...] days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or when that supplier or contractor should have become aware of those circumstances, whichever is earlier, provided that no complaint may be submitted after the entry into force of the procurement contract.

(3) Unless the complaint is resolved by mutual agreement of the parties, the procuring entity or the approving authority as appropriate shall, within [...] days after the submission of the complaint, issue a written decision. The decision shall:

(a) State the reasons for the decision; and

(b) If the complaint is upheld in whole or in part, state the corrective measures that shall be undertaken.

(4) If the procuring entity or the approving authority does not issue a decision by the time specified in paragraph (3) of this article, the supplier or contractor submitting the complaint or the procuring entity as the case may be is entitled immediately thereafter to institute proceedings under article [63 or 66]. Upon the institution of such proceedings, the competence of the procuring entity or the approving authority to entertain the complaint ceases.³

Article 63. Review before an independent administrative body*.⁴

(1) Without prejudice to the right of suppliers or contractors to seek judicial review, a supplier or contractor entitled under article [61] to seek review may submit a complaint to [insert name of administrative body].

(2) The complaints shall be submitted in writing within the following time periods:

(a) Complaints as regards the terms of solicitation shall be submitted no later than the deadline for presenting submissions unless the deadline expired in the course of the review of such a complaint under article [62] of this Law; in which case, the provisions of paragraphs 2 (b) and (3) of this article shall apply;

³ As suggested by experts during consultations with the Secretariat, the accompanying Guide text will draw a clear distinction between the review proceedings under this article and debriefing proceedings.

* States where hierarchical administrative review of administrative actions, decisions and procedures is not a feature of the legal system may omit this article and provide only for judicial review (article 66), on the condition that in the enacting State exists an effective system of judicial review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the procurement rules and procedures of this Law are not followed, in compliance with the requirements of the United Nations Convention against Corruption.

⁴ The accompanying Guide text will clarify the meaning of the term “independent administrative body”, in particular whether the body should be composed of outside experts. It was noted that the Guide might highlight the disruptions to the procurement proceedings if decision-taking at the review stage lacked independence since decisions might be challenged in the court and this would cause further delays (A/CN.9/668, para. 262 (g)).

(b) All other complaints arising from the procurement proceedings shall be submitted within [...] days of when the supplier or contractor submitting the complaint became aware of the circumstances giving rise to the complaint or when that supplier or contractor should have become aware of those circumstances, whichever is earlier.

(3) The [timely] submission of a complaint under article [62] shall suspend the time period for submission of a complaint under this article for the whole duration of the proceedings under article [62] up to the maximum period required for the procuring entity or the approving authority as the case may be to take a decision in accordance with article [62 (3)] and communicate such decision to the supplier or contractor in accordance with article [64 (5)].⁵

(4) Upon receipt of a complaint, the [insert name of administrative body] shall give notice of the complaint promptly to the procuring entity and to the approving authority where applicable.

(5) The [insert name of administrative body] may grant one or more of the following remedies, unless it dismisses the complaint:

(a) Declare the legal rules or principles that govern the subject matter of the complaint;⁶

(b) Prohibit the procuring entity or the approving authority where applicable from acting or deciding unlawfully or from following an unlawful procedure;

(c) Require the procuring entity or the approving authority where applicable that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) Annul in whole or in part an unlawful act or decision of the procuring entity or the approving authority where applicable;

(e) Revise an unlawful decision by the procuring entity or the approving authority where applicable or substitute its own decision for such a decision;⁷

⁵ As suggested by experts during consultations with the Secretariat, the Guide to Enactment will explain that this suspension of time limits is not the suspension of the procurement proceedings referred to in article 65. In the light of this, paragraph (2) of this article was redrafted to accommodate complaints as regards the terms of solicitation submitted to the procuring entity or the approving authority before the deadline for presenting submissions but which expired in the course of the review of that complaint by the procuring entity or the approving authority under article 62. Under the earlier provisions, affected suppliers or contractors would have no possibility to challenge in the independent administrative body the procuring entity's decision or lack thereof as regards the complaint unless the deadline for presenting submissions was extended by the procuring entity or the procurement proceedings were suspended under article 65.

⁶ At the Working Group's fifteenth session, in response to the suggestion that paragraph (5) (a) should be included in the chapeau of the paragraph, the Secretariat was requested to research the drafting history of the provisions. The Working Group decided to defer the consideration of the suggestion until after the findings of the Secretariat were considered (A/CN.9/668, para. 264). The results of the requested research were set out in a note by the Secretariat A/CN.9/WG.I/WP.68, under section D.

⁷ The Working Group may wish to revise the wording of this subparagraph to include a reference to corrective action, which is the term used in both the WTO Agreement on Government

(f) [Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of an unlawful act or decision of, or procedure followed by, the procuring entity or the approving authority where applicable, and for any loss or damages suffered, which [may] [shall] be limited to [either] costs for the preparation of the submission or [protest] [the costs relating to the challenge, or both];]⁸ [Require the payment of compensation for any reasonable costs incurred by the supplier or contractor submitting the complaint in connection with the procurement proceedings as a result of any unlawful act or decision of, or procedure followed by, the procuring entity or the approving authority where applicable;]⁹

(g) Order that the procurement proceedings be terminated;

(h) Annul the procurement contract that entered into force unlawfully and, if notice of the procurement contract award has been published, order the publication of notice of the annulment of the award.

(6) The [insert name of administrative body] shall within [...] days issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

Procurement (1994) (the GPA) and the provisionally agreed text of the revised WTO Agreement on Government Procurement (the draft revised GPA).

⁸ The Working Group, at its fifteenth session, agreed to retain in paragraph (5) (f) option I only, the wording of which should be aligned with the relevant provisions of international instruments, such as article XX (7) (c) of the GPA and article XVIII (7) (b) of the draft revised GPA. The Working Group further agreed to move option II from paragraph (5) (f) to the Guide with the explanations of the reasons for removing it, in particular that allowing for compensation of anticipatory losses proved to be highly disruptive for procurement proceedings since it provided additional incentives for complaints. It was also suggested that the Guide should explain evolution in regulations on this matter and highlight the relevant provisions of the WTO instruments. For the reasons set out in a note by the Secretariat A/CN.9/WG.I/WP.68, section C, the Secretariat faced difficulties with the implementation of the Working Group's instructions. The Working Group may wish to consider the text proposed in the first pair of square brackets together with the considerations raised in the referred note by the Secretariat. The words put in square brackets within the text contained in the first set of square brackets reflect the different wording in article XX (7) (c) of the GPA and article XVIII (7) (b) of the draft revised GPA.

⁹ The text in the second square brackets is as proposed by the informal drafting party, July 2009, based on option I from the 1994 Model Law. The suggested text was accompanied by an explanatory note stating that, "per the decision of the Working Group at its February 2009 session, option II from the 1994 Model Law is to be moved 'from paragraph 5 (f) to the Guide to Enactment with the explanations of the reasons for removing it, in particular that allowing for compensation of anticipatory losses proved to be highly disruptive for procurement proceedings since it provided additional incentives for complaints.' (A/CN.9/668, paragraph 262 (f)). Moving option II to the Guide would leave it to the enacting State to allow for broader damages, if the enacting State so decided."

Article 64. Certain rules applicable to review proceedings under articles [62 and 63]¹⁰

(1) Promptly after the submission of a complaint under article [62 or 63], the review body shall notify all suppliers or contractors participating in the procurement proceedings¹¹ to which the complaint relates as well as any governmental authority whose interests are or could be affected about the submission of the complaint and its substance.

(2) Any such supplier or contractor or governmental authority has the right to participate in the review proceedings. A supplier or contractor or the governmental authority that fails to participate in the review proceedings is barred from subsequently making the same type of [claim] [complaint].

(3) The participants to the review proceedings shall have access to all proceedings and shall have the right to be heard prior to a decision of the review body being made on the complaint, the right to be represented and accompanied, [and the right to request that the proceedings take place in public]¹² and the right to request that witnesses be presented.

(4) In the cases of the review by the approving authority or the [insert name of administrative body], the procuring entity shall provide to the review body all documents pertinent to the complaint, including the record of the procurement proceedings, in timely fashion.

(5) A copy of the decision of the review body shall be furnished within [...] days after the issuance of the decision to the participants to the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public.

(6) No information under paragraphs (3) to (5) of this article shall be disclosed if its disclosure would be contrary to law, would impede law enforcement, would not be in the public interest, would prejudice the legitimate commercial interests of the suppliers or contractors, would impede fair competition or would compromise essential national security or essential national defence.¹³

¹⁰ The Working Group, at its fifteenth session, approved the draft article as revised at that session (A/CN.9/668, paras. 267-268).

¹¹ At the Working Group's fifteenth session, it was agreed to clarify in the Guide that the term "participating in the procurement proceedings" could include a different pool of participants depending on the timing of the review proceedings and subject of the complaint, and further to specify that those whose submissions were rejected might not have the right to participate in the review proceedings if the latter concerns the stages in the procurement proceedings subsequent and not related to the rejection (A/CN.9/668, para. 267 (c)).

¹² The informal drafting party, July 2009, proposed putting these words in square brackets for further consideration, in particular in order to accommodate concerns regarding national defence and security and other grounds justifying exemptions of information from public disclosure.

¹³ This paragraph consolidates the repetitive provisions in paragraphs (3) to (5) of this article in the previous drafts. The Secretariat understands that the provisions would need to be retained in this article irrespective of article 22 (1) of this draft (that applies only to the procuring entity) since they are meant to impose confidentiality requirements on other entities/persons involved in the review proceedings. The Working Group may wish to consider however that other branches of law regulate these issues as far as they are concerned entities or persons other than

[(7) Any decision by the review body and the reasons and circumstances therefor shall be made part of the record of the procurement proceedings.]¹⁴

Article 65. Suspension of procurement proceedings¹⁵

(1) The [timely] submission of a complaint suspends the procurement proceedings for a period to be determined by the review body.¹⁶

(a) Provided that the complaint is not frivolous and contains a declaration the contents of which, if proven, demonstrate that the supplier or contractor will suffer irreparable injury in the absence of a suspension, that it is probable that the complaint will succeed, and that the granting of the suspension would not cause disproportionate harm to the procuring entity or to other suppliers or contractors;

(b) Unless the procuring entity certifies that urgent public interest considerations require the procurement to proceed. The certification, which shall state the reasons for the finding that such urgent considerations exist and which shall be made a part of the record of the procurement proceedings, is conclusive with respect to all levels of review except judicial review.¹⁷

(2) The review body may extend the originally determined period of suspension in order to preserve the rights of the supplier or contractor submitting the complaint or commencing the action pending the disposition of the review proceedings, provided that the total period of suspension shall not exceed the period required for the review body to take decision in accordance with article [62 or 63] as applicable.

(3) The decision on the suspension or the extension of the suspension shall be promptly communicated to all participants to the review proceedings, indicating the duration of suspension or extension. Where the decision was taken not to suspend the procurement proceedings on the grounds indicated in paragraph (1) of this article, the review body shall notify the supplier or contractor concerned about that decision and the reasons therefor.

the procuring entity, and the content of these provisions may therefore be more appropriately reflected in the accompanying Guide text.

¹⁴ At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

¹⁵ The Working Group, at its fifteenth session, approved the draft article, which is based on article 56 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

¹⁶ As suggested by experts during consultations with the Secretariat, the Working Group may wish to address safeguards that should be made available to the aggrieved supplier or contractor at the end of the suspension period in order to ensure effective challenge or appeal of the decision taken by the review body in another review body or the court. The Working Group may wish to address who determines, and on what basis, whether the complaint fulfils the requirements of subparagraph (1) (a).

¹⁷ As suggested by experts during consultations with the Secretariat, the Guide to Enactment will explain that this provision is included because the review body's determination of public interest considerations cannot bind a court or other judicial body.

(4) [Any decision under this article and the reasons and circumstances therefor shall be made part of the record of the procurement proceedings.]¹⁸

Article 66. Judicial review¹⁹

The [insert name of court or courts] has jurisdiction over actions pursuant to article [61] and petitions for judicial review of decisions made by review bodies, or of the failure of those bodies to make a decision within the prescribed time limit, under article [62 or 63].

¹⁸ At the Working Group's seventeenth session, the suggestion was made that this and similar provisions throughout the Model Law should be deleted and listed only in the article on documentary record of procurement proceedings. The Working Group did not decide on this suggestion (A/CN.9/687, para. 91).

¹⁹ The Working Group, at its fifteenth session, approved the draft article, which is based on article 57 of the 1994 Model Law, without change (A/CN.9/668, para. 269).

V. POSSIBLE FUTURE WORK

A. Present and possible future work on electronic commerce (A/CN.9/692)

[Original: English]

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I. Introduction

1. At its fortieth session, in 2007, the Commission requested the Secretariat to continue to follow closely legal developments in the area of electronic commerce, with a view to making appropriate suggestions in due course.¹

2. At its forty-first session, in 2008, the Commission requested the Secretariat to engage actively, in cooperation with the World Customs Organization (WCO) and the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), and with the involvement of experts, in the study of the legal

¹ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 195.

aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document on the legal aspects of creating and managing a single window, and to report to the Commission on the progress of that work.² That request was reiterated by the Commission at its forty-second session, in 2009.³

3. Furthermore, at its forty-second session, in 2009, the Commission requested the Secretariat to prepare studies on electronic transferable records also in light of the written proposals received at that session (documents A/CN.9/681 and Add.1 and A/CN.9/682), and to organize colloquia on those topics, resources permitting, with a view to reconsidering those matters at a future session.⁴

4. In furtherance of the above, the present note contains an update on the progress of the work of the WCO-UNCITRAL Joint Legal Task Force on Coordinated Border Management Incorporating the International Single Window and provides information relating to electronic transferable records. Moreover, it contains an update on recent developments in the field of electronic commerce, with particular regard to identity management and electronic commerce conducted with mobile devices, including payments (m-payments).

II. Electronic single window facilities

5. The second meeting of the WCO-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window (the “Joint Legal Task Force”) took place from 8 to 11 February 2010 at the premises of the WCO in Brussels. Pursuant to the instructions received from its Permanent Technical Committee, the WCO secretariat involved WCO regional chairs in the preparation of that meeting.

6. The second Joint Legal Task Force meeting stressed once more the relevance of electronic single window facilities for trade facilitation. In particular, it was noted that such facilities were likely to play a significant role in shaping paperless trade, thus directly impacting electronic commerce procedures.

7. The Joint Legal Task Force agreed that the analysis of legal issues arising from the implementation of single window facilities would greatly benefit from the availability of reference models, prepared on the basis of documents such as UN/CEFACT draft recommendation 35⁵ and the APEC Single Window Implementation Guide and Working Group Phase 2 Final Report,⁶ as well as of case studies. Such reference models would illustrate commercial transactions at the national and at the international level in the context of the trade clearance process and the technical models of electronic single window facilities, with particular attention to the parties involved and their location.

² Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 333-338.

³ Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 340.

⁴ Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 343.

⁵ UN/CEFACT, *Establishing a Legal Framework for an International Trade Single Window — Draft Recommendation No. 35*, February 2009 (Public Review Draft); available from www.unece.org/cefact/recommendations/rec35/Rec35-PublicReviewDraftv9-Feb09.doc.

⁶ APEC document #209-CT-01.3 (July 2009), available from http://publications.apec.org/publication-detail.php?pub_id=910.

8. At that meeting, certain legal issues were identified as suitable for further study in the near future. Such issues included: legal validity of electronic communications, including via mobile devices; identification, authentication and authorization, in particular in the context of identity management; data use, retention and privacy; evidentiary value of electronic records and other enforcement-related issues; and legal implications of the various technical architectural options.

9. As an outcome of the meeting, the Joint Legal Task Force established a work plan to gather the necessary information from experts in customs procedures and to compile it so that it could be used for legal analysis. The work plan schedule took into account the desirability to interact with relevant UNCITRAL meetings, including possible future sessions of UNCITRAL Working Group IV.

10. Other work of the Secretariat relating to single window facilities included cooperating with the secretariat of the Eurasian Economic Community in the preparation of a legislative framework for the implementation of such facilities in member States of the Community, and providing comments, at the request of UN/CEFACT, on UN/CEFACT draft recommendation 35.

11. In light of the above, the Commission may wish to consider asking Working Group IV (Electronic Commerce) to review at its future sessions the work on single windows carried out by the Joint Legal Task Force and by other organizations, and to exchange views and formulate recommendations on possible legislative work in that domain.

III. Electronic transferable records

A. Introduction

12. The possibility of future work by UNCITRAL with regard to issues of negotiability and transferability of rights in goods in an electronic environment was first mentioned at the Commission's twenty-seventh session, in 1994,⁷ and subsequently discussed in various sessions of the Commission and of Working Group IV.⁸ In this framework, two documents have dealt in depth with substantive aspects of the topic.

13. Document A/CN.9/WG.IV/WP.69 discussed both paper-based and electronic bills of lading and other maritime transport documents. In particular, that document provided an overview of the attempts to deal with bills of lading in the electronic environment, and made suggestions for model legislative provisions which were eventually adopted as articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce.⁹

⁷ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*, para. 201.

⁸ See A/CN.9/484, paras. 87-93; *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 291-293. For an historical record of previous sessions, see A/CN.9/WG.IV/WP.90, paras. 1-4.

⁹ United Nations publication, Sales No. E.99.V.4.

14. Furthermore, that document contained a preliminary analysis of the conditions for establishing the functional equivalence of electronic and paper-based bills of lading. In this respect, it highlighted as a key issue the possibility to identify with certainty the holder of the bill, which would be entitled to delivery of the goods. Such issue brought into focus the need to ensure the uniqueness of the electronic record incorporating the title to the goods.¹⁰

15. Document A/CN.9/WG.IV/WP.90 discussed in general legal issues relating to transfer of rights in tangible goods and other rights. It offered a comparative description of the methods used for the transfer of property interests in tangible property and for the perfection of security interests, and of the challenges posed by the transposition of those methods in the electronic environment. It also provided an update on on-going efforts for the use of electronic means in transfer of rights in tangible goods.

16. With respect to documents of title and negotiable instruments, that document stressed the desirability to ensure control over the electronic transferable record in a manner equivalent to physical possession, and suggested that a combination of a registry system and adequately secure technology could assist in addressing issues relating to the singularity and authenticity of the electronic record.¹¹

17. The use of electronic communications in international trade has gained further acceptance since the preparation of those two documents, including with respect to the use of registries for the creation and transfer of rights.

18. A notable example of such use in relation to security interests is provided by the Convention on International Interests in Mobile Equipment (Cape Town, 2001)¹² (the Cape Town Convention) and, in particular, its Protocol on Matters specific to Aircraft Equipment (Cape Town, 2001)¹³ (the Aircraft Equipment Protocol to the Cape Town Convention).

19. Article 16 of the Cape Town Convention mandates the use of an electronic registry for the registration of international interests in mobile equipment and related transactions and notices, as described in that article. Interests registered under the Cape Town Convention have priority over those registrable but not registered in those cases falling under the scope of that Convention. Thus, registration may confer priority to the interest, with clear benefits for the interest holder, typically a financing entity.

20. The electronic registry system established by the Cape Town Convention is supervised by a supervisory authority and managed by a registrar. The Cape Town Convention contains further provisions on the electronic registry, including, in its article 28, rules on the liability of the registrar for malfunctioning of the registry.

21. In the case of the Aircraft Equipment Protocol to the Cape Town Convention, the International Civil Aviation Authority (ICAO) discharges the functions of the Supervisory Authority, and Aviareto Limited, an Irish-based company, was selected as the Registrar by the Supervisory Authority. The Supervisory Authority has

¹⁰ A/CN.9/WG.IV/WP.69, para. 92.

¹¹ A/CN.9/WG.IV/WP.90, paras. 35-37.

¹² United Nations, *Treaty Series*, vol. 2307, No. 41143.

¹³ *Ibid.*, vol. 2367, No. 41143.

adopted regulations on the operation of the registry.¹⁴ Additional information on the Cape Town Convention, the Aircraft Equipment Protocol to the Cape Town Convention and its electronic registry is available from the Unidroit website¹⁵ and from the Registrar's yearly reports on its activity.¹⁶

22. The use of electronic registries for security interests has attracted further attention and may be relevant for the future work of UNCITRAL Working Group VI (Security Interests).¹⁷ In fact, the UNCITRAL Legislative Guide on Secured Transactions provides recommendations regarding the use of electronic communications reflecting the content of previous UNCITRAL legislative texts.¹⁸ It also contains a chapter on the registry system, recommending that it should be in electronic form when possible and setting criteria for its operation,¹⁹ and it further suggests a specific rule on the liability of the electronic registry operator.²⁰

23. Moreover, the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) has adopted the "Model Registry Regulations under the Model Inter-American Law on Secured Transactions" which are also meant for use with electronic registries.²¹

24. With respect to electronic transferable records incorporating a right to goods, it should be noted that the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules")²² contains a chapter devoted to electronic transport records. In particular, article 8 of the Rotterdam Rules provides for the use and effect of electronic transport records, article 9 indicates the procedures for use of negotiable electronic transport records and article 10 sets out rules for the replacement of negotiable transport documents with negotiable electronic transport records and vice versa. Moreover, the Rotterdam Rules define both the notion of electronic transport record (article 1 (18))²³ and that of negotiable electronic transport record (article 1 (19)).²⁴

¹⁴ ICAO doc. 9864, *Regulations and Procedures for the International Registry*, Third Edition, 2009, available from www.icao.int/icao/en/leb/intl_registry/index.html.

¹⁵ Available from <https://www.internationalregistry.aero/irWeb/pageflows/work/Reports/DownloadAnnualReport/DownloadAnnualReportController.jspf>.

¹⁶ A select bibliography on the International Registry for Aircraft Objects is available from www.unidroit.org/english/conventions/mobile-equipment/bibliography/registryaircraft.htm.

¹⁷ See document A/CN.9/702.

¹⁸ *UNCITRAL Legislative Guide on Secured Transactions. Terminology and recommendations*, United Nations publication, Sales No. E.09.V.13. See, in particular, recommendations n. 11 and n. 12, on the functional equivalence between written and electronic form and between handwritten and electronic signatures.

¹⁹ *Ibid.*, recommendation n. 54.

²⁰ *Ibid.*, recommendation n. 56: *Responsibility for loss or damage*. [...] If the system is designed to permit direct registration and searching by registry users without the intervention of registry personnel, the responsibility of the registry for loss or damage should be limited to system malfunction.

²¹ CIDIP-VII/RES.1/09, *Adoption of the Model Registry Regulations under the Model Inter-American Law on Secured Transactions* (9 October 2009).

²² United Nations publication, Sales No. E.09.V.9.

²³ Rotterdam Rules, article 1 (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

25. Finally, the Republic of Korea has recently enacted legislation enabling the use of electronic bills of lading. Since such legislation aims at addressing the issues of uniqueness and security that were often considered as fundamental in the creation and management of electronic transferable records, a detailed description of that system might provide useful insight for the consideration of future work in this field.

B. Legal framework for the operation of electronic bills of lading in the Republic of Korea

26. In the context of a broader legislative reform exercise, the Republic of Korea has introduced in its Commercial Act an article enabling electronic bills of lading.²⁵ The provisions of that article are complemented by those contained in a Presidential Decree.²⁶ Contractual agreements for access to the service may also be relevant to determine the legal framework applicable to electronic bills of lading.²⁷

1. Scope and general provisions

27. Article 862 of the revised Korean Commercial Act establishes the legal equivalence between electronic and paper-based bills of lading managed in an electronic title registry (“the electronic title registry”, or “the registry”). The adoption of the electronic form is voluntary.²⁸ All natural and legal persons wishing to use the electronic bills of lading system shall register with the registry operator by providing their name, address and company registration number, as appropriate, prior to obtaining access to the services.²⁹

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.

²⁴ Ibid., article 1 (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.

²⁵ Article 862 of the revised Korean Commercial Act, enacted on 3 August 2007 (Law n. 9746). This article on bills of lading, can be found in Part V (Marine Commerce), Chapter II (Transport and Charter), Section 6 (Seaway Bill) of the Commercial Act.

²⁶ In accordance with article 862 (5) of the Commercial Act, specific requirements for electronic bills of lading and other relevant matters for the implementation of the Commercial Act are defined in the Presidential Decree on the Implementation of the Electronic Bill of Lading Provisions of the Commercial Act (“the Presidential Decree”). The Presidential Decree went into effect on 4 August 2008. On 26 September 2008, the Korean Ministry of Justice designated Korea Trade Net (KTNET) as the registry operator in accordance with articles 3 and 4 of the Presidential Decree. KTNET started its service to the public on electronic bills of lading on 30 March 2009.

²⁷ Service Agreement of the e-B/L Korea Portal (the “Service Agreement”).

²⁸ Commercial Act, article 862 (1).

²⁹ Presidential Decree, article 8 (5) prescribes that the transferees of electronic bill of lading shall register with the registry operator prior to the request for transfer.

28. All communications among parties are exchanged in electronic form unless the law specifies otherwise.³⁰ In order to ensure the authenticity and integrity of the electronic communications, parties must sign the electronic document transmitted to the registry operator for issuance and transfer of electronic bills of lading with a digital signature provided by a Korea-based certification service provider.³¹

29. Article 862 of the revised Korean Commercial Act applies to bills of lading issued in connection with domestic or international carriage of goods by sea.³² However, a practical difficulty may arise for non-Korean companies in obtaining Korea-based PKI certification as this requires a personal identification number or company registration number issued in Korea. In this respect, it should be further noted that article 27 bis of the Korean Electronic Signature Act³³ foresees cross-border recognition of digital signatures by virtue of a formal agreement between governments. Thus, in principle, foreign digital signatures may get recognition in the Korean legal system.

2. Issuance of the electronic bill of lading

30. In order to issue an electronic bill of lading, the carrier needs to submit a request to the registry operator.³⁴ The message shall contain the same information required for paper-based bill of lading³⁵ and, in addition, indicate the place of receipt and of delivery of the goods.³⁶ The carrier or its agent shall also transmit the general terms and conditions of the electronic bill of lading.³⁷ The carrier shall further transmit the agreement of the parties on the use of the electronic form.³⁸ The shipper may express its consent on the use of the electronic form at the time of submitting the shipping request to the carrier.³⁹

³⁰ The registry operator communicates with the parties through the electronic addresses designated in the online platforms (Service Agreement, article 15).

³¹ The carrier or its agent shall sign the request for issuance of electronic bills of lading with its digital signature (Presidential Decree, articles 6 (1) and 6 (1) (3)); the holder shall sign the request for transfer of electronic bills of lading with its digital signature (Ibid., article 8 (2) (3)).

³² The Korean practice on paper-based bills of lading may extend their application to multimodal carriage of goods with a prevalent maritime leg. Based on this analogy, the e-B/L Korea Portal issues electronic multimodal transport bill of lading.

³³ Electronic Signature Act, last amended on 26 December 2008 (Law n. 9208).

³⁴ Commercial Act, article 862 (1) and Presidential Decree, article 6 (1). In practice, all requests are submitted to the registry through online platforms by click-wrap method. Small-sized companies may use a web-based portal ("e-B/L Korea Portal"), while medium- and large-sized companies may implement customized solution or internal enterprise resource planning systems to submit requests directly to the registry and update the information contained therein.

³⁵ Commercial Act, article 853 (1).

³⁶ Presidential Decree, article 6 (1) (2).

³⁷ The carrier may register the general terms and conditions of the electronic bill of lading in the registry by uploading them in the e-B/L Korea Portal prior to the request (Service Agreement, article 8). In such case, the carrier does not need to transmit the general terms and conditions again upon issuance of each electronic bill of lading (Presidential Decree, article 6 (2)).

³⁸ This communication may be effected in paper form (Presidential Decree, article 6 (1)).

³⁹ In the e-B/L Korea Portal, the shipper may submit the shipping request through uTradeHub (a one-stop electronic trade service operated by KTNET), and, on that occasion, express its agreement to the use of the electronic bill of lading through a click-wrap agreement. The registry operator receives the shipping request, assigns a number to it and forwards it to the carrier.

31. The request from the carrier to the registry operator constitutes the authorization to issue an electronic bill of lading. The registry operator creates an electronic record constituting the electronic bill of lading and assigns a unique identification number to it, thereby guaranteeing the singularity of the electronic record.⁴⁰

32. The registry operator then informs the consignor of the creation of the record.⁴¹ The consignor may begin to exercise the right of control on the electronic bill of lading upon receipt of this notification.⁴²

3. Transfer of the electronic bill of lading

33. The holder may endorse an electronic bill of lading by transmitting to the registry operator a message communicating the intention to transfer the electronic record.⁴³ The transferor shall indicate in the message the transferee's information and the unique identification number of the electronic bill of lading assigned by the registry operator.⁴⁴

34. The registry operator amends the electronic record by updating the information relating to the holder and informs the transferee and the transferor accordingly.⁴⁵ Upon receipt of this message, the transferee begins to exercise the right of control on the electronic bill of lading.⁴⁶

4. Amendment of the electronic bill of lading

35. The holder of the electronic bill of lading or the carrier may amend the particulars of the electronic bill of lading by submitting a request to the registry operator.⁴⁷ The registry operator shall inform the non-requesting party of this request;⁴⁸ if that party accepts the suggested changes,⁴⁹ the registry operator amends the electronic record in line with the request and informs the parties accordingly.⁵⁰

⁴⁰ Actually, two electronic records are created in the implemented system. One identifies the holder of the electronic bill of lading, and is stored in the registry. The second contains the information submitted with the request and is stored in the uTrade Document Repository. The two records are uniquely identified, linked and synchronized daily.

The uTrade Document Repository is a platform operated by KTNET according to Article 16 of the Act on the Promotion of Electronic Trade establishing parameters for the management of the PKI infrastructure (Act on the Promotion of Electronic Trade, last amended on 22 May 2009 (Law n. 9705)). The uTrade Document Repository, the electronic title registry and the electronic bill of lading online platform (e-B/L Korea Portal) form the electronic bill of lading information system.

⁴¹ Presidential Decree, article 6 (3).

⁴² Commercial Act, articles 862 (2) and 862 (4).

⁴³ Presidential Decree, articles 8 (1).

⁴⁴ Ibid., articles 8 (2) (2).

⁴⁵ Ibid., articles 8 (3) and 8 (4).

⁴⁶ Commercial Act, articles 862 (3) and 862 (4).

⁴⁷ For the holder, see Presidential Decree, article 9 (1). The Service Agreement extends this right to the carrier (Service Agreement, article 19).

⁴⁸ Presidential Decree, article 9 (2).

⁴⁹ Ibid., article 9 (3).

⁵⁰ Ibid., article 9 (4). If the non-requesting party refuses the amendment, it shall submit the reasons for refusal to the registry operator, which shall then inform the requesting party.

36. Only the holder may request splitting or combining electronic bills of lading.⁵¹ The consent of the carrier is required if the splitting or combining results in the cancellation of an electronic bill of lading.

5. Replacement of the electronic bill of lading

37. The holder may request to the registry operator the replacement of an electronic bill of lading with a paper-based one.⁵² In that case, the registry operator shall terminate the electronic record of the bill of lading and communicate the termination to the carrier.⁵³ The registry operator shall then issue a paper-based bill of lading and annotate on its back any previous endorsement of the electronic bill of lading.⁵⁴ This annotation has the same legal effect as an endorsement.⁵⁵

6. Delivery of goods and termination of the electronic bill of lading

38. The holder of the electronic bill of lading may request the delivery of the goods by transmitting a message to the registry operator.⁵⁶ The registry operator shall then amend the electronic record to prevent further circulation and transmit the delivery request to the carrier.⁵⁷

39. The carrier shall verify that the requesting party corresponds to the party entitled to the delivery of the goods according to the electronic record and, in that case, shall communicate to the registry operator its acceptance of the delivery request and deliver the goods.⁵⁸

40. After delivery of the goods, the carrier shall transmit to the registry operator the actual name of the recipient of the goods and date of delivery.⁵⁹ Upon receipt of this information, the registry operator shall terminate the electronic record and communicate the termination to the carrier and to the consignee.⁶⁰

41. In case of refusal to deliver the goods, the carrier shall inform the registry operator of the reasons. In turn, the registry operator shall communicate the refusal

⁵¹ Service Agreement, article 19.

⁵² Presidential Decree, article 12 (1). The holder shall submit a request through the online platform to obtain the paper-based bill of lading from the registry operator (Service Agreement, article 20).

⁵³ Ibid., article 12 (4). The registry operator is responsible for the accuracy of the information on the paper-based bill of lading (Presidential Decree, article 12 (5)).

⁵⁴ Ibid., article 12 (2).

⁵⁵ Ibid., article 12 (3). The Presidential Decree assigns to the registry operator the exclusive right to issue paper-based bill of lading in order to prevent multiple issuance. This represents an exception to the principle that the carrier should issue paper-based bills of lading. Moreover, article 7 of the Service Agreement gives the registry operator the right to define the format of paper-based bills of lading in accordance with its needs.

⁵⁶ Ibid., article 10 (1).

⁵⁷ Ibid., article 10 (2).

⁵⁸ Ibid., articles 11 (1) and 11 (2). The carrier is informed of the identity of the requesting party at the time of receipt of the delivery order, which is submitted by the requesting party to the registry through the online portal.

⁵⁹ Ibid., article 11 (2).

⁶⁰ The termination of the record prevents any deletion, change or addition of information in the electronic bill of lading (Ibid., article 2 (7)).

to the holder of the electronic bill of lading and amend the electronic record so that the electronic bill of lading may be circulated again.⁶¹

7. Registry operator

42. The registry operator should be a legal entity with equipment and facilities capable of offering electronic bills of lading services, a net asset of more than 20 billion Korean won⁶² and insurance liability coverage.⁶³ Particular importance is given to the adoption of adequate measures for data archival and security. Further, the registry operator shall employ at least 12 staff qualified in information technology, information management and trade operations, and shall adopt an internal regulation on the procedure and methods of operating and managing the equipment and facilities. The Ministry of Justice has the authority to supervise the registry operator and to audit its operations.⁶⁴

8. Liability issues

43. Article 862 of the revised Korean Commercial Act and the Presidential Decree do not contain specific rules on the allocation of liability; therefore, the general rules on liability contained in the Commercial Act and the contractual provisions contained in the Service Agreement define the liability regime relating to the use of electronic bills of lading.

44. In particular, under the contractual provisions contained in the Service Agreement, the registry operator shall be exempted from any liability and dispute arising from the shipment of the goods.⁶⁵ Moreover, the registry operator shall not be liable for any damage arising from the user's failure to keep its user id and password safely, from a user's violation of the Service Agreement, or from changes in user information. Finally, the registry operator shall not be liable for natural disasters.

45. The users of the e-B/L Korea Portal have a legal duty to verify any change in the status of the electronic bill of lading and to notify the registry operator of any discrepancy.⁶⁶

9. Records retention

46. The registry operator shall retain the electronic records of the electronic bills of lading for ten years after the date of delivery of the goods, if that took place; for ten years after the date of issuance of the electronic bill of lading, if the delivery of the goods did not take place and, in case of replacement of electronic bill of lading with paper-based bill of lading, for ten years after the termination of the electronic record by the registry operator.⁶⁷

⁶¹ Ibid., article 10 (3).

⁶² Currently corresponding to circa 17 million USD.

⁶³ Ibid., article 3.

⁶⁴ Ibid., article 14.

⁶⁵ Service Agreement, article 5.

⁶⁶ Ibid., article 14.

⁶⁷ Presidential Decree, article 13.

47. In light of the above, the Commission may wish to discuss whether further work to establish a uniform legal framework for electronic transferable records should be undertaken.

IV. Identity management

48. An electronic identity for a person or entity is defined by a set of attributes (e.g., a name; an email address; a birth date), usually selected in light of their relevance in the specific context. Such attributes may be common to several persons or entities or may be unique. However, the aggregation of the attributes in each identity should be unique, at least in the context in which it is used, to allow secure authentication of that identity and legitimate access to a service by the user.

49. The business model currently prevailing in the electronic world requires service providers and other businesses to identify and authenticate users seeking access to services or databases. In turn, users need to establish a dedicated identity credential for each service they wish to access. This approach has led to the proliferation of identities referring to the same user, whose management may be burdensome. It has also led to redundancy of data stored by businesses, with increased costs as well as privacy risks. Attempts to streamline identity management, for instance with “single sign-on” systems, have not yet gained support on a broad scale, especially in open networks, due to concerns relating, *inter alia*, to privacy, security and technological neutrality.

50. Identity management systems have recently attracted significant attention as a tool to improve trust in electronic commerce and other electronic applications. Indeed, the extensive reliance of businesses, governmental offices and consumers on electronic communications requires appropriate mechanisms for establishing mutual trust. Identity management systems aim at enabling identity portability across different applications by facilitating the secure exchange of identity credentials and eliminating redundant operations. They therefore may provide a significant contribution to establishing a trustworthy, secure and efficient electronic environment.

51. Identity management systems may operate using different technical processes, such as proprietary standards, open source technologies or public specifications which may be implemented in different manners. Their system architecture may also vary significantly.

52. Identity management systems may perform the identification, authentication and authorization of the user by a selective use of shared identity attributes, thus potentially addressing issues relating to the proliferation of electronic identities. Identity management systems are already being used both in the public sector⁶⁸ and in the private sector,⁶⁹ including for social networking.

⁶⁸ For the US government identity management policy, see www.idmanagement.gov/ and, in particular, *Federal Identity, Credential, and Access Management (FICAM) Roadmap and Implementation Guidance*, Version 1.0 (10 November 2009). Moreover, the US government is preparing a National Strategy for Secure Online Transactions whose goal is “to improve the trustworthiness and security of online transactions by facilitating the establishment of interoperable trust frameworks and implementation of improved authentication and

53. Identity management involves the initial process of identifying a physical or legal entity (“identification”), and the process of later verifying that an entity claiming to be the one previously identified is, in fact, such entity (“authentication”). Once an entity is successfully authenticated, a third process, referred to as “authorization”, is used by the party relying on the authentication to determine the rights and privileges granted to the authenticated identity — e.g., whether such identity should be granted access to a database, or to an online service.

54. In their simplest form, identity management systems envisage three main actors: the subject (i.e., the physical or legal person being identified), the identity provider, and the relying party. The function of the identity provider is to verify the identity of the subjects and to assert their identities vis-à-vis relying parties. Therefore, the identity provider may act as a trusted third party, receiving, storing, managing, redistributing and possibly aggregating the information submitted by subjects and relying parties.

55. A more complex scheme involves the existence of multiple identity providers federated under a trust framework provider. In this model, the trust framework provider would establish the minimum standards to be maintained in the federation and monitor the compliance of all identity providers with those standards. This approach aims at ensuring competition among identity providers, thus possibly improving the quality of their services.

56. Identity management systems may provide significant benefits both to subjects and to relying parties. In particular, they could allow subjects to interact with different relying parties with a single identity, thus avoiding inputting and sharing redundant identifying information, and simplifying and expediting authentication procedures for access to services.

57. From the standpoint of relying parties, possible advantages stem from the fact that subjects would need to be identified only once by the identity provider. The identity provider would then authenticate subjects and share selectively the relevant attributes of their identity with the various relying parties when the subject wishes to obtain access to services. This could lead to significant savings for relying parties in human and technical resources due to scale economies, and could support easier interaction among relying parties through increased interoperability. It might also facilitate compliance with regulatory standards.

58. Inter-governmental organizations have already contributed to the study of this topic. On the technical side, the International Telecommunication Union has set up a Focus Group on Identity Management “to facilitate and advance the development of

authorization technology and processes for all online transaction participants across federal, civil and private sectors” (see Federal News Radio, *White House works to change online transactions*, 25 March 2010, available from www.federalnewsradio.com/?nid=35&sid=1919771).

⁶⁹ See, for instance, the OpenID system at <http://openid.net/>, the Kantara system at <http://kantarainitiative.org/> and the SAFE-BioPharma Association system at www.safe-biopharma.org/.

a generic [identity management] framework and means of discovery of autonomous distributed identities and identity federations and implementations”.⁷⁰

59. On the policy side, the Organisation for Economic Co-operation and Development (OECD) has prepared a first reference document.⁷¹ That document identifies the need for “compatibility of regulatory compliance obligations across organisations” in order to facilitate legal interoperability. It also highlights the desirability, especially at the international level, of creating an enabling legal environment, rather than a regulatory one, with a view to fostering systems federation.⁷² That document further lists accountability and transparency in the operation of the various components of the identity management system as elements relevant for an enabling legal environment. Moreover, the document highlights the need for clear rules regarding delivery of services, handling and storing personal information, in particular sensitive one, and allocation of liability risks among participants.

60. A more detailed discussion has classified the legal issues raised by identity management systems in four main categories: privacy, identification and authentication, liability and performance.⁷³

61. Privacy and security risks have attracted significant attention from an early stage. Dangers relating to inappropriate use, undue disclosure and breach of identity information have been stressed. In this respect, it was suggested that the use of a federated approach, and, in particular, the supervision of a trust framework provider, would increase the levels of privacy and security.⁷⁴ Reference has also been made to the desirability or necessity of setting international standards on the cross-border flow of identity information.

62. Identification and authentication are the key processes that underlie any identity management system. Identification allows establishing the relation between the subject and an electronic identity, while authentication permits validating the association between the subject claiming that identity and the identity claimed. Thus, a faulty identification would expose relying parties to abusive access to the services they provide in spite of strong authentication requirements. Similarly, a faulty authentication would expose relying parties to similar risks notwithstanding a correct identification. As the identity management environment favours identity portability, all parties might be particularly exposed to potential damages arising from such abusive accesses.

63. Compliance with proper procedures for authentication and identification might be relevant also for parties not included in the identity management scheme. For

⁷⁰ More information on the ITU Focus Group on Identity Management is available from www.itu.int/ITU-T/studygroups/com17/fgidm/index.html.

⁷¹ OECD Working Party on Information Security and Privacy, *The Role of Digital Identity Management in the Internet Economy: a Primer for Policy Makers*, DSTI/ICCP/REG(2008)10/FINAL (11 June 2009).

⁷² Ibid., p. 12.

⁷³ T. J. Smedinghoff, *Federated Identity Management: Balancing Privacy Rights, Liability Risks, and the Duty to Authenticate* (21 August 2009), available from <http://ssrn.com/abstract=1471599>.

⁷⁴ Center for Democracy & Technology, *Issues for Responsible User-Centric Identity*, November 2009 — Version 1.0, p. 2, available from http://cdt.org/files/pdfs/Issues_for_Responsible_UCI.pdf.

instance, where appropriate under applicable law, a financial institution might wish to rely on an identity provider in the framework of an identity management system to comply with legal duties under Know Your Customer (KYC) standards to prevent money-laundering and terrorism financing.

64. Discussion of rules for the allocation of liability, in particular in case of incorrect identification, unauthorized access to services or identity data, or for denial of access to legitimate services or identity data, might be particularly useful. Scenarios of concern might also involve misuse of identity information and illegal access to services. The allocation of liability would need to balance the various interests without hindering the broader adoption of the model. In order to do so, it might be desirable to define the performance standards of the various actors, which, in turn, might support establishing mutual trust.

65. Current standards are being shaped through self-regulation and contractual agreements. Calls have also been made for compiling a set of legal rules defining duties and obligations of participants in identity management systems.⁷⁵ Such rules might also have a statutory nature.

66. In light of the above, the Commission may wish to consider whether the current state of the matter warrants further study by the Secretariat, including by participating in or organizing expert meetings, as appropriate.

V. Use of mobile devices in electronic commerce

67. The broad use of mobile devices, including mobile telephones, is a well-established reality in many developed countries. In the last years, it has seen high growth rates also in developing countries, where mobile devices are considered a particularly efficient tool to overcome limited communication infrastructures.⁷⁶ Indeed, the rapidly increasing number of users of mobile devices in developing countries proved to be instrumental in achieving the goal set by the World Summit on the Information Society (WSIS) Geneva Plan of Action “to ensure that more than half the world’s inhabitants have access to ICTs within their reach”⁷⁷ well before its deadline of 2015.⁷⁸

68. This trend has also led to increased offer of a broad range of services delivered through mobile devices. The technology used may differ in light of the available communication infrastructure. Thus, mobile devices may be used to send and receive electronic communications via Short Messaging Services (SMS), or to browse Internet through Wireless Application Protocol (WAP), or to perform contactless transactions based on Near Field Communication (NFC) applications. In

⁷⁵ The American Bar Association has constituted a Federated Identity Management Legal Task Force whose goals are to: “identify and evaluate the legal issues that arise in connection with the development, implementation and use of federated identity management systems; identify and evaluate appropriate legal models to address those issues; develop model terms and contracts that can be used by parties”. More information on the work of that Legal Task Force is available from www.abanet.org/dch/committee.cfm?com=CL320041.

⁷⁶ UNCTAD, *Information Economy Report 2009*, United Nations publication, Sales No. E.09.II.D.18, p. 4-8.

⁷⁷ WSIS-03/GENEVA/DOC/0005.

⁷⁸ UNCTAD, *WSIS Follow-up Report 2008*, UNCTAD/DTL/STICT/2008/1, p. 2-4.

most, if not all cases, the communication may be qualified as of electronic nature under the legislative standards adopted in UNCITRAL texts.

69. At a general level, the predictability of the legal status of transactions conducted with electronic means, including those effected with mobile devices, would be greatly enhanced by the adoption of appropriate legislation. However, on the one hand, several countries, especially least developed ones, have not yet adopted general electronic commerce laws; on the other hand, certain countries, having explicitly indicated that mobile commerce is among the forms of electronic commerce covered by technology-neutral legislation, have envisaged additional specific rules for its needs.⁷⁹ At the same time, industry organizations are active in presenting their views on various legislative issues.⁸⁰ Guidance on the adoption of appropriate legislative standards, with particular respect to the use of mobile devices, might therefore be useful.

70. One area where the importance of mobile technology has been stressed is payment services. In this field, too, it is possible to notice an increase not only in the quantity but also in the variety of the services offered, which is proportional to technological availability and affordability to users. Rapid changes in technology may give additional weight to the reasons for adopting technology-neutral legislation.

71. Mobile payments are considered as a tool supportive of financial inclusion, especially in rural areas.⁸¹ In fact, in a rapidly increasing number of developing countries, mobile network operators offer fee-based payment services through electronic communications transmitted via mobile devices, typically via SMS. This scheme may reach clients not having access to the services of traditional financial institutions for a number of reasons, including difficulty in accessing their physical facilities.⁸² Cross-border payments may be common, for instance, in support of regional trade, especially in areas where trading communities are based on links other than nationality, and for remittances of expatriates.⁸³

72. It should be noted that mobile network operators typically do not offer financial services, but simply facilitate money transfer; their services may therefore be defined as mobile payments (or m-payments). However, financial institutions may as well offer their services, which typically include access to credit and remuneration of money deposits, through mobile devices; in that case, the service

⁷⁹ France, *Loi n°2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique*, article 28.

⁸⁰ See, for instance, the GSM Europe Working Group on M-Commerce, whose views are available from www.gsmeurope.org/work_groups/mcommerce.shtml.

⁸¹ Timothy R. Lyman, Mark Pickens, David Porteous, *Regulating Transformational Branchless Banking: Mobile Phones and Other Technology to Increase Access to Finance*, CGAP Focus Note no. 43, January 2008, available from www.cgap.org/p/site/c/template.rc/1.9.2583/.

⁸² A well-known example of implementation of this business model is offered by Kenya: see Alliance for Financial Inclusion (AFI), *Case Study. Enabling mobile money transfer. The Central Bank of Kenya's treatment of M-Pesa*, February 2010, available from www.afi-global.net/downloads/AFI_case%20study_Mpesa.pdf.

⁸³ For additional consideration on the use of electronic means to promote financial inclusion, see document A/CN.9/698, *Microfinance in the context of international economic development*, in particular, para. 58.

may be qualified as mobile banking (or m-banking).⁸⁴ Since mobile banking often requires higher technological standards, including for security purposes, it is more commonly available in countries with advanced communications networks. Other relevant factors in the diffusion of mobile banking may include the sophistication of the financial markets and, in particular, the availability of multiple tools for interaction with financial services providers.

73. Mobile payments may pose peculiar challenges. For instance, the goal of financial inclusion may require adopting a lower threshold for the identification of clients in environments where formal identity documents may not be easily available. Therefore, lower identification standards could be applied to those clients. This might, in turn, suggest the adoption of flexible authentication standards in the context of a technology-neutral approach. A recent study by the OECD discusses some of the policy issues specific to mobile commerce, in particular, from the perspective of consumers.⁸⁵

74. In light of the above, and taking into account the potential impact of mobile technologies for development, the Commission may wish to consider whether the current state of the matter deserves further study. With respect to mobile payments, the Commission may wish to recall the work already conducted in the area of international payments, for instance when drafting the UNCITRAL Model Law on International Credit Transfers,⁸⁶ with a view to considering whether that work should be revised and updated to accommodate the use of mobile devices.

⁸⁴ From the regulatory standpoint, it should be noted that one important difference between m-payments and m-banking may lie in the extent to which the service operator might fall under the scope of a central financial authority.

⁸⁵ OECD, *Policy Guidance for Addressing Emerging Consumer Protection and Empowerment Issues in Mobile Commerce*, June 2008.

⁸⁶ United Nations publication, Sales No. E.99.V.11.

**B. Possible future work on security interests
(A/CN.9/702 and Add.1)
[Original: English]**

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I. Introduction

1. At its fortieth session in 2007, the Commission decided that, after completion of the *UNCITRAL Legislative Guide on Secured Transactions* (the “*Guide*”), future work should be undertaken with a view to preparing a supplement to the *Guide* dealing with security rights in certain types of securities, taking into account work by other organizations, in particular the International Institute for the Unification of Private Law (“Unidroit”).¹

2. At its fourteenth and fifteenth sessions, Working Group VI (Security Interests) had a preliminary discussion about its future work programme. During those sessions, several suggestions were made, including the following: (a) a supplement to the *Guide* dealing with security rights in securities not covered by the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009; the “Unidroit Securities Convention”);² (b) a legislative guide on registration of security rights in general security rights registries; (c) a model law on secured transactions based on the recommendations of the *Guide*; (d) a contractual guide on secured transactions; and (e) a contractual guide on intellectual property licensing (see A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126, respectively).

¹ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), paras. 147 and 160.

² www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm.

3. At its forty-second session in 2009, the Commission noted with interest the future work topics discussed by the Working Group. At that session, the Commission agreed that, depending on the availability of time, preparatory work could be advanced through a discussion at the sixteenth session of the Working Group. The Commission also agreed that the Secretariat could hold an international colloquium early in 2010 with broad participation of experts from Governments, international organizations and the private sector. It was generally agreed that, on the basis of a note by the Secretariat, the Commission would be in a better position to consider and make a decision on the future work programme of the Working Group at its forty-third session.³

4. At its sixteenth and seventeenth sessions, the Working Group engaged in a preliminary discussion of its future work programme (A/CN.9/685, para. 96, and A/CN.9/689, paras. 59-61). At the seventeenth session of the Working Group, some support was expressed for work on regulations on registration of security rights and a model law on secured transactions based on the recommendations of the *Guide*. With regard to a supplement to the *Guide* on security rights in certain types of securities, it was observed that that work would have to be limited to non-intermediated securities in view of the work done by Unidroit and the Hague Conference on intermediated securities (see the Unidroit Securities Convention and the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary; The Hague, 2006; the “Hague Securities Convention”).⁴ With respect to intellectual property licensing or a possible international registry on security rights in intellectual property, it was noted that any work on those topics would need to be closely coordinated with the World Intellectual Property Organization (“WIPO”) (A/CN.9/689, para. 61).

5. In accordance with the decision of the Commission at its forty-second session,⁵ an international colloquium on secured transactions was held in Vienna from 1 to 3 March 2010. The purpose of the colloquium was to obtain the views and advice of experts with regard to possible future work in the area of security interests. Approximately 100 experts from governments, international organizations and the private sector participated in this three-day event and the discussions thereof provided a basis for this note by the Secretariat. The papers submitted for the international colloquium are available on the UNCITRAL website and selected articles will be published in the Uniform Law Review in coordination with Unidroit.

II. Possible future work topics

A. Security rights in non-intermediated securities

1. Introduction

(a) General

6. The *Guide* addresses, in a comprehensive way, almost all types of movable asset that are important to modern commercial financing transactions: equipment,

³ Ibid., *Sixty-fourth session, Supplement No. 17* (A/64/17), paras. 313-320.

⁴ http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=72.

⁵ Ibid.

inventory, receivables (the *Guide* incorporates the principles of the *United Nations Convention on the Assignment of Receivables* and supplements the Convention; the “*Receivables Convention*”),⁶ the right to payment of funds credited to a bank account, the right to receive the proceeds under an independent undertaking, negotiable instruments, negotiable documents and intellectual property rights (see recommendation 2, subpara. (a)). However, as all securities are expressly excluded from the scope of the *Guide* (see recommendation 4, subpara. (c)), the *Guide* fails to address an extremely important type of movable asset. This gap is partially filled by the Unidroit and the Hague Securities Conventions. However, as these Conventions deal only with intermediated securities, the gap remains with respect to non-intermediated securities and thus no guidance is provided to States with respect to security rights in non-intermediated securities. It should be noted that Book IX, Proprietary security in movable assets of the Draft Common Frame of Reference (DCFR) of the Principles, Definitions and Model Rules of European Private Law deals with security rights in all types of movable asset, including securities, whether intermediated or not.

7. As financial market transactions typically involve intermediated securities, this gap may not be serious for a financial markets regime. However, it is an important gap for a commercial financing regime because non-intermediated securities are very important in many commercial financing transactions. In the context of commercial financing transactions, it is quite common for the lender to request, in addition to security rights in various assets of the borrower, a security right in the shares of the borrower or its subsidiaries. These securities are often privately held, not held by an intermediary, and not traded on a recognized market. Depending on the law of the State in which a particular company is organized, these shares may be either certificated or dematerialized.

(b) The Unidroit Convention on Substantive Rules for Intermediated Securities

8. It should be noted that the main purpose of the Unidroit Securities Convention is to establish a common legal framework for the holding and disposition of intermediated securities (see the preamble to the Convention). Intermediated securities are securities held with an intermediary; they are often referred to as indirectly-held securities although that term is not used in the Convention). A simple case of intermediated securities is the following: ABC, a publicly traded company, has issued shares; the registered holder of the shares in the books of ABC is CDS; Y, a securities broker, has an account with CDS in which shares of ABC are held. Z, an investor, has a securities account with X in which shares of ABC are held. The rights of the investor with respect to the shares of ABC credited to his account are called “intermediated securities”.

9. The Unidroit Securities Convention aims at providing basic legal rules on the acquisition and disposition of intermediated securities, including the acquisition of a security right in them. The provisions of the Convention on security rights deal principally with three issues: (a) effectiveness against third parties; (b) priority; and (c) enforcement. With respect to effectiveness against third parties, the Convention provides that a security right in intermediated securities may become effective

⁶ www.uncitral.org/uncitral/en/uncitral_texts/payments/2001Convention_receivables.html. United Nations publication Sales No. E.04V.14.

against third parties if: (a) the securities are held in an account in the name of the secured creditor (see articles 9 and 11); or (b) the holder of the securities grants the control of the securities to the secured creditor (see article 12). Control is acquired by the secured creditor by way of an agreement between the account holder, the securities intermediary and the secured creditor whereby the latter becomes empowered to block a disposition of the securities by the account holder or to dispose of them without any further consent of the account holder. An entry made in the securities account in favour of a secured creditor may also have the same effect as a control agreement.

10. The rules of the Unidroit Securities Convention on priority may be summarized as follows: (a) a secured creditor who becomes the account holder in respect of intermediated securities ranks ahead of any competing claimant (see articles 11 and 19, para. 2); (b) a secured creditor whose security right has been made effective against third parties by control has priority over any security right made effective against third parties by any other method provided by non-Convention law (for example, by registration; see articles 12 and 19, para. 2); (c) if two persons obtain control of the same intermediated securities, the first in time to obtain control will prevail (article 19, para. 3); (d) if a securities intermediary who holds a security right in a securities account maintained by it subsequently permits another secured creditor to obtain control of the account, the other creditor will rank first (article 19, para. 4).

11. The Unidroit Securities Convention also provides that a security right granted by an intermediary in intermediated securities held with another intermediary prevails over the rights of the account holder of the first intermediary if the security interest has been made effective by control (see article 20). As a secured creditor of an account holder cannot enjoy greater rights than those of the latter, this rule may affect the secured creditors of an account holder. This is not, however, a priority rule in the strict sense because in the circumstances envisaged by the rule, a secured creditor of the account holder and a secured creditor of the intermediary would not hold a security right in the same intermediated securities.

12. The provisions of the Unidroit Securities Convention on enforcement are optional and are intended to supplement domestic laws. It must also be noted that the Convention recognizes a title transfer agreement for security purposes as a distinct legal institution. Accordingly, such a transfer would not be subject to the legal regime applicable to security interests. Essentially, the provisions of the Convention on enforcement permit the secured creditor, if the debtor is in default, to dispose of the intermediated securities privately without any prior notice or court supervision requirement. In addition, the Convention provides that the commencement of insolvency proceedings against the debtor may not stay the enforcement rights of the secured creditor.

13. The Unidroit Securities Convention leaves certain issues to other law. An example of such an issue is the creation of a security right in intermediated securities. Another example is whether such a security right may become effective against third parties by registration of a notice to a general security rights registry (such a security right is subordinate to a security right made effective under the Convention by a book entry or by control). As a result and in view of the fact that the *Guide* does not deal with security rights in securities, no guidance is provided to States with respect to these matters.

2. Desirability

14. In order to determine the desirability of work on security rights in non-intermediated securities, the Commission may wish to consider: (a) some frequently encountered transactions in which non-intermediated securities are used as security for credit to small or medium-size businesses; and (b) the problems created by the wide divergences in the ways that the various legal systems treat these commercial financing transactions.

(a) Transactions in which non-intermediated securities are used as security for credit

15. Where the borrower's assets include the shares of one or more wholly-owned subsidiaries or where the borrower is a holding company and the shares of its subsidiaries are its only assets, the lender may only be willing to extend credit to the borrower based, in whole or in part, on the value of the subsidiaries by obtaining security rights in the shares of the subsidiaries. The lender's primary source of repayment in the event the borrower defaults in the repayment of the loan would be to seek to sell the subsidiaries as going concerns.

16. Security rights in the shares of a borrower can also be extremely important to a lender even in situations where the lender also holds security rights in the borrower's receivables, inventory and other movable assets. The reason is that, depending on the circumstances at the time of enforcement, the lender might conclude that selling the business as a going concern can result in a greater recovery than if the lender enforced its security rights in the borrower's assets by collecting receivables and selling other assets at an auction. A potential buyer often will be willing to pay more because the business is functioning, or because purchasing the shares would preserve certain contractual arrangements with third parties or tax benefits. In addition, selling a business as a going concern can be more expeditious and less costly than selling the assets piecemeal.

17. A variation on this theme is where the loan is being made to a corporate group that is engaged in a single business, where the intellectual property is owned by one member of the group and the immovable property by another, and the managerial and support services are in a third member of the group. In this situation, the entire corporate group may function as a single enterprise, even though the assets and employees are spread among the various separate legal entities that comprise the group. The prospect of preserving the going concern value of the entire enterprise in this circumstance can be essential to a lender considering a loan to such an enterprise. In this situation, the lender may very well request a security right in the shares of the parent company or of the subsidiaries.

18. In addition, the lender may wish to obtain a direct security right in certain assets of the borrower, but may be unable to do so for a variety of reasons, including the following: (a) the borrower's assets may include rights from leases, licences, sales contracts or other assets in which the borrower may be contractually prohibited from granting a security right; (b) where the assets are owned by a subsidiary or affiliate of the borrower, applicable corporate governance laws in the relevant State may restrict the ability of a company to grant a security right in its assets to secure a loan made to its parent or affiliate; (c) the applicable secured transactions laws may not recognize security rights in certain of the assets of the borrower, such as various types of intellectual property; (d) where the requested

loan is intended to finance the acquisition of the shares of the borrower, “financial assistance” laws in the relevant State may make it unlawful for that borrower to grant a security right in its assets to secure such a loan; (e) the tax laws in the relevant State may impose a substantial economic burden on a company that grants a security right in its assets to secure a loan made by its non-domestic parent or affiliate companies.

19. In each of these situations, even though the lender may be unable to obtain a security right in the assets of a company, it may be able to secure its loan with such assets indirectly by obtaining a security right in the shares of the company. Although a security right in the shares of a company will be subordinate to the claims of other creditors of the company, such a security right nevertheless may have sufficient value to a lender to induce it to extend credit. The lender’s decision to extend credit will typically be based, in whole or in part, on its ability to preserve the going concern value of the borrower by means of security rights in directly-held securities. Preserving this going concern value can be important to the borrower and third parties as well. One benefit to the borrower is simply that the availability of this remedy may induce the lender to extend more credit to the borrower than it otherwise would, or to extend credit on better terms. A second benefit is that the greater the amount of the loan that the lender will recover through enforcement of the security right, the less likely it is that there will be a deficiency leading the lender to seek to collect from guarantors, and the greater the likelihood that there may be an excess recovery available to pay other creditors or equity holders. There can be a social benefit as well in that, if the enterprise is sold as a going concern, there is a greater likelihood that jobs will be preserved.

(b) Problems to be addressed by a future supplement to the *Guide*

20. In many States, current law provides a mechanism for obtaining a security right in shares of at least certain types of domestic corporate entities. In other States, the law may not expressly address the matter and courts may have to fill the gap by applying by analogy the general security right law. As is currently the case with security rights in equipment, inventory, receivables and other types of movable asset, these laws vary greatly from State to State. For example, the laws of some States provide minimal formal requirements for the creation of a security right in non-intermediated securities, while in other States there are more elaborate formal requirements, such as a notarial document. In addition, in some States, a security right in non-intermediated securities is automatically effective against third parties at the time when it is created, while in other States, a separate act, such as possession of the certificates in the case of certificated securities or registration of the security agreement or the registration of a notice with respect to the security right, is required. Moreover, the laws of many States differ with respect to the rules for determining the priority of a security right in non-intermediated securities as against competing claimants, such as other secured creditors, buyers, judgement creditors or insolvency administrators. Furthermore, the laws of many States differ with respect to the manner in which a security right in non-intermediated securities may be enforced, with some States requiring the commencement of a judicial proceeding and other States permitting non-judicial enforcement.

21. A supplement to the *Guide* that would set forth clear and concise commentary and recommendations for the creation, third-party effectiveness, priority and

enforcement of security rights in non-intermediated securities in an efficient and cost-effective manner would encourage lenders to extend credit in situations where they would otherwise be unwilling to do so or to provide more credit at lower cost. To the extent that such laws followed the principles of a text prepared by the Commission, such laws would be harmonized, a result that should facilitate the provision of credit across national borders and thus promote international trade. As capital markets typically involve intermediated securities, such a supplement would not affect in an appreciable way capital markets and laws applicable to capital markets.

3. Feasibility

22. The Commission may wish to note that it would not be difficult to prepare specific commentary and recommendations of the *Guide* with respect to security rights non-intermediated, non-public securities. The following issues would need to be addressed:

(a) The term “securities”

23. The term “securities” may need to be explained and distinguished from negotiable instruments and receivables (security rights in). In this context, one question that may need to be addressed is whether the term should include interests in business ventures that in some States might not be viewed as traditional securities (such as partnership interests and joint venture interests).

24. Alternatively, reference may be made for the meaning of the term “securities” to other texts, such as, for example, the Unidroit Securities Convention, which provides that “‘securities’ means any shares, bonds and other financial instruments or financial assets (other than cash) that are capable of being credited to a securities account and of being acquired and disposed of in accordance with the provisions of this Convention” (see article 1, subpara. (a)).

25. It is also important to distinguish: (a) between certificated or tangible securities and uncertificated, intangible or dematerialized securities; and (b) between intermediated securities (that is, those held in a securities account) and non-intermediated securities (that is, those held directly by their owner). These distinctions are important because different rules may apply to different types of securities.

(b) Scope

26. To avoid any overlap with the Unidroit Securities Convention, intermediated securities covered by this Convention would need to be excluded from the scope of any future work by the Commission on security rights in securities. For the same reason, publicly traded securities may also need to be excluded even though they are directly held.

27. The exclusion may take, for example, the form of recommendation 4, subparagraph (a), of the *Guide*, which provides that the law should not apply to “aircraft, railway rolling stock, space objects and ships, as well as other categories of mobile equipment, in so far as such asset is covered by a national law or an international agreement to which a State enacting legislation based on these

recommendations ... is a party and the matters covered by this law are addressed in that national law or international agreement”.

(c) Creation (effectiveness between the parties)

28. The general rules of the law recommended in the *Guide* might apply to the creation of a security right in non-intermediated securities, whether the securities are certificated or dematerialized (see recommendations 13-22).

(d) Effectiveness against third parties

29. With respect to certificated non-intermediated securities, the general rules of the law recommended in the *Guide* that are analogous to those applicable to security rights in negotiable instruments might apply (see recommendations 32 and 37). As a result, a security right in certificated non-intermediated securities may be made effective against third parties by registration or possession.

30. With respect to dematerialized securities, the rule of the law recommended in the *Guide* that are analogous to those applicable to security rights in rights to payment of funds credited to a bank account might apply (see recommendation 49). As a result, a security right in dematerialized non-intermediated securities may be made effective against third parties by registration or control (the control agreement must be among the issuer, the grantor and the secured creditor).

(e) Priority

31. With respect to certificated securities, in line with the analogy to negotiable instruments, a possessory security right may have priority over a registered or other security right, or over the right of a buyer or other transferee of the securities (see recommendations 101 and 102).

32. With respect to dematerialized securities, in line with the analogy to rights to payment of funds credited to a bank account, a security right made effective against third parties by control may have priority over a registered or other security right, or the right of buyer or other transferee of the securities (see recommendations 103-105).

(f) Enforcement

33. The general rules of the law recommended in the *Guide* might apply to security rights in non-intermediated securities, whether the securities are certificated or dematerialized.

(g) Applicable law

34. With respect to certificated securities, the conflict-of-laws rule of the law recommended in the *Guide* for tangible assets might apply (the law of the State in which the certificated securities are located will apply; see recommendation 203). For dematerialized securities, the law of the State in which the issuer is located might apply.

(h) Coordination with other law

35. A supplement on security rights in non-intermediated securities would need to be coordinated with other law dealing with the custody and transfer of securities, as well as with security rights in securities. As mentioned above, to avoid any overlap with law dealing with security rights in intermediated securities, such as the Unidroit and the Hague Securities Conventions, security rights in intermediated (and perhaps publicly traded) securities would need to be excluded. In addition, to avoid any overlap with any future work of Unidroit on a commentary and an accession kit to the Unidroit Securities Convention, as well as on capital markets that may address issues left by the Unidroit Securities Convention to national law, a supplement on security rights in non-intermediated securities should avoid touching on those issues.

36. At the same time, however, the commentary and the accession kit to the Convention to be prepared by Unidroit should avoid making recommendations to States on issues left by the Convention to national law that would be inconsistent with the recommendations made in the *Guide*. For example, there is no reason why the general rules of the law recommended in the *Guide* with respect to the creation of a security right in a movable asset should not apply to the creation of a security right in intermediated securities. In addition, there is no reason why the general rules of the law recommended in the *Guide* with respect to the third-party effectiveness of a security right in a movable asset by registration of a notice in the general security rights registry should not apply to a security right in intermediated securities.

37. Moreover, such a supplement may need to address questions pertaining to which law applies to a security right in non-intermediated securities that become intermediated securities. For example, one of the questions that would need to be addressed is the impact of that change on security right made effective against third parties by registration and in particular whether the third-party effectiveness of the security right should continue for a short period of time. Similarly, a supplement would need to address the question of which law applies to a security right in intermediated securities that become non-intermediated securities.

(i) Form and structure of work

38. While the Commission may wish to leave the form and structure of any future work on non-intermediated securities to the Working Group, it may wish to note that such future work could take the form of a supplement to the *Guide*. As the Supplement on Security Rights in Intellectual Property, this new supplement could include asset-specific commentary and recommendations that would modify the general commentary and recommendations of the *Guide*. The structure of this new supplement could follow the structure of the *Guide*, that is, deal with key objectives, terminology, creation, effectiveness against third parties, the registry system, priority, rights and obligations of the parties, rights and obligations of third-party obligors, enforcement, acquisition financing, applicable law, transition and insolvency.

4. Conclusions

39. The Commission may wish to consider whether to entrust at this time Working Group VI with the task of preparing a text (for example, a supplement to the *Guide*) on security rights in non-intermediated securities. The main objective of this supplement would be to complete the work of the Commission on the *Guide* by filling an important gap in the *Guide* with respect to a type of asset that is more important for commercial financial transactions than for financial market transactions. Such a supplement would not interfere with the Unidroit Securities Convention, as it would deal with matters outside the scope of the Convention or not addressed in the Convention.

40. To the contrary, such a supplement could support the Unidroit Securities Convention by presenting to States a complete and coordinated regime on secured transactions, as is already done in the *Guide* with the Cape Town Convention and its Protocols, the Hague Securities Convention, the intellectual property conventions and the *Receivables Convention* (see recommendation 4 of the *Guide*). The Commission may wish to note that the *Guide* supports, for example, the *Receivables Convention* by incorporating the principles of the *Receivables Convention* and by supplementing the regime of the *Receivables Convention* addressing issues that the *Receivables Convention* left to other law. Thus, States may usefully enact both the recommendations of the *Guide* into national law and adopt the *Receivables Convention*.

41. In addition, such a supplement would not interfere with the work of Unidroit on the commentary and the accession kit to the Unidroit Securities Convention, at least if it did not address at all issues related to intermediated securities. If the supplement were to address these issues, the Commission may wish to instruct the Working Group to address them in a way that would be consistent with both the Unidroit Securities Convention and the *Guide*. Moreover, such a supplement would not interfere with future work of Unidroit on capital markets, as normally non-intermediated securities are not used as security for credit in capital market transactions.

42. Alternatively, the Commission may wish to consider assigning a lower priority to this topic. Such an approach would permit the Commission to complete its work on one of the other topics that may be considered to be of higher priority. It would also allow time for Unidroit to complete its work on the commentary and the accession kit to the Unidroit Securities Convention and to develop further its future work on capital markets. In this regard, the Commission may wish to take into account that Unidroit has already developed the Securities Convention and has a good deal of expertise in securities-related matters. If the Commission were to decide to assign a lower priority to this topic than to other topics, the Commission may wish to request the Secretariat to coordinate with Unidroit to ensure that any recommendations Unidroit may make in these future instruments (the commentary and accession kit to the Convention, as well as any future text on capital markets) with respect to security rights in securities would be consistent, to the maximum extent possible, with the recommendations of the *Guide*.

43. For example, there is no reason why the general rules of the law recommended in the *Guide* with respect to the creation of a security right in a movable asset should not apply to the creation of a security right in intermediated securities. In

addition, there is no reason why the general rules of the law recommended in the *Guide* with respect to the third-party effectiveness of a security right in a movable asset by registration of a notice in the general security rights registry should not apply to a security right in intermediated securities. In such a case, a rule may need to be recommended to deal with the priority of a security right in intermediated securities made effective against third parties by a book entry under the Unidroit Securities Convention as against a security right in the same securities made effective against third parties by registration of a notice in a general security rights registry under non-Convention law (such as the law recommended in the *Guide*).

B. Registration of security rights in movable assets

1. Introduction

44. The establishment of a publicly accessible registry system is an essential feature of the law recommended in the *Guide* (see the preamble to the recommendations in chapter III). Registration enables those dealing with assets in a person's possession or control with a transparent and objective source of information about whether those assets may be subject to a security right. Registration in turn gives secured creditors an efficient mechanism for ensuring the third-party effectiveness of their security rights and for establishing their priority against certain competing claimants (see the preamble to the recommendations of chapter IV).

45. Chapter IV of the *Guide* contains commentary and recommendations on the legal and operational aspects of a general security rights registry. However, like any other chapter of the *Guide*, chapter IV does not stand alone. It is intended to be read in conjunction with the other chapters of the *Guide*. This means that, in order to understand the requirements and legal effects of registration, the reader has to refer to chapter III on the effectiveness of a security rights against third parties and chapter V on the priority of a security right. Similarly, to determine the transactional and territorial scope of the registry, the reader must refer to the various parts of the *Guide* dealing with the concept of a security right and chapter X on conflict of laws.

46. In addition, the *Guide* does not cover the myriad of administrative, operational, technological and infrastructural details that a State enacting a secured transactions law based on the recommendations of the *Guide* would need to consider in order to implement an efficient and cost-effective registry system. In the absence of this kind of guidance, experience shows that States may end up spending excessive amounts of money and time only to end up with a dysfunctional system that is unnecessarily cumbersome and opaque and that is not responsive to the interests of its business and legal clientele. In view of the central role that the registry plays in the overall framework of secured transactions law, the ultimate result is to undermine a State's attempts to institute reform.

47. In recognition of the importance of concrete registry guidelines to the overall success of secured transactions law reform, some organizations that prepared model laws on secured transactions, also prepared principles, guidelines or regulations with respect to the registration of security rights. For example, the European Bank for Reconstruction and Development (EBRD), which prepared the EBRD Model

Law on Secured Transactions,⁷ also prepared Guiding Principles for the Development of a Charges Registry.⁸ Similarly, the Organization of American States (OAS), which prepared the OAS Model Law on Secured Transactions,⁹ also prepared Model Registry Regulations under the Model Inter-American Law on Secured Transactions.¹⁰

48. In addition, other organizations involved in secured transactions law reform developed detailed rules with respect to the registration of security rights. For example, the Asian Development Bank prepared a Guide to Movables Registries.¹¹ Moreover, organizations or States that introduce modern secured transactions laws make the establishment and the development of a general security rights registry a central part of their law reform effort. For example, the Convention on International Interests in Mobile Equipment (Cape Town, 2001)¹² and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (Cape Town, 2001)¹³ contain detailed rules with respect to an international asset-specific registration system that is very similar to the one recommended in the *Guide*. In addition, Book IX of the Draft Common Frame of Reference (DCFR) of the Principles, Definitions and Model Rules of European Private Law¹⁴ contain detailed rules on the registration of security rights that are largely similar to the rules recommended in the *Guide*.

2. Desirability

49. As mentioned above, while chapter IV of the *Guide* provides valuable commentary on the registry system contemplated by the *Guide*, for the reader to comprehend the legal relevance of registration it is necessary to have a comprehensive detailed understanding of the *Guide* as a whole. Accordingly, a text on registration that presented the legal aspects of registration in an integrated summary and accessible plain-language manner would greatly assist those involved in the implementation of the registry who may not be secured transactions law experts but who will require a basic knowledge of the overall legal framework in which the registry is designed to operate in order to carry out their work. As also mentioned above, such a text would additionally enable detailed guidance to be given on the full panoply of legal, practical and operational issues that need to be addressed in the course of implementing a registry system but which chapter IV does not now address or does not address in sufficient detail. In view of the central importance of the registry to the overall success of secured transactions legal reform, preparation of a text on registration that would substantially supplement chapter IV of the *Guide* would be desirable.

50. In many States, the most familiar registry model for property rights is the land registry which differs significantly in its purpose and structure from the notice-filing

⁷ www.ebrd.com/pubs/legal/secured.pdf.

⁸ www.ebrd.com/country/sector/law/st/core/pledge/core.htm.

⁹ www.oas.org/dil/cidip-vi-securedtransactions_eng.htm.

¹⁰ www.uncitral.org/pdf/english/colloquia/3rdSecTrans/John_Wilson_MR.pdf.

¹¹ www.adb.org/documents/reports/movables_registries/default.asp.

¹² www.unidroit.org/english/conventions/mobile-equipment/main.htm.

¹³ www.unidroit.org/english/conventions/mobile-equipment/main.htm#NR2.

¹⁴ C. v. Bar and E. Clive (ed.), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Vol. 6 (2009) pp. 5389-5667.

registry model recommended in the *Guide* for security rights in movable assets. Accordingly, in the absence of more specific guidance on the function and structure of the registry, there is a risk that features and procedures of the land registry model will be carried over unnecessarily to the security rights registry system with a resulting loss in the efficiency and effectiveness of the system. For example, such a system involves a major difference in the role of the registry personnel which, rather than acting as gatekeepers as in a land titles system, operate essentially as background administrators to facilitate filing and searching without official interference. In addition, the notice-filing registry model, unlike most land registries, easily allows for the maximum exploitation of the electronic technology, and a registry guide would enable detailed direction to be given at this level.

51. Moreover, even if a State implements a secured transactions law based on the recommendations of the *Guide*, that State will still need to deal with a number of operational and legal issues that are normally not addressed in the secured transactions law but rather in subordinate registration regulations or administrative guidelines. Without guidance at this level, secured transactions law reform cannot be effectively and efficiently implemented. Thus, a text on registration that would include, for example, principles, guidelines and regulations with respect to the registration and searching process would usefully complete the work of the Commission on secured transactions. It could be reasonably expected that, with such a complete secured transactions system, States would find it easier to implement a law based on the recommendations of the *Guide* and do so in a coordinated and coherent manner that would allow them to benefit from the effective implementation of the law. Finally, a text on registration would also provide a valuable resource for the purposes of practical educational programmes and training programmes for registry administrators and personnel, as well as for financiers, businesses, lawyers and other users of the registry system.

3. Feasibility

52. The work achieved so far by the Commission and other organizations mentioned above is a good indication of the likelihood that the Commission could successfully prepare a text on registration of security rights within a reasonable period of time. In determining the feasibility of such a project, the Commission may also wish to take into account the following issues to be addressed in the course of the implementation of such a project.

(a) Purposes of registration

53. A text on registration could discuss the purposes of registration of a notice of a security right in a general security rights registry, drawing on the various chapters of the *Guide*.

(b) Registration forms

54. A text on registration could discuss in some detail the minimum mandatory content and any additional optional content of the notice of the security right that must be registered. In this respect, this text could draw on the commentary of the *Guide* and elaborate further, for example, by including sample registration forms.

(c) The registration and search process

55. A text on registration could discuss issues relating to the registration and search process, including: (a) whether the notice must be submitted in paper or in, electronic form, or whether both should be permitted; (b) whether a searcher would have to submit a search inquiry in paper or electronic form or whether both should be available; (c) the appropriate way to identify the grantor, as the grantor identifier is the principal registration and search criterion; (d) the appropriate way to describe the encumbered asset, in particular to the extent it may be a supplementary registration and search criterion for some types of transaction; and (e) modes of access to the registry for registration and searching. Although the *Guide* already addresses many if not all of these issues, a text on registration could elaborate further with more specific and detailed examples, as well as setting out sample regulations or administrative guidelines.

(d) Effectiveness of registration

56. A text on registration could discuss questions relating to the legal effectiveness of a registration and how these questions relate to the technical design of the registry system, including: (a) whether advance registration should be possible and how it is to be effected; (b) whether a single registration for successive security agreements should be possible and how it is to be effected; (c) the time when registration becomes legally effective taking into account the manner in which registrations are tendered and processed by the system; (d) the legal effect of unauthorized amendments and discharges and administrative and technical procedures for dealing with the consequences and for reinstating the registrations; and (e) what constitutes an adequate description of the encumbered asset and the effect of errors or omissions in registered particulars. Once again, the *Guide* addresses many, if not all, of these issues but a text on registration would provide valuable elaboration.

(e) Registry administration

57. A text on registration could discuss questions relating to the administration and operation of the registry, including: (a) financing the start-up and operational costs of the registry; (b) the potential role of private operators in the administration and operation of the registry; (c) the role of government in creating and supervising the registry; (d) the liability of the registry; (e) the security of the registry record (addressing also concerns about fraudulent or false registrations and discharges as well as the risk of corruption in the operation of the registry); and (f) the appropriate balance to be struck between operational efficiency and the reliability and security of registry data. Again, some of these issues are already addressed in the *Guide*, but a text on registration would provide more detailed guidance as well as covering additional matters.

(f) Transactional scope of the registry

58. A text on registration could address questions relating to the transactional scope of the registry, including: (a) the range of transactions to be covered; (b) the exclusion of possessory pledge types of security devices; (c) the principle of “substance over form” in characterizing security rights; (d) the treatment of acquisition financing devices (for example, retention-of-title sales, financial leases and functional equivalents of these); (e) the treatment of true long-term leases, assignments of receivables, commercial consignments, judgment liens and security

rights created by law; and (f) coordination with specialized registries (for example, immovable, ship, aircraft and intellectual property registries. The *Guide* addresses most, if not all, of these issues, but a text on registration may usefully elaborate.

(g) Territorial scope of the registry

59. A text on registration could discuss questions relating to the territorial scope of the registry, including: (a) the context within which conflict-of-laws issues relating to registration may arise; (b) conflict-of-laws issues relating to the registration of security rights in tangible encumbered assets; and (c) conflict-of-laws issues relating to security rights in intangible encumbered assets. Although the *Guide* already addresses most, if not all, of these issues in the context of conflict of laws generally, the text on registration would focus on how these rules apply to registration-related issues, in particular and to the design of the registry.

(h) Additional issues

60. Additional issues that might valuably be addressed in a text on registration include technical issues related to the design and operation of the registry, notably: (a) the computer architecture; (b) staff training; (c) educational and publicity outreach to the registry clientele and public generally; (d) post-implementation data collection and dissemination; and (e) the need to build in research and development capability to be able to respond to new developments.

(i) Form and structure of work

61. While the Commission may wish to leave the form and structure of any future work on registration to the Working Group, the Commission may wish to consider that such work could take the form of a guide on the implementation of a security rights registry. Such a guide may respond to the need identified above, add value to the *Guide* and, at the same time, be reasonably feasible to prepare. The Commission also may wish to note that such a guide, by building on and integrating the work already done by other international organizations and by States that have implemented a registry along the lines of that contemplated by the *Guide* could result in international minimum standards for registration and search procedures and for registry design, administration, and operation, thereby contributing further to the international harmonization of secured transactions regimes.

62. As to the structure of such a registry guide, it could include commentary accompanied by recommendations or guidelines addressing the sets of issues identified above. This text could be accompanied by a lexicon defining legal and technical terms relevant to the registry, by a checklist setting out the issues and the sequence of steps involved in the implementation of a registry, and by a bibliography listing further resources.

63. Moreover, such a registry guide could include model regulations or administrative rules with accompanying commentary explaining policy choices and consequences. In this context, the Commission may wish to note that a prescribed set of regulations (“one size fits all”) may not be sufficient. Alternative regulations may need to be provided to appropriately reflect different modes of implementation of the registry and different policy choices by States in relation to the issues identified above. For example, the regulations would have to take into account for each State the existence of other

registries for specific types of encumbered asset (for example, patents) and the relationship of the registry to these other registries. Moreover, while the basic element of registration based on grantor identifier is central to the contemplated registry for all States, the particular grantor identifier or identifiers to be used (for example, names as compared with State issued identification numbers), and the types of asset that might be susceptible to supplementary serial-number registration, might well differ from one State to another.

64. Furthermore, the allocation of legal rules relating to the registry between the secured transactions law and the subordinate regulations or administrative rules may well vary in different States. The difficulties in amending the principal law in some States might point in the direction of placing most if not all legal issues relating to the registry into the regulations which may more easily be adjusted to respond to change. Other states, concerned with the risk of too frequent or otherwise inappropriate changes by those vested with the discretion to amend the rules, might prefer to imbed at least the most important rules in the principal law. Consequently, the regulations will need to be presented in a flexible manner that enables them to be incorporated either as part of the principal law or as administrative guidelines. The presentation will also need to take account of how best to accommodate different legal styles in different legal traditions.

65. While the registration guide and any model regulations that might be developed should reflect the recommendations of the *Guide*, they may not have to be a supplement to the *Guide*. A stand-alone guide on registration could be extremely useful to States that are interested in improving and integrating their existing registries for security rights in movables, even if their substantive laws differ from the law recommended in the *Guide*.

4. Conclusions

66. Experience shows that secured transactions law reform cannot be effectively implemented without the establishment of an efficient publicly accessible security rights registry. It also shows that States are often forced to invest more funds than should be necessary to establish and operate such a registry owing to the absence of clear guidance on the implementation process and the legal and operational framework of the registry. As a general text on secured transactions, the *Guide* does not cover, or does not address in sufficient detail, the myriad of legal, administrative infrastructural and operational questions that must be addressed and resolved to ensure the successful and efficient implementation of a registry.

67. Thus, the Commission may wish to consider entrusting Working Group VI with the task of preparing a text on registration as a matter of priority. Such a text would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of a general security rights registry. While the specific form and structure of the text could be left to the Working Group, the Commission may wish to note that: (a) such a text could include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the work of the Commission on the *Guide*, as well as on the work of other organizations, such as the European Bank on Reconstruction and Development, the Organization of American States and the Asian Development Bank, as well as national law regimes that have implemented registry systems along lines similar to the registry contemplated by the *Guide*.

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Possible future work on security interest

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II. Possible future work topics (*continued*)

C. Security rights in movable assets: a model law

1. Introduction

1. The *UNCITRAL Legislative Guide on Secured Transactions* (the “*Guide*”) is a substantial document with commentary, discussing various workable approaches to all policy issues to be addressed in a secured transactions law, and 242 detailed legislative recommendations. It will be accompanied by a substantial supplement on security rights in intellectual property (the “draft Supplement”). However, while the *Guide* combines the flexibility of the commentary with the certainty of the recommendations, the *Guide* is not a model law or a convention. Thus, the *Guide* leaves to each State the task of drafting a secured transactions law based on its recommendations. The language of the recommendations of the *Guide* is so specific, however, that they may take the shape of a model law if the words “the law should provide that”, introducing each recommendation, were omitted. Such a model law

could complement the work of the Commission on security rights in movable assets. Like the *Guide*, a model law would combine flexibility with certainty, but to a different extent, as, generally, a model law would provide less flexibility, but more certainty.

2. The Commission may wish to note that there are already several regional model laws on secured transactions, including the following: (a) the Model Law on Secured Transactions adopted by the European Bank for Reconstruction and Development (EBRD) in 1993;¹ (b) the Model Inter-American Law on Secured Transactions adopted by the Organization of American States (OAS) in 2002;² (c) the OHADA Uniform Securities Act;³ and (d) Book IX of the Draft European Common Frame of Reference (DCFR) of the Principles, Definitions and Model Rules of European Private Law.⁴ So far, there has not been an effort to prepare a model law on secured transactions that could apply to all States of the world, irrespective of legal tradition or stage of economic development.

2. Desirability

3. The *Guide* covers all relevant issues to be addressed in a secured transactions law. However, the *Guide* is a lengthy and complex document and its transformation into law may require a substantial amount of time and effort. In addition, a *Guide* may not attract the attention of States in the way that a model law could do. Moreover, to the extent that the recommendations of the *Guide* may be implemented (or interpreted) differently from State to State, the modernization effect of their implementation may vary and thus the harmonization effect may be reduced. Furthermore, States with developing economies or economies in transition may lack the resources or the expertise necessary to efficiently implement law reform in an area as complex as secured transactions law.

4. It should also be noted that a model law based on the recommendations of the *Guide* may not only assist States in the actual implementation of the recommendations of the *Guide*, but would also maximize the potential modernization and harmonization effect of such a model law. While being more flexible than a convention but less flexible than a guide, a model law may provide the ideal level of flexibility, allowing States to address their specific needs. The process of transforming the recommendations of the *Guide* into a model law is also likely to result in improving and completing the recommendations of the *Guide*. Thus, a model law may increase the likelihood that States will enact legislation adopting the principles of the *Guide*.

5. Furthermore, as already noted, at present, there is no model law on secured transactions on a global scale. In addition, most of the currently existing regional model laws are out-dated and have been prepared prior to adoption of the *Guide*. Thus, circumstances may be ripe for the preparation of an up-to-date model law for worldwide adoption, reflecting the policy approaches recommended in the *Guide*. Overall, a model law on secured transactions to be prepared by the Commission

¹ www.ebrd.com/pubs/legal/secured.pdf.

² www.oas.org/DIL/CIDIP-VI-securedtransactions_Eng.htm.

³ OHADA, *Traité et actes uniformes commentés et annotés* (2002) 619.

⁴ C. v. Bar and E. Clive (ed.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Vol. 6* (2009), pp. 5389-5667.

would complement the *Guide* and thus benefit States in reforming their secured transactions laws.

6. However, it is not certain that the benefits deriving from a model law outweigh the potential disadvantages of such a project. The preparation of a model law may be a relatively simple exercise if it involves the transformation of the recommendations of the *Guide* into model legislative provisions. However, this will not be the case if the merits of each recommendation were to be reconsidered. Indeed, if the substance of each recommendation were to be discussed anew, such a project may take a substantial time and may result in a text that could be inconsistent with the recommendations of the *Guide*.

7. Moreover, the preparation of a model law at this stage may inadvertently result in States postponing implementation of the *Guide's* recommendations until the model law is completed. In this sense, embarking on the preparation of a model law at this stage may not be an efficient use of the Commission's resources. There is another reason why a model law may not be needed. In secured transactions laws, as in many other fields of law, the "one-size-fits-all" approach may not be appropriate. By contrast, the flexibility provided by the *Guide's* commentary, coupled with the level of certainty provided by its recommendations, may prove to be the most appropriate vehicle of modernization and harmonization of secured transactions laws. The fact that, as already noted, the various regional model laws that have been prepared so far have had varying degrees of success may also indicate that a model law may not be needed on a world level. In any case, as long as national legislation is consistent with the recommendations of the *Guide*, States may not need a model law to achieve their goals of modernizing their secured transactions laws.

3. Feasibility

8. In determining the feasibility of preparing a model law on secured transactions, the Commission may wish to take into account the following considerations. The Commission's experience with the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*,⁵ adopted in 2000, and the *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects*,⁶ adopted in 2003, may be indicative of the possibility that such a project may be completed successfully within a reasonable period of time.

9. As already noted, if the preparation of a model law involved the transformation of the recommendations of the *Guide* into model legislative provisions, such a project could be completed successfully within a reasonable period of time. If, however, this process were to require the reconsideration of every issue and policy approach, on which consensus was reached after long and difficult discussions, then the preparation of a model law may entail a very complex project, calling for a significant amount of time and resources. As a result, the preparation of a model law may or may not be feasible, depending on the terms of reference that the Commission would set for Working Group VI.

⁵ United Nations publication, Sales No. E.01.V.4.
www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2001Guide_PFI.html.

⁶ United Nations publication, Sales No. E.04.V.11.
www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2003Model_PFI.html.

10. Even if such a project were feasible, it may still result in difficult situations such as, for example, coming up with a model law that would be inconsistent with the recommendations of the *Guide*. The existence of several regional model laws on secured transactions and the absence of an international model law may suggest the lack of international consensus for the preparation of such an international model law. This perception may be reinforced by the fact that all international normative texts in the field of secured transactions have been asset specific so far, abstaining from regulating security rights in all types of asset (as is the case with the *United Nations Convention on the Assignment of Receivables in International Trade* (the “*Receivables Convention*”),⁷ the Cape Town Convention⁸ and its protocols,⁹ as well as Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009)¹⁰ and the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary).¹¹ This status suggests that the preparation of an international model law applicable to security rights in all types of asset may still be unattainable in the near future.

11. Some examples are given below in order to assist the Commission in determining the feasibility of the preparation of a model law on secured transactions.

(a) Definitions

12. A model law would have to include definitions (the *Guide* has only a terminology section which is indicative and non-binding). Reaching consensus on a set of definitions that could work in all legal systems in the field of property and secured transactions law may be quite challenging. For example, the *Guide* uses the generic term “security right” to denote all types of security rights, possessory and non-possessory. As long as it follows a functional approach to secured transactions, a State implementing the recommendations of the *Guide* may remain faithful to the principles of the *Guide* even if it uses different terms (for example, pledge, hypothec, fiduciary transfer of a movable or assignment of a receivable, retention of title right or financial lease right). Thus, a model law may contain different definitions.

(b) Scope

13. A model law would need to define its scope. Assuming that the model law follows the recommendations of the *Guide*, it would apply to consensual security rights in movable assets. However, a model law may take a different approach and have a broader scope of application. For example, it may conceive security rights as embracing all legal devices that provide for a right in property carving out exceptions to the principles of the debtor’s universal patrimonial liability and equality of creditors. Thus, a model law may embrace: (a) both consensual and non-consensual security rights; (b) security rights in both movable and immovable

⁷ United Nations publication, Sales No. E.04.V.14.

www.uncitral.org/uncitral/en/uncitral_texts/payments/2001Convention_receivables.html.

⁸ www.unidroit.org/english/conventions/mobile-equipment/main.htm.

⁹ For example, www.unidroit.org/english/conventions/mobile-equipment/main.htm#NR2.

¹⁰ www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm.

¹¹ http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=72.

property; (c) possessory security rights and mere enforcement preferences; and (d) the use of title to secure performance of an obligation.

14. In addition, if a model law follows the approach of the *Guide*, it would have to address matters left to other law in many jurisdictions (although this is a matter of legislative approach rather than scope, as the *Guide* makes no claim that all matters covered in the *Guide* should be included in a single statute dealing with security rights). These matters may include, for example: (a) outright assignments; (b) leases; (c) procedural mechanisms of enforcement; (d) conflicts of laws; and (e) insolvency. These matters may be more easily included in a *Guide* than in a model law. In any case, whether it implements the recommendations of the *Guide* or a model law, a State may exclude from its national law matters included in the *Guide* (leaving those matters to be governed by other law) and include matters that the *Guide* excludes (thereby expanding the coverage of the national law).

(c) Proceeds

15. A model law would have to address the question whether a security right in an asset extends automatically to the proceeds of the asset (including proceeds of proceeds). If a model law follows the approach of the *Guide*, it would have a very broad notion of “proceeds”, embracing what are known in many jurisdictions as products and fruits, as well as what is received upon disposition of an encumbered asset, even if the security right follows the asset in the hands of the transferee (see the term “proceeds” in the Introduction to the *Guide*, sect. B).

16. While this approach was adopted in the recommendations of the *Guide*, a different approach may have to be followed in a model law. The reason for this is that, in many jurisdictions, there may not be a concept equivalent to “proceeds” or of a security right extending to “proceeds”. If there is such a notion of proceeds, it may be limited to situations of real subrogation, that is, to cases where, for example, a hypothec in an encumbered asset is extinguished because the asset was sold and acquired by another person in good faith. In such a case, it may be necessary to draft two distinct rules, one for proceeds and another for products and fruits. Whether the two rules would lead to the same result would depend on whether agreement is reached to follow the approach recommended in the *Guide*.

(d) Acquisition financing

17. A model law would also have to deal with acquisition financing devices (loans granted for the acquisition of assets, retention-of-title sales and financial leases). If a model law follows the approach of the *Guide*, it would have to adopt a generic and functional approach to acquisition financing. Such an approach focuses on the nature of the secured transaction rather than on the parties to it (either sellers or lenders) or who holds title to the relevant asset. Under such an approach, whether a purchase or a loan, any secured transaction by which ownership is acquired with funds provided by a lender is an acquisition financing transaction. Likewise, any transaction that produces results which are functionally equivalent (retention-of-title sale or a financial lease) is considered as an acquisition financing transaction. Moreover, functionalism extends beyond the characterization of the transaction. All providers of credit, whether the contracting party (seller, financial lessor or lender) or a third party (lender or trustee), and all forms of acquisition financing, whether in cash, credit or in kind, fall under the notion of acquisition financing. The

significance of characterizing a security right as an acquisition security right lies in the priority position that accrues to the acquisition financier. The underlying policy sought to be achieved in the recommendations of the *Guide* is to provide that the acquisition security right has priority over even previously-registered holders of non-acquisition security rights. In the case where there is a grace period for registration of an acquisition security right, such security right will outrank even previously perfected security rights.

18. A model law may follow a different approach as many jurisdictions continue to distinguish between rights available to: (a) sellers and lessors who deploy title as an acquisition financing device; (b) sellers and others whose acquisition financing agreements take a vendor's hypothec which is equivalent to ownership; and (c) lenders who take a security right. In each of these cases of title security, a model law may elaborate a regime that would be slightly different from the regime recommended in the *Guide*. For example, only the retention-of-title sale may be subject to a regulatory regime for enforcement tracking the regime applicable to security rights. In addition, the priority ranking of the acquisition financier may have to be determined according to basic principles of property law (*nemo dat quod non habet*). Moreover, except in the case of financial leasing, a lender may have to take an assignment of the seller's or the lessor's rights to obtain an acquisition security right.

19. As in the two cases previously noted (scope and proceeds), there are obvious differences in legislative technique. It is true that there are significant differences between the policy approaches of the *Guide* and those currently adopted in many law jurisdictions, especially regarding lender acquisition financing. Those differences may be overcome, but this task may be easier in a guide rather than in a model law.

4. Conclusions

20. The Commission may wish to consider that, at least for the time being, the *Guide* is sufficient as a rich, elaborate and pedagogically sophisticated normative instrument to assist States in modernizing their secured transactions laws. The Commission may also wish to consider that it should allow time for the *Guide* to be considered and enacted into national law before it makes a decision to prepare a model law. In addition, the Commission may wish to consider that, while a model law on secured transactions would present obvious benefits, in light of the existence of the *Guide*, those benefits may be marginal. Moreover, the Commission may wish to consider that, achieving those benefits would come only after the investment of great time and effort on the part of the Commission, while the resources of the Commission might be more productively spent on other secured transactions law topics.

21. In view of the above, the Commission may wish to decide to retain the topic of a model law on secured transactions on its future work agenda, postponing further consideration of the matter to a later stage. At that time, the Commission may wish to determine the desirability and feasibility of a model law taking into account the experience gained from the implementation of the recommendations of the *Guide*, the draft Supplement and any other text to be prepared by the Commission in the field of secured transactions.

D. Rights and obligations of the parties to a security agreement

1. Introduction

22. One of the fundamental principles of the law recommended in the *Guide* is the principle of party autonomy. According to that principle, unless otherwise provided by secured transactions or other law, the parties to a security agreement may agree as to how to address their particular needs in the security agreement (see recommendation 10). In addition, the *Guide* includes a chapter (chapter VI) on the rights and obligations of the parties. This chapter discusses, in an indicative rather than exhausting way, issues that the parties may wish to address in their agreement, and includes a few recommendations (see recommendations 110-116).

23. However, parties negotiating complex security agreements may require detailed guidance as to the issues that they should address in their security agreements and as to how to best address those issues. Thus, a text that discusses in a comprehensive way the rights and obligations of the parties to a security agreement would be very useful. Such guidance would be particularly useful to those parties that may not have easy access to an experienced legal counsel or to parties in those parts of the world in which expertise may not be readily available, at least, at an affordable cost. The *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*,¹² which was adopted by the Commission in 1987, is a good example of such a text.

2. Desirability

24. As noted above, the *Guide* contains a chapter on the rights and obligations of the parties (see chapter VI). In addition, the *Guide* provides that, unless otherwise provided in the secured transactions or other law, parties may agree on how to address a matter in their security agreement (see recommendation 10). However, parties to complex security agreements may require detailed and comprehensive guidance as to the issues they should address in the security agreement and as to the ways in which those issues could be best addressed. Individual small-and medium-size businesses and consumers may not have an as easy and affordable access to adequate legal counsel as large businesses. This may also be the case with parties to security agreements in States with developing economies or economies in transition.

25. Such a text could usefully complement the *Guide*, providing information also to legislators implementing the law recommended in the *Guide*, as well as to judges, arbitrators, business people and lawyers. For example, with regard to the creation of security right, the law recommended in the *Guide* simply requires an agreement concluded between the grantor and the secured creditor and sets out the minimum contents and the form of that security agreement (see recommendation 13-15). A detailed text on the rights and obligations of the parties could highlight the various issues to be addressed in a security agreement and illustrate, in more detail, how to formulate a security agreement. This would include ways in which parties could describe the secured obligation and the encumbered asset. In addition to creation issues, such a text could address other issues left by secured transactions law to

¹² United Nations publication, Sales No. E.87. V10.
www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1988Guide.html.

party autonomy (for example, subordination agreements, definition of default and waiver of rights in the context of enforcement; see recommendations 94 and 133).

3. Feasibility

26. In determining the feasibility of the preparation of a text on the rights and obligations of the parties to a security agreement, the Commission may wish to take into account the following considerations.

(a) Minimum content of a security agreement

27. A text on the rights and obligations of the parties to a security agreement could usefully explain that a security agreement must have a minimum content and provide examples of how to express that content. For example, such a text could provide examples of how to: (a) state the intention of creating a security right; (b) identify the grantor and the secured creditor; and (c) describe the secured obligation and the encumbered asset.

(b) Third-party effectiveness and priority

28. A text on the rights and obligations of the parties to a security agreement could address issues relating to the third-party effectiveness and priority of a security right that are exceptionally referred to party autonomy (such as, for example, issues relating to subordination of priority).

(c) Default and enforcement

29. A text on the rights and obligations of the parties to a security agreement could usefully discuss how parties could address in their security agreement matters relating to default and enforcement, including the following matters: (a) what constitutes default; (b) the ability of the secured creditor to enforce its security right upon default; and (c) to the extent allowed by secured transactions and other law, the rights and remedies of the grantor and the secured creditor in the case of default and enforcement.

(d) Applicable law

30. Under the law recommended in the *Guide*, the parties to a security agreement may choose the law applicable to their mutual rights and obligations (see recommendation 216). A text on the rights and obligations of the parties to a security agreement could usefully discuss ways in which the parties could effectively agree on the law applicable to such matters.

(e) Relationship with other law

31. A text on the rights and obligations of the parties to a security agreement would not replace contract law. It would simply supplement it with regard to rights and obligations of the parties. It would also supplement secured transactions law to the extent that law permits party autonomy. In addition, in the same way that the law recommended in the *Guide* defers to consumer-protection law, such a text would also have to defer to consumer-protection law.

(f) Other matters

32. There is a variety of other matters that a text on the rights and obligations of the parties to a security agreement should address perhaps with sample language for the consideration of the secured creditor and the grantor. These matters include the questions whether: (a) the grantor has to be the same person as the borrower; (b) the security agreement secures all the relevant obligations; (c) the security right is subject to any legal restrictions; (d) there must be a clear payment schedule in the credit; (e) there are any special rights or obligations (such as rights of way or rights of access to a site); (f) there are any special obligations for the preservation of encumbered assets; (g) there are any obligations not to transfer the encumbered asset or create another security right in it; (h) ways in which the grantor and other interested parties could be notified in the case of default and enforcement; (i) there should be a reference to extrajudicial enforcement; and (j) there should be a dispute resolution clause.

(g) Form and structure of work

33. While the Commission may wish to leave the exact form and structure of work to Working Group VI, it may wish to note that a text on the rights and obligations of the parties to a security agreement could take the form of a guide. Such a guide would mainly be addressed to parties to security agreements. Its main purpose would be to assist parties in negotiating and drafting security agreements by identifying the legal issues involved in those agreements, discussing possible approaches to the solution of those issues and, where appropriate, suggesting solutions that the parties may wish to incorporate in their agreements. Such a guide would also be a useful tool for legislators, judges, arbitrators, business people and practitioners.

4. Conclusions

34. To the extent it would elaborate on the concrete ways to implement the principle of party autonomy and on the rights and obligations of the parties to a security agreement, a text on the rights and obligations of the parties to a security agreement could usefully complement the *Guide*. In addition, to the extent such a text would promote better understanding of secured transactions, it would promote implementation of the recommendations of the *Guide*. However, the Commission may wish to consider that preparation of such a text may not be as urgent as the preparation of a text on the registration of security rights in general security rights registries or a text on security rights in securities. Therefore, the Commission may wish to retain the topic on its future work agenda for further consideration at a future session.

E. Intellectual property licensing

1. Introduction

35. Economic development depends to a large extent on innovation protected by intellectual property rights. The development of such rights requires substantial investment of time, effort and money. The funds necessary may come mainly from two sources. One is the use of intellectual property rights as security for credit, which is the subject of the draft Supplement. The other possible source of funding is the commercial exploitation of the intellectual property by the owner or other right holder through licensing or other contracts, which presupposes that the intellectual property has commercial value.

36. There are several texts on various aspects of intellectual property licensing developed by various organizations. The World Intellectual Property Organization (WIPO) in particular has prepared a number of texts on various aspects of intellectual property licensing, including: (a) copyright licensing; (b) intellectual property asset management; (c) licensing guides for small- and medium-size enterprises; and (d) training in particular in the area of technology transfer and licensing. However, all these texts address the economic, technical or other practical aspects of intellectual property licensing rather than all the legal issues arising in that regard.

37. Generally, intellectual property licensing is at the intersection of intellectual property and contract law. Yet, intellectual property law focuses more on the recognition and enforcement of exclusive intellectual property rights rather than on the contractual aspects of intellectual property licensing; and general contract law focuses on contract formation and enforcement rather than on the specific issues arising in the context of intellectual property licensing. Thus, it seems that there is a need for a text that would address in a systematic and comprehensive way the legal issues arising with respect to intellectual property licensing. Guidance on all those issues would be helpful to intellectual property owners, licensors, licensees, financiers and professionals, but also to governments considering law reform. Such a text could draw on work undertaken by various organizations, such as WIPO, Unidroit (Unidroit Model Law on Leasing)¹³ and the Commission (United Nations Convention on Contracts for the International Sale of Goods; the “CISG”).¹⁴

2. Desirability

38. As already noted, intellectual property is becoming increasingly important in commercial transactions, whether domestic or international. In addition, the various texts prepared by international organizations, such as WIPO, provide guidance with respect to economic, technical or other practical aspects of intellectual property licensing, they do not address all the relevant legal issues. Moreover, intellectual property law deals mainly with the recognition and enforcement of intellectual property rights. While it is important to protect intellectual property rights, for parties to earn true value from their intellectual property, it is often necessary for them to engage in commercial contracting in order to develop the intellectual

¹³ www.unidroit.org/english/modellaws/2008leasing/main.htm.

¹⁴ United Nations publication, Sales No. E.95.V.12.
www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html.

property and make it available to third parties. Such commercial practices are the province of traditional commercial law.

39. However, many States do not have specific legal regimes for intellectual property licensing or intellectual property contracting in general. They instead often rely on general principles of contract law. Intellectual property commerce, especially in States with developing economies and economies in transition, could be enhanced if the law provided guidance in the form of commercial contracting rules especially suited for intellectual property. In addition, in some States, commercial contracting laws tailored for other types of asset, such as sales of tangible assets, are sometimes applied to intellectual property due to a lack of other available guidance. This practice can lead to distortions. It also places a premium on specialized knowledge needed to “contract out” of inappropriate laws that can disadvantage small- and medium-size businesses. Moreover, there is increased interest in several international forums to deal with intellectual property contracting practices, albeit in specific situations that do not involve the totality of the relevant legal issues. Furthermore, in commercial practices, many intellectual property contracts involve a multiplicity of intellectual property rights, such as software that could include patent, copyright, trademark and trade secret rights. Thus, a more coordinated approach would lead to better results and avoid conflicts in approaches.

40. In view of the above, it would appear that a text on intellectual property licensing that would address in a comprehensive and systematic way all the legal issues arising in the context of intellectual property licensing would be useful to parties negotiating and drafting such contracts, as well as to governments interested in preparing legislation to address those issues.

3. Feasibility

41. In determining the feasibility of a text on intellectual property licensing, the Commission may wish to take into account the various texts prepared by other organizations and the following considerations.

(a) Scope

42. The key to the feasibility of a text on intellectual property licensing is to identify carefully the scope of the text. The text could deal not only with intellectual property licensing but also with intellectual property contracting in general (and thus deal also with transfers). The text could also deal with all the issues to be addressed in an intellectual property contract. More specifically, the text could apply to all types of intellectual property, rather than looking to different rules for specific types of intellectual property (for example, for patents, copyrights, trademarks or trade secrets) or industry sectors (for example, for movies, software, fashion designs and pharmaceuticals). The text could also focus on common contracting rules that would apply across all types of intellectual property and industry sector, rather than try to devise asset- or sector-specific rules, which may add to complexity.

(b) Contents

43. A text on intellectual property licensing could deal with several issues. For example, such a text may have to include a definition of the term “licence” and

distinguish between exclusive and non-exclusive licences. In addition, the text could include a provision on party autonomy, tracking article 6 of the CISG, and a provision on interpretation, tracking article 7 of the CISG. Moreover, with respect to the formation of a licence agreement, the text could refer to the general requirements for contract formation and any additional requirements under intellectual property law. Furthermore, with respect to warranties, the text could refer to best practices in the field of intellectual property licensing. The text could also include a section on performance, dealing with the respective rights and obligations of the parties (for example, the obligation of the licensor to “enable use” of the licence by the licensee and the obligation of the licensee to “pay or perform for performance accepted”). The text could also deal with transfers and incorporate generally applicable rules (such as, for example, that a transfer should be authorized and permitted under intellectual property law or the *nemo dat* rule). Finally the text could deal with remedies of the parties in the case of breach of contract under the text on intellectual property licensing (such as, for example, cancellation, specific performance and damages), without interfering with any remedies under intellectual property law.

(c) Relationship with other law

44. The text could build on the usual approach in commercial law of recognizing party autonomy by presenting approaches to intellectual property licensing that are descriptive rather than prescriptive, enabling rather than regulatory. The purpose of the text would be to provide “residual” contracting rules that would apply when not displaced by specific rules of the kind described above. At the same time, such a text should defer to various laws, including intellectual property law that regulates specific licence agreement terms and practices, secured transactions law, competition law and consumer protection law.

(d) Form of and structure of work

45. While the Commission may leave the matter of the exact form and structure of work to the Working Group, it may wish to note that a text on intellectual property licensing could take the form of a contractual guide, a legislative guide or even a model law. The structure of such a text could follow the structure of the CISG and the Unidroit Model Law on Leasing and, for example include the following sections: (a) general provisions (definitions, scope of application, party autonomy, and interpretation); (b) intellectual property contract formation; (c) warranties; (d) performance; (e) transfers; and (f) remedies.

4. Conclusions

46. Intellectual property licensing (or contracting in general) is an extremely important practice at the intersection of intellectual property and contract law. Various aspects of intellectual property licensing are addressed by a number of organizations, in particular, WIPO. Yet, despite the importance of intellectual property licensing, neither the currently existing texts nor intellectual property law in general nor contract law address in a comprehensive and systematic way all the legal issues arising in the context of intellectual property licensing.

47. Thus, the Commission may wish to consider referring to a working group (other than Working Group VI as intellectual property licensing is not a secured

transactions topic) the task of preparing a text on intellectual property licensing or contracting in general. As this topic is at the intersection of commercial and intellectual property law, the Commission may wish to undertake this project in close cooperation with organizations active in the field of intellectual property law and in particular WIPO. Alternatively, the Commission may wish to retain this topic on its future work agenda, postponing further consideration to a later stage. At that time, the Commission may wish to consider appropriate ways of coordinating efficiently and effectively with intellectual property organizations, such as WIPO.

F. Implementation of UNCITRAL texts on secured transactions

48. The Commission may wish to consider its future work programme on the implementation of its texts on secured transactions. These texts include: (a) the *Receivables Convention*; (b) the *Guide*; and (c) the draft Supplement, which the Commission is expected to consider and adopt at its current session.

49. With respect to the *Receivables Convention*, the Commission may wish to note that it has been signed by Luxembourg, Madagascar and the United States of America, and ratified by Liberia. The Commission may also wish to note that the United States of America is taking steps to ratify the *Receivables Convention* and reiterate its recommendation to all States to consider becoming party to the *Receivables Convention*. The Commission may wish to consider requesting the Secretariat to intensify its efforts of disseminating information and providing assistance to States interested in becoming party to the *Receivables Convention*.

50. The Commission may also wish to note that, while Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) did not address the issue of the law applicable to the third-party effects of assignments of receivables, the European Commission is considering the preparation of a study on the matter. The Commission may wish to request the Secretariat to continue coordinating with the European Commission with a view to avoiding any conflict between the *Receivables Convention* and any text to be prepared by the European Commission on the law applicable to the third-party effects of assignments of receivables (see also A/CN.9/707, para. 34).

51. With respect to the *Guide*, the Commission may wish to note that the *Guide* already influenced the recent secured transactions law reform in Australia and the Republic of Korea, as well as Book IX of the Draft European Common Frame of Reference (DCFR) of the Principles, Definitions and Model Rules of European Private Law. The Commission may also wish to note that the *Guide* is a valuable resource tool because it discusses all issues to be addressed in a secured transactions law, explains all the workable approaches presenting their advantages and disadvantages and makes recommendations to the legislator.

52. The Commission may also wish to note that the *Guide* is a useful resource tool not only for States but also for international organizations that provide assistance for law reform in the area of secured transactions, such as the International Bank for Reconstruction and Development (the “World Bank”). In this connection, the Commission may wish to note that the Secretariat provided comments to the Investment Climate Advisory Service (“FIAS”) of the World Bank on a revised

version of the OHADA Uniform Securities Act, with a view to ensuring consistency with the *Guide*. With the same goal in mind, the UNCITRAL Secretariat also provided comments to FIAS on the World Bank Toolkit on Secured Transactions (see A/CN.9/707, para. 39).

53. Finally, with regard to the draft Supplement to the *Guide*, the Commission may wish to note that it should be very helpful to States because it fills the gaps left by the *Guide* with regard to security rights in intellectual property.

54. In view of the above, the Commission may wish to recommend that States give favourable consideration to the *Guide* and the draft Supplement when revising or adopting legislation relevant to secured transactions. The Commission may also wish to consider requesting the Secretariat to intensify its efforts of disseminating information and providing legislative assistance to States interested in implementing the *Guide* and the draft Supplement (see A/CN.9/695, para. 24).

**C. Possible future work on online dispute resolution in
cross-border electronic commerce transactions
(A/CN.9/706)**

[Original: English]

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I. Introduction

1. At its thirty-third session (New York, 12 June-7 July 2000), the Commission held a preliminary exchange of views on proposals to include online dispute resolution in its future work programme.¹ At that session, it was generally agreed that further work could be undertaken to determine whether specific rules were needed to facilitate the increased use of online dispute settlement mechanisms. In that context, it was suggested that special attention might be given to the ways in which dispute settlement techniques such as arbitration and conciliation might be made available to both commercial parties and consumers. It was widely felt that the use of electronic commerce tended to blur the distinction between consumers and commercial parties. It was also recalled that in a number of countries, the use of arbitration for the settlement of consumer disputes was restricted for reasons

¹ *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 385.

involving public policy considerations and might not easily lend itself to harmonization by international organizations. At its thirty-fourth² (Vienna, 25 June-13 July 2001) and thirty-fifth³ (New York, 17-28 June 2002) sessions, the Commission decided that future work on electronic commerce would include further research and studies on the question of online dispute resolution and that Working Group II (Arbitration and Conciliation) would cooperate with Working Group IV (Electronic Commerce) with respect to possible future work in that area.

2. At its thirty-eighth session (New York, 12-23 March 2001), Working Group IV (Electronic Commerce) discussed the possibility of pursuing further work to determine whether specific rules were needed to respond to the increased need for online dispute settlements.⁴ At its fortieth (Vienna, 14-18 October 2002) to forty-second (Vienna, 17-21 November 2003) sessions, the Working Group recommended to the Commission that the Secretariat be entrusted with the preparation of the necessary studies concerning the UNCITRAL Model Law on International Commercial Arbitration as well as the UNCITRAL Arbitration Rules to assess their appropriateness for meeting the specific needs of online arbitration.⁵

3. At its thirty-second session (Vienna, 20-31 March 2000), Working Group II (Arbitration and Conciliation) took note of the suggestion that it would be useful to review the implications of online arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication).⁶ In addition, at its forty-first (Vienna, 13-17 September 2004) to its fiftieth (New York, 9-13 February 2009) sessions, the Working Group noted the possible inclusion of issues raised by online dispute resolution in its future work programme.⁷

4. At its thirty-ninth (New York, 19 June-7 July 2006) to forty-first (New York, 16 June-3 July 2008) sessions, the Commission took note of suggestions that the issue of online dispute resolution should be maintained as an item for future work.⁸

5. At its forty-second session (Vienna, 29 June-17 July 2009), the Commission considered future work in the field of electronic commerce. At that session, the Commission had before it a proposal by the United States of America on online dispute resolution entitled "Possible future work on electronic commerce" (A/CN.9/681/Add.2). In that proposal, it was recommended that a study be prepared on possible future work on the subject of online dispute resolution in cross-border electronic commerce transactions.⁹ The proposal further recommended that the study should address the types of e-commerce disputes that may be solved by online dispute resolution systems, the appropriateness of drafting procedural rules for online dispute resolution, the possibility or desirability to maintain a single database

² Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 287 and 311.

³ Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 180 and 205.

⁴ A/CN.9/484, para. 9.

⁵ A/CN.9/484, para. 134; A/CN.9/527, para. 3; and A/CN.9/546, para. 3.

⁶ A/CN.9/468, para. 113.

⁷ A/CN.9/569, para. 80; A/CN.9/573 para. 100; A/CN.9/592, para. 90; A/CN.9/614, para. 5; A/CN.9/641, para. 5; A/CN.9/665, para. 5; and A/CN.9/669, para. 5.

⁸ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 183 and 186-187; *Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), para. 177; and *Sixty-third Session, Supplement No. 17* (A/63/17), para. 316.

⁹ Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 338.

of certified online dispute resolution providers, and the issue of enforcement of awards made through the online dispute resolution process under the relevant international conventions.¹⁰ The Commission agreed on the importance of the proposals relating to future work in the field of online dispute resolution to promote electronic commerce, for the reasons expressed in the proposal submitted to the Commission.¹¹ It was suggested that further studies should be undertaken to identify the different groups interested in possible future standards, including consumers. It was noted in that respect that the variety of rules on consumer protection made it particularly difficult to achieve harmonization in that field. Divergent views were expressed on the desirability of a discussion of the issue of enforcement of awards rendered in online arbitral proceedings. It was explained that practical difficulties arose from the fact that the disputes settled by such awards generally involved small monetary amounts, especially in consumer-related disputes, and from the costs of cross-border enforcement under existing instruments.¹² After discussion, the Commission requested the Secretariat to prepare studies on the basis of the proposal contained in the document mentioned above with a view to reconsidering the matter at a future session. It further requested the Secretariat to hold a colloquium on that issue, resources permitting.¹³

6. Pursuant to that request, the Secretariat organized a colloquium in cooperation with the Pace Law School Institute of International Commercial Law and the Penn State Dickinson School of Law.¹⁴ The speakers and panellists at the Colloquium consisted of a selection of experts from each of the practice areas examined and the Colloquium was attended by leading experts from government, private sector, academia and the non-profit sector from all parts of the world.

7. This note contains a summary of the Colloquium proceedings and of the key issues that were identified. The first part contains a presentation of the evolution of electronic commerce over the last decade, and of some international, regional and domestic initiatives developed to deal with resolution of disputes originating in business-to-business and business-to-consumer transactions. The second part outlines questions and issues raised regarding features of online dispute settlement mechanisms and the prospect of formulating a set of rules to support the creation of a viable global online dispute resolution system to handle small value, large volume claims.

¹⁰ A/CN.9/681/Add.2.

¹¹ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 341.

¹² *Ibid.*, para. 342.

¹³ *Ibid.*, para. 343.

¹⁴ The Colloquium, entitled “A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)” was held in Vienna, on 29 and 30 March 2010.

II. Electronic commerce and initiatives undertaken with respect to online dispute resolution

A. Technology and its impact on business-to-business and business-to-consumer transactions

8. Business-to-business and business-to-consumer electronic commerce has rapidly developed over the past decade, based largely on the exponential diffusion of the Internet, increased broadband access and the rise of mobile commerce throughout the world.

9. One of the main drivers underlying e-commerce growth is the rising number of individuals connected to the Internet. A little over one fifth of the world's population used the Internet in 2008, compared to 2 to 5 per cent in the late 1990s.¹⁵ Studies also revealed that acceptance of the Internet as a trading platform is growing.¹⁶ Data on the magnitude of e-commerce trade are unfortunately not available for many countries and where data do exist, they are often not comparable. Available information from national authorities suggests that business-to-consumer electronic commerce is expanding rapidly but that its role remains relatively low, in particular when compared to traditional retail and business-to-business electronic commerce.¹⁷

10. The United Nations Commission on Trade and Development (UNCTAD) provided an assessment of the diffusion of key information and communication technologies (ICT) applications between 2003 and 2008, based on the Information Economy Report 2009.¹⁸ That report noted some very positive developments, which underscored the considerable opportunities that ICT use represented.¹⁹ UNCTAD analysis also showed that the narrowing of the gap between people with effective access to digital and information technology and those with very limited or no access at all ("digital divide") remained a key development challenge, in particular "the broadband gap".

11. Regarding global ICT development between 1997 and 2008, UNCTAD reported that the development of the use of mobile phones had been far more significant than that of any other technologies. In the past couple of years, mobile telephony emerged as the most important ICT for low-income countries, and as the principal gateway to increased ICT access and use. This growth appeared to be

¹⁵ OECD, "Empowering e-consumers, strengthening consumer protection in the internet economy", 8-12 December 2009, DSTI/CP(2009)20/FINAL, para. 13.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ UNCTAD, "Information Economy Report 2009: Trends and Outlook in Turbulent Times" October 2009, United Nations publication, Sales No. E.09.II.D.18.

¹⁹ There were an estimated 1.4 billion Internet users around the world at the end of 2008 and 1.6 billion people in 2009. China hosted the largest number of users with 298 million, followed by the United States with 191 million and Japan with 88 million. Africa counts 53 million users. While more than half of the population in developed countries has access to the Internet, the corresponding share is on average 15-17 per cent in developing countries.

continuing.²⁰ Mobile phones were being used in novel ways, with important implications for doing business in developing countries. For instance, they were used to make banking transactions, or to obtain market information. African countries were pioneering mobile banking and other electronic transaction services involving the use of mobile phones. In Kenya, South Africa, Tanzania and Zambia, for example, cell phones enabled companies and individuals to make payments, transfers and pre-paid purchases without a bank account. For small companies in low-income countries, the mobile phone has overtaken computers as the most important ICT tool.

12. The growth of traditional computer networks globally as well as the development of mobile commerce has also enabled consumers to purchase goods and services from foreign businesses.²¹ Participants to the Colloquium shared the view that consumers were becoming a major part of international commercial transactions.

13. The view was expressed at the Colloquium that future expansion of business-to-business and business-to-consumer electronic commerce would depend in large part on the level of confidence of users when making online transactions.²² Participants to the Colloquium shared the view that an online redress system for high volume low value claims was essential to the continued success and growth of both business-to-business and business-to-consumer electronic commerce.

B. Current legal initiatives regarding online dispute resolution

1. Instruments adopted by the Organization for Economic Cooperation and Development (OECD)

14. The work of the OECD Committee on Consumer Policy (“CCP”) over the past ten years addressed the issues of consumer disputes through the development of the 1999 E-commerce Guidelines,²³ a round table and report (2002)²⁴ on payment cardholder protections, the Cross-border Fraud Guidelines (2003)²⁵ and a workshop and report in 2005 on alternative dispute resolution,²⁶ leading to the development of a Recommendation on Consumer Dispute Resolution and Redress in 2007.²⁷ The

²⁰ Between 2003 and 2008, according to the International Communication Union (ITU) estimates, there were some 4.6 billion mobile subscriptions at the end of 2009, up from only 1.4 billion in 2003.

²¹ OECD Conference Report, Empowering e-commerce consumers, December 8-10, 2009, DSTI/CP(2009)20/FINAL, paras. 6-17.

²² Ibid., para. 20.

²³ Guidelines for Consumer Protection in the Context of Electronic Commerce (approved by the OECD Council on 9 December 1999).

²⁴ Report on Consumer Protections for Payment Cardholders, OECD Digital Economy Papers, No. 64, OECD Directorate for Science, Technology and Industry (2002).

²⁵ The OECD Guidelines for protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders: Recommendation adopted by the OECD Council on 11 June 2003.

²⁶ The OECD Workshop on Consumer Dispute Resolution and Redress in the Global Marketplace held in Washington D.C. on 19-20 April 2005. Report published in 2006.

²⁷ OECD Recommendation on Consumer Dispute Resolution and Redress adopted by the OECD Council on 12 July 2007. Recommendation developed by the OECD Committee on Consumer Policy (CCP).

Recommendation covers mechanisms for (i) resolving consumer disputes and (ii) facilitating redress for economic harm resulting from business-to-consumer transactions (online and offline) for goods and services. It identifies the different categories of mechanisms which should be made available to consumers at domestic and cross-border levels such as individual actions (alternative dispute resolution, small claims court procedures); collective actions (private collective actions, actions by a consumer organization on behalf of a group of consumers, actions by a government agency on behalf of a group of consumers); and government obtained monetary redress. In 2009, the CCP launched a review of the 1999 E-commerce Guidelines with the intent to commence work to update the Guidelines, which may entail the review of related instruments.

2. Initiatives undertaken by regional intergovernmental organizations

European Union

15. Participants to the Colloquium mentioned that, despite the improved legal framework resulting from the adoption of a number of directives in the field of consumer protection and electronic commerce,²⁸ the remaining differences in the European Union (EU) between the various national regulatory frameworks, in particular consumer protection rules, required that e-shops, irrespective of their location, whether inside or outside the EU, comply with varying national sets of consumer protection rules of the EU member States. It was also mentioned that the European Commission maintained a central database of alternative dispute resolution bodies for consumer complaints, which were considered to be in conformity with the European Commission's Recommendations on Dispute Resolution.²⁹ According to a study prepared by the European Consumer Centres Network (ECC-Net),³⁰ published in December 2009, approximately 12,000 cross-border complaints have been filed each year for the past three years within ECC-NET structure, out of which less than 500 resulted in alternative dispute settlement.

16. Some regulatory options for furthering development of European consumer and contract laws, including online dispute resolution, were mentioned. One of the most feasible, it was said, would be an optional instrument for resolution of business-to-consumer transactions (referred to as the "Blue Button"). The proposed blue button online dispute resolution system would not be applicable automatically. Adoption of this procedure would be made by party agreement. For instance, a seller could display on the e-shop website an icon indicating that the client (whether

²⁸ This includes, inter alia, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce") (OJ L 178, 17.7.2000, p. 1-16); Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 on unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, p. 22-39); and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19-27).

²⁹ Available at http://ec.europa.eu/consumers/redress_cons/adr_en.htm.

³⁰ ECC-Net is an EU-wide network co-sponsored by the European Commission and the Member States. It is made up of 29 centres, one in each of the 27 EU Member States and also in Iceland and Norway.

consumer or otherwise) could agree by clicking on the “Blue Button” to make the substantive and procedural legal principles contained in the optional instrument applicable to the transaction concluded between the parties. Participants to the Colloquium explained that adoption of this online procedure would facilitate expeditious and economical resolution of disputes based on the agreement of the parties and thereby eliminate the need to resolve difficult problems such as those pertaining to jurisdiction and applicable law.

17. Another option, which was proposed as an alternative to online dispute resolution, would be the adoption of a simplified fast-track procedure, similar to that captured in Regulation (EC) No. 861/2007 establishing a European Small Claims Procedure.

The Organization of American States (OAS)

18. Several private international law initiatives relating to consumer protection are currently being considered by the OAS through the Inter-American Specialized Conference on Private International Law. Those initiatives include a proposal for an Inter-American convention on the law applicable to certain contracts and consumer relations as well as a proposal for a model law on jurisdiction and conflict of laws rules in consumer contracts. Both proposals provide that e-commerce disputes should be litigated in the forum of the consumer.³¹ A third proposal has been submitted for a State-sponsored initiative to resolve cross-border electronic commerce consumer contract disputes for the sale of goods and services (referred to below as the “initiative”). That initiative was described and discussed in detail during the Colloquium. The initiative would create a multi-state electronic system to provide negotiation, facilitated settlement, and arbitration for certain cross-border consumer contract claims on the basis of a cooperative framework agreement and model rules. Under this initiative, a consumer/buyer would be able to file a cross-border complaint online against a registered vendor in another participating State. During the negotiation phase, the buyer and vendor would be allowed to exchange information and proposals, and negotiate a binding settlement, through electronic means. If an amicable settlement was not reached by this means, the case could then be brought to the arbitration phase and a qualified online arbitrator would be appointed by a government-approved authority where the vendor is located to evaluate the case and either conduct a facilitated settlement or issue a binding award. The decision would be rendered by the online arbitrator based on the parties’ submissions and the decision is final and binding.³²

³¹ Proposals by the Member States for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) — Topic I — Consumer Protection (CP/CAJP — 2652/08 and CP/CAJP — 2652/08 Add.1 to Add.4).

³² The initiative is composed of several actors including the national consumer authorities of the buyer and the vendor, national authorities and the central clearinghouse. The national authorities and the central clearinghouse maintain a single database of certified online dispute resolution (ODR) providers that are used to arbitrate a case in order to ensure independence and impartiality. All communication among the actors is in electronic form and is centralized by the central clearinghouse. The central clearinghouse manages the process and acts as the central focal point for communication among the parties. The national consumer authorities, national authorities and the central clearinghouse oversee the communication of parties, examine the effectiveness of the system and deal with communications in real time. The initiative attempts to simplify enforcement issues by providing for ODR where the vendor is located. The vendor

The African Union and African regional organizations

19. The African Union held a summit in 2010 on information technology, and participants to the Colloquium mentioned that a Convention on digital transactions was in the process of being drafted and should be adopted before 2012.

20. As an illustration of the growing importance of online dispute resolution, it was mentioned that the Economic Community of West African States (ECOWAS) collaborated with partner institutions such as the West African Economic and Monetary Union (UEMOA) and the International Telecommunication Union (ITU) to develop regional guidelines for the ICT sector, which led to six Supplementary Acts being adopted by Heads of States in January 2007, in Ouagadougou.³³ Three additional texts were developed with the assistance of the United Nations Economic Commission for Africa (ECA) on cybercrime, electronic commerce, and personal data protection. Two of those texts — cybercrime and personal data protection — were adopted by ICT ministers of ECOWAS in Praia, Cape Verde in 2008.³⁴

21. It was mentioned during the Colloquium that the Council of Ministers of the Organization for the Harmonization of Business Law in Africa (OHADA) had decided during its meeting held on 17-20 December 2009 in N'Djamena (Chad), to, inter alia, create a central database of the Commerce and Movable Credit Register and adopt information technology standards for the exchange of data electronically. It was also mentioned during the Colloquium that a project would be considered by OHADA to prepare a draft Uniform Act on digital transactions.

Countries in the Middle East region

22. It was noted that the Arab League Model Laws,³⁵ inspired by the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures were proposed as a guideline for countries in the region, as they contained provisions on electronic payments, electronic contracts (including consumer protection) and matters relating to applicable laws and jurisdiction. It was mentioned that States in that region had also adopted legislation inspired by the UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures, and that that existing harmonized legal

opts-in to the system with their national administrators where they do business. Each national consumer authority or national authority where the vendor is located selects the online ODR provider, and the seat of arbitration for the process is the vendor's State. In the event of non-compliance, the award may be enforced by the national consumer authority or national administrator in the vendor's home country by taking direct enforcement action, requesting assistance from payment networks, or referring the case to collection agencies.

³³ West African Common Market Project: Harmonization of Policies Governing the ICT Market in the UEMOA-ECOWAS Space. (Final Guideline) accessed at: www.itu.int/ITU-D/treg/projects/itu-ec/Ghana/modules/Compil-Guidelines_final.pdf and Supplementary Act A/SA.1/01/07 on the Harmonization of Policies and of the Regulatory Framework for the Information and Communication Technology (ICT) Sector adopted in the Thirty-First session of the Authority of Heads of State and Government, ECOWAS, Ouagadougou, 19 January 2007 accessed at www.ecowas.int/publications/en/actes_add_telecoms/ICT_Policy_ECOWAS_Engl.pdf.

³⁴ ECOWAS Press release No. 100/2008 "ECOWAS Telecommunications ministers adopt texts on cyber crime, personal data protection".

³⁵ Model Law for Electronic Transactions and Model Law for Electronic Commerce prepared by the Arab League.

framework on electronic commerce constituted a sound basis for the development of electronic commerce transactions, but that there was a lack of a global system for solving online disputes.

The Caribbean Community (CARICOM)

23. The current initiatives undertaken by the Caribbean Community (CARICOM) include the CARICOM ICT 4 Development, the draft Model Law on Consumer Protection (2008) and the development of Model Consumer Policies in three critical areas which are electronic commerce, safety and sustainable consumption.³⁶ The purpose of those model policies is to protect consumers buying through electronic commerce.

3. Examples of domestic initiatives

24. Examples of domestic initiatives were provided during the Colloquium. In certain countries, organizations have been set up to administer domain names and provide online arbitration to resolve disputes arising in that field. For instance, in Chile, the Network Information Center (“NIC Chile”) was described as an organization responsible for administering domain names as designated by the Internet Assigned Numbers Authority (IANA). NIC Chile provides an electronic platform to arbitrators offering a support technological service for the administration of arbitration cases. The responsibility for the management and administration of the website lies with the arbitrators. The arbitral procedure includes the access of the parties to the file and their keys with various tools to interact with the arbitrators and to participate in the conduct of the arbitral proceedings. If an arbitrator is not appointed through party agreement, NIC Chile would appoint an arbitrator from a list established for that purpose. The arbitration is confidential, including all evidence and all communications between the participants to the arbitral proceedings. Participants to the Colloquium also mentioned that in Mexico, Concilianet, a government run online dispute resolution platform has been established.³⁷

25. In China, where electronic commerce has been one of the fastest growing industries, the online dispute resolution system was described as divided into four categories: (1) the Online Dispute Resolution Centre of China International Economic and Trade Arbitration Commission (CIETAC), which mainly settles domain name disputes, common address disputes and electronic business disputes;³⁸ on 1 May 2009, the Online Arbitration Rules of CIETAC took effect and they are applied to larger volume business-to-business electronic commerce disputes; (2) the Online Dispute Resolution Centre, set up by China’s E-commerce Laws Nets and Beijing Deofar Consulting Ltd., which offers information exchange platform and solving disputes related to electronic commerce; (3) the Internal Complaint Mechanism, which refers to the system established by the provider of the network transaction platform and used to accept consumer complaints and settle disputes through consultation; and (4) the Online petitions, which are adopted by many

³⁶ Information on CARICOM ICT 4 Development is available at <http://caricomict4d.org/>.

³⁷ <http://concilianet.profeco.gob.mx/concilianet/faces/inicio.jsp>.

³⁸ By the end of 2009, the online dispute resolution centre had closed nearly 1,500 cases by online mode. In 2009 alone, the online dispute resolution centre had accepted 299 cases and closed 308 cases.

non-profit organizations such as China's Electronic chamber, electronic Commerce Association of Beijing and e-commerce Industry Association of Shanghai.

26. Under another approach, in some countries, parties are offered by State courts the possibility to solve, through mediation, their disputes arising in the context of Internet transactions. In France, for instance, the "*forum des droits sur Internet*", an entity set up with the assistance of the French public authorities, signed a protocol with the Court of Appeal of Paris in 2009 for the settlement of disputes arising in the context of Internet transactions. That Protocol applies to consumer disputes, and provides for mediation. Parties may at any time refer the matter back to the competent court of first instance.

4. Examples of initiatives undertaken by non-governmental organizations and the private sector

27. Over the past ten years, non-governmental organizations (NGOs) and the private sector have collectively developed many different types of systems and guidelines that have contributed to resolving domestic and cross-border disputes arising from online transactions. It was mentioned that those mechanisms provided good results when based on a framework of best practice standards, model codes of conduct, and standards from international organizations such as the OECD and the Global Business Dialogue on e-Society (GBDe).³⁹

28. A few important initiatives were mentioned at the Colloquium, such as the dispute resolution agreement between Consumers International and GBDe,⁴⁰ the launch of the European Extrajudicial Network,⁴¹ the Better Business Bureaus (BBB)⁴²/Eurochambres Trustmark alliance and e.Consumer.gov, which is a project of members of the International Consumer Protection Enforcement Network (ICPEN) and a portal for consumers to report complaints about online and other cross-border transactions with foreign sellers.

29. The Protocol for Manufacturer/Supplier Disputes of the International Centre for Dispute Resolution ("ICDR", the international division of the American Arbitration Association ("AAA"))⁴³ was given as an example of creation of online dispute resolution systems in the context of business-to-business transactions.

³⁹ The GBDe constitutes an international complaint-handling network for cross-border online shopping. The concept scheme was proposed at the 2007 GBDe summit in Tokyo. The stakeholders are governments (USA, Japan, Chinese Taipei, Malaysia, Viet Nam, Singapore, Thailand), International Organizations (Asia-Pacific Economic Cooperation (APEC), OECD), consumers' organizations, and alternative dispute resolution providers (from USA, Japan, Chinese Taipei, Singapore, Korea). GBDe has handled various cases, involving domain registration, fake escrow company, and failure of delivery.

⁴⁰ Global Business Dialogue on Electronic Commerce, "Alternative Dispute Resolution Guidelines, Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce," November 2003, available at www.gdb-e.org.

⁴¹ "Commission Working Document on the creation of a European Extra-Judicial Network (EEJ-NET)", available at http://ec.europa.eu/consumers/policy/development/acce_just/acce_just_07_workdoc_en.pdf.

⁴² The Better Business Bureaus ("BBBs") are private, non-governmental agencies. The system is made up of 123 member local Better Business Bureaus throughout the United States of America and Canada. In 2009, the BBB system handled nearly one million consumer disputes. The BBB reported a substantial increase in cross-border complaints in 2009.

⁴³ Available at www.adr.org.

General Electric (“GE”), a multinational corporation handling a large number of suppliers, had designed, in cooperation with ICDR, a manufacturer/supplier online dispute resolution programme. The challenge was to set up a process to resolve fairly and quickly a large volume of supplier-manufacturer small claims. In 2009, the system became operational and in 2010, a pilot experience was undertaken. In brief, the system was described to function as follows: the request for resolving a dispute online is initiated via an application called “webFile”, followed by online negotiation; in case of failure to settle, online dispute resolution is initiated on the basis of documents already submitted via “webFile”. Engineers serve as adjudicators for online dispute resolution. A brief reasoned award is rendered within 30 days from the appointment of the arbitrator. It may be noted that the ICDR Protocol established for the online resolution of manufacturer/supplier disputes is no longer restricted to online cases related to GE, but is now available as a general protocol to apply to the online resolution of manufacturer/supplier disputes generally.

30. It was also explained during the Colloquium that eBay, a company with experience in business-to-business, business-to-consumer and consumer-to-consumer transactions, has developed an online dispute resolution centre. Launched in 1995, eBay has made numerous acquisitions over the years, including the PayPal payment service in 2002. The eBayPayPal platform includes an online dispute resolution centre, where parties can attempt to solve problems which might arise during the transactions. It is based on principles that the system offered to the parties must be fair and predictable, the resolution must be quick and policies clear. Enforcement is essential to success. Refund should come through the same money transfer channel as the original payment.

III. Practicalities of establishing a global online dispute resolution system

1. Cross-border electronic commerce disputes and the administration of justice

31. Disputes arising in the online context are diverse, and include failure to deliver, late delivery, false or deceptive information on price and product.⁴⁴ Participants to the Colloquium underlined that those disputes were difficult for courts to handle for a variety of reasons, which included high volume of small value claims, the contrast between the low value of the transaction and the high cost of litigation, questions of applicable law in both electronic commerce and consumer protection contexts and difficulties of enforcement of foreign judgments.

32. It was also highlighted that a difficult question in cross-border consumer redress related to the determination of the appropriate forum, and the legal

⁴⁴ Figures related to complaints filed with the European Consumer Centre Network (the “ECC-Net”) for 2007 show that half of the cross-border complaints and disputes related to purchases made over the Internet. Delivery problems and dissatisfaction with the products purchased were the leading reasons for the complaints, accounting for 75 per cent of the total. Information collected by econsumer.gov, which is an intergovernmental initiative that provides a means for consumers to file complaints involving cross-border transactions (e-commerce and other forms), reveals a similar pattern (see OECD, “Empowering e-consumers, strengthening consumer protection in the internet economy”, 8-12 December 2009, para. 20, available at www.oecd.org).

consequences attached thereto. One approach, followed in the European Union through the enactment of the Brussels I and Rome I Regulations, had been to provide for jurisdiction in the forum of the consumer. That solution, which may be ideal for consumers, raised a number of practical problems if transposed to the international level, the most obvious being the difficulty for the consumer to utilize enforcement remedies and for the vendor to handle large volumes of claims in many different countries where consumers were located.⁴⁵

2. Commercial and consumer online dispute resolution

Definition of online dispute resolution

33. Online dispute resolution is a means of dispute settlement whether through conciliation or arbitration, which implies the use of online technologies to facilitate the resolution of disputes between parties. Online dispute resolution has similarities with offline conciliation and arbitration but the information management and communication tools which are used during the proceedings, and may apply to all or part of the proceedings, also have an impact on the methods by which the disputes are being solved.

34. Online dispute resolution may be applied to a range of disputes. While the application of online dispute resolution is not limited to disputes arising out of business-to-business and business-to-consumer online transactions, it developed in that context as it is logical to use the same medium (the Internet) for the resolution of e-commerce disputes. Online arbitration raises specific legal issues stemming from the formal requirements contained in national and international arbitration laws and conventions.

General remarks on conciliation

35. Conciliation or mediation refers to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute. In the context of commercial and consumer disputes, mediation is an important filter. The main advantages of conciliation or mediation in the context of online dispute resolution are its flexibility, its rapidity and its minimal cost. It was underlined during the Colloquium that using mediation to solve online disputes implied clear rules, compliance with general principles of accessibility, low cost, confidentiality, impartiality and independence of conciliators. It also implied efficient enforcement procedures at the international level.

⁴⁵ The draft Hague Conference Convention on Choice of Court Agreements included a proposal on competent jurisdiction which would have followed Brussels I and effectively voided the parties' choice of court in business-to-consumer contracts, unless the forum chosen was the country of destination. However, the provision proved to be controversial given concerns about of its potential negative impact on vendors in e-commerce transactions. After prolonged consideration and negotiations, the final text of the convention excluded agreements where a consumer is a party. *See generally* Hague Conference on Private International Law Permanent Bureau, Preliminary Document No. 17 of February 2002 at 10, available at www.hcch.net/upload/wop/gen_pd17e.pdf.

General remarks on arbitration

36. A question that would deserve further study is the extent to which online arbitration would be recognized by existing legislation on arbitration and which aspects in online arbitration would require specific regulation. For instance, many arbitration laws require the arbitration agreement to be written or recorded in writing. It still remains uncertain in many jurisdictions whether this formal requirement would be fulfilled by electronic communications. At the stage of recognition and enforcement of an award, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) imposes a duty on contracting States to recognize an agreement in writing. Courts of some jurisdictions may refuse to recognize and enforce an award under the New York Convention where the award is based on an arbitration agreement concluded by electronic means. The New York Convention also requires that originals or certified copies of the arbitration agreement and the award be produced by the parties.

37. Some formal legal requirements may be in conflict with electronic forms but the approach to that matter is evolving. In that respect, it may be noted that UNCITRAL adopted at its thirty-ninth session, in 2006, a revision to article 7 on “definition and form of arbitration agreement” of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law on Arbitration”) whereby it offers to States wishing to enact legislation based on the Model Law on Arbitration two options. The first option follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the “contents” of the agreement “in any form” as equivalent to traditional “writing”. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule also modernizes the language referring to the use of electronic commerce by adopting wording inspired by the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts. It may be noted that the instruments adopted by UNCITRAL in the field of electronic commerce contain generic rules, designed to be applicable to both business-to-business and business-to-consumer environments. The second approach defines the arbitration agreement in a manner that omits any form requirement. The Commission also adopted, at its thirty-ninth session, in 2006, a “Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958”.⁴⁶ The Recommendation was drafted in recognition of the widening use of electronic commerce and enactments of domestic legislation as well as case law, which are more favourable than the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards. The Recommendation encourages States to apply article II (2) of the New York Convention “recognizing that the circumstances described therein are not exhaustive”.

⁴⁶ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17), Annex 2.*

38. Another matter that would require further analyses is the evidentiary weight accorded to an electronic document and whether an electronic communication has the same evidentiary weight as a paper record.

General remarks on business-to-consumer dispute settlement

39. Business-to-consumer disputes, when they are simple and factually straightforward, may be easily solved through automated and informal systems. Complex or high value disputes should comply with due process standards that might be more stringent than those applied in the context of international commercial arbitration. Due process in the context of online dispute resolution may entail proportionate fair hearing, reasons for decisions and transparency of the process. It remains uncertain whether there should be any form of judicial review. A balance therefore needs to be found between efficiency and fairness. In the context of online dispute resolution, arbitrators and institutions hosting such procedures should satisfy the requirements of independence and impartiality.

40. The question of the validity of an arbitration agreement would need to be carefully considered. In that regard, a variety of approaches have been adopted by jurisdictions when a consumer is a party to the agreement. In addition, the manner in which parties are brought to arbitrate a dispute may have an impact on the validity of an arbitration agreement, whether under national laws or, for instance, the New York Convention.

41. The commencement of arbitration would require specific rules, as under most online dispute resolution models there is an asymmetrical obligation and consumers retain the right to choose between arbitration and litigation.

42. The question of the determination of the place of arbitration, with all the legal consequences attached thereto, would require careful consideration and tailored solutions.

43. Awards in commercial arbitration are usually enforced under the New York Convention, which presupposes that the award is based on an enforceable arbitration agreement under the New York Convention. Legal enforcement under that regime might be costly and inappropriate for consumer disputes. This raises the question whether there would be a need for a specific instrument to deal with the issue of enforcement. It was also highlighted that the successful and sustained online dispute resolution programmes of the last decade have been those able to automatically enforce their outcomes; for instance, the Internet Corporation for Assigned Names and Numbers (ICANN) can unilaterally change domain name registries and PayPal can freeze funds and move them unilaterally to enforce claim decisions. The procedure of credit card charge back was also presented during the Colloquium. Credit card charge back is not a dispute resolution mechanism but in the consumer context, it tends to fulfil that function in an effective manner. Under that procedure, the credit card issuer allows the consumer to cancel the payment of a purchase price made using a credit card and acts as an adjudicator between the parties.

3. Challenges surrounding the creation of a global online dispute resolution system

44. Some of the challenges faced in designing a global online dispute resolution system are of a technical nature and relate to the ability to create (a) a system which is able to continue functioning effectively as the number of cases increases, and

(b) a central structure for data communication protocols that ensures that all the various endpoints of the network can communicate in real time with each other, despite existing differences in language and culture. Another key challenge for development of online dispute resolution is the absence of the online environment and infrastructure in certain countries.

45. Some of the challenges are of a legal nature, and relate to the difficulty of capturing a global definition of “consumer”, and of designing a global conciliation and arbitration system to deal specifically with online disputes, which would be fully compliant with due process requirements and able to provide fair results to all parties involved. A global online dispute resolution system should be developed based on general principles and generic rules of fairness and commercial practices that can be adapted to local needs. The regulatory frameworks for e-commerce vary among countries. In addition to differences in substantive law, countries have different approaches toward regulation.⁴⁷ This can have implications not only for businesses, but also for consumers — particularly those engaging in cross-border trade. Consumer rights and obligations, for example, vary considerably from one jurisdiction to another. Some countries use generic regulation, developed in other consumer protection contexts, to address e-commerce issues, while others have adopted regulation dealing specifically with e-commerce and consumers.

46. Other challenges are of a cultural and linguistic nature. Participants at the Colloquium said that locally culturally appropriate systems for solving disputes arising in the context of cross-border consumer transactions may be more appropriate than global solutions. Cultural and language barriers should be taken into account. Technology and online dispute resolution systems should be adapted to local conditions and cultures, and the nature and types of disputes prevailing in a given society should be given consideration. In that context, it was said that global solutions must develop incrementally, be supported by science and technology, and by an international legal framework.

47. To tackle these challenges, it was recommended that policy development for promoting online dispute resolution should take into account the following: treat as a priority education and awareness raising among merchants and consumers regarding the impact and increasing importance of online dispute resolution in resolving commercial disputes; ensure that national legislation recognizes the validity and enforceability of electronic transactions and facilitates the use of out-of-court dispute settlement schemes; enhance cooperation and exchange among ODR providers; promote voluntary adherence by e-business to reliability programs; and give sufficient attention to cultural and linguistic differences.

48. Further, it was emphasized that government regulation alone is not sufficient. It was recommended that business groups and civil society as well as governments come together to establish a consensual procedure. It was also recommended that the consensus-based system should be friendly to consumers, cost-effective to business and fair to consumers, and be consistent with local consumer protection mandates.

⁴⁷ OECD Conference Report, Empowering e-commerce consumers, December 8-10, 2009, DSTI/CP(2009)20/FINAL, para. 38.

49. The view was expressed that the flow of trade results in synergies between technologies, the stream of goods and services and payment channels being created, and that these developments justify the need for the kinds of rules necessary to support development of a global online dispute resolution system.

IV. Concluding remarks

50. The commonly shared view expressed during the Colloquium was that traditional judicial mechanisms for legal recourse do not offer an adequate solution for cross-border electronic commerce disputes, and that the solution — providing a quick resolution and enforcement of disputes across borders — lies in a global online dispute resolution system for small value, high volume business-to-business and business-to-consumer disputes. It was also underlined that electronic commerce cross-border disputes, which will form a significant proportion of complaints in the coming years, require tailored mechanisms that do not impose costs, delays and burdens that are disproportionate to the economic value at stake. It was acknowledged that many challenges face the creation of a system that would meet the needs of all parties involved, and take account of cultural, jurisdictional and linguistic differences.

51. Participants also noted that proposals for regional online dispute resolution systems were in the process of being developed, and it may therefore be timely to deal with the matter internationally from the outset in order to avoid development of inconsistent mechanisms. Many participants to the Colloquium expressed the view that an international phenomenon such as electronic commerce needs more than similar national frameworks; it calls for an international umbrella that can accommodate international electronic commerce. The goal of any work undertaken by UNCITRAL in this field should be to design generic rules which, consistent with the approach adopted in UNCITRAL instruments (such as the Model Law on Electronic Commerce), could apply in both business-to-business and business-to-consumer environments.

52. In view of the above recommendations, the Commission may wish to consider whether it would be timely for it to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.

D. Possible future work on insolvency law — Further proposal by the delegation of Switzerland for preparation by the UNCITRAL Secretariat of a study on the feasibility and possible scope of an instrument regarding the cross-border resolution of large and complex financial institutions
(A/CN.9/709)

[Original: English]

1. The financial crisis, in particular the insolvency of Lehman Brothers on 15 September 2008, has made it painfully clear that certain financial institutions are “too big” or “too interconnected to fail”. They cannot be wound down in an orderly fashion without exposing the financial system to unacceptably high risks. This state of play implies a great deal of moral hazard and imposes potentially huge costs on taxpayers. Establishing a legal framework which permits an orderly winding down of a large and complex financial institution without putting the stability of the financial system at large at risk therefore is a priority for Switzerland.
2. In the case of large and complex financial institutions (“LCFI”) with major cross-border activities, an orderly resolution cannot be achieved without coordination among relevant jurisdictions. In the absence of a coordinated approach, reorganization and/or liquidation measures will be of limited effect, resulting almost inevitably in a disorderly dismantling of the institution or the group. Coordination across borders, therefore, is a necessary, albeit not sufficient, condition for an orderly winding down of large and complex financial institutions with major cross-border activities.
3. The most efficient way to achieve coordination would be by concluding a multilateral international instrument on the recognition and enforcement of insolvency orders. This approach, which would require agreement on who has jurisdiction to resolve a LCFI, seems overly ambitious to achieve for the foreseeable future for a number of reasons, including the important public policy objectives at stake in such an instance and probably the need for an ex ante agreement on burden sharing. It is therefore necessary to explore other options to improve coordination, including coordination (i) through parallel proceedings in home and host states; (ii) by means of cross-border insolvency agreements, or (iii) by way of conflict-of-laws mechanisms.
4. The need for improved cross-border coordination of resolution proceedings has been acknowledged by leading international organizations and specialized bodies. In particular, Recommendation 4 of the Cross-border Bank Resolution Group (CBRG), a subcommittee of the Basel Committee on Bank Supervision, advocates that “further work toward more effective recognition of foreign crisis management and resolution proceedings should be undertaken at the bilateral, regional or international level”.¹ The CBRG specifically refers to the work undertaken by UNCITRAL regarding the treatment of domestic enterprise groups, suggesting that the relevant concepts developed in the Legislative Guide may provide guidance in view of the establishment of such a framework.

¹ See Report and recommendations of the Cross-border Bank Resolution Group — final paper (March 2010), www.bis.org/publ/bcbs169.htm (accessed May 18, 2010).

5. At the 38th session of Working Group V (Insolvency Law) (“Working Group”) the Swiss delegation submitted a proposal for a study on the feasibility of an international instrument regarding the cross-border resolution of large and complex financial institutions for consideration by the Working Group (A/CN.9/WG.V/WP.93/Add.5). During that session, some delegations, as well as certain observers, expressed reservations, arguing that matters relating to the insolvency of financial institutions did not fall into the core competencies of the Working Group and that similar work was being done by other bodies. Switzerland respectfully submits that (i) UNCITRAL is better suited than any other international organization to tackle this kind of issue and that (ii) no similar work has been or is currently being undertaken on the technical level envisaged by the Swiss proposal.

6. While it is correct that the insolvency of banks and other financial institutions has been excluded so far from the scope of insolvency-related work undertaken by UNCITRAL,² Switzerland maintains that UNCITRAL is better suited than any other organization to undertake the proposed study. First, a resolution is primarily a highly technical process requiring special skills and knowledge, whether or not the firm is a financial institution. Second, many tools used in national resolution regimes can also be found in corporate bankruptcy, like e.g., the transfer of assets to a new corporation or the conversion of debt into equity. Switzerland therefore is convinced that UNCITRAL is better suited than any other organization to undertake the proposed study. Also, no other international organization or body is currently undertaking work similar to the study proposed by Switzerland. While the issue is being discussed in many forums, none of these has actually tackled the task of exploring practical alternatives and avenues.

7. As exposed, we do not share the concern that the Working Group might not be the appropriate forum or might be unable to address the issues proposed. Nevertheless, we respect the views expressed within the Working Group that it may not be advisable to deal with these issues in the plenum and in the perspective of establishing normative provisions. At the same time, we acknowledge that considerable support was expressed by different delegations of the Working Group in respect of the possibility to assign the Secretariat with the task of a comprehensive report encompassing the issues raised by the Swiss proposal. Such a report could tackle any or all of the following issues:

- Identify the issues relevant for and particular to the winding down of large and complex financial institutions;
- Establish a comparative study of selected legal orders in respect of mechanisms to ensure cooperation across borders in the course of a winding down of large and complex financial institutions;
- Establish and summarize the work undertaken or being undertaken by other institutions, as well as the contents of any such work in this area;
- Identify areas and legal issues where the principles established in the 2004 UNCITRAL Legislative Guide on Insolvency Law and the 1997 UNCITRAL Model Law on Cross-Border Insolvency could or should be applied directly or by analogy;

² See Legislative Guide on Insolvency Law, p. 40 (2005); UNCITRAL Model Law on Cross-Border Insolvency, Art. 1(2) (1997).

- Identify possible alternative approaches for facilitating and ensuring cooperation across borders in the course of a winding down of large and complex financial institutions;
- Issue recommendations in respect of possible future work by UNCITRAL or other bodies as well as national legislators or regulating authorities in the fields identified.

8. The Swiss delegation was deeply impressed by the quality and efficiency the Secretariat showed when establishing the 2009 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. A document of comparable quality in the field of insolvency of financial institutions would be invaluable to legislators, regulators and practitioners.

9. Consequently, the Swiss delegation hereby submits a modified proposal that takes into account the valuable suggestions expressed by different delegations and the Secretariat itself. This new Swiss proposal suggests that the UNCITRAL Commission give a mandate to the Secretariat to establish a report on the feasibility and possible scope of an instrument regarding the cross-border resolution of large and complex financial institutions that would deal with the issues raised in the previous paragraph. Such a mandate would not interfere with any of the proposals submitted by other delegations for work to be carried out within the Working Group V in the course of its regular meetings. We further suggest that discretion be given to the Working Group, acting in cooperation with the Secretariat, to determine the content of such a report as well as the timelines and working methods used in its making. The report would ultimately be agreed upon by the Working Group and be submitted for approval to the UNCITRAL Commission.

**E. Possible future work on online dispute resolution in
cross-border electronic commerce transactions — Note
supporting the possible future work on online dispute resolution
by UNCITRAL, submitted by the Institute of International
Commercial Law
(A/CN.9/710)**

[Original: English]

I. Introduction

1. In preparation for the forty-third session of the Commission, the Institute of International Commercial Law submitted to the Secretariat a note in support of future work on online dispute resolution in cross-border electronic commerce transactions. The English version of that note was submitted to the Secretariat on 24 May 2010. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received.

Annex

Paper supporting the possible future work on online dispute resolution by UNCITRAL

Note submitted by the Institute of International Commercial Law (Pace Law School) and the following organizations and institutions:

American National Standards Institute; Cairo Regional Centre for International Commercial Arbitration, Egypt; Center for Transnational Law (CENTRAL), Cologne University, Germany; Center for International Legal Education, University of Pittsburgh; Chartered Institute of Arbitrators (Singapore) Limited; Committee on International Contract and Commercial Law, International Section of New York State Bar Association; Czech Arbitration Court; China Society of Private International Law; Construction Industry Arbitration Council (CIAC), India; Dispute Resolution Division, Council of Better Business Bureaus, Inc.; Egyptian ADR Association; European Legal Studies Institute, University of Osnabruck, Germany; Faculty of Law, Potchefstroom Campus, Northwest University, Potchefstroom, South Africa; Geneva Master in International Dispute Settlement, University of Geneva Law Faculty and Graduate Institute of International and Development Studies; Global Business Dialogue on e-Society; Hong Kong Internet Forum; Hong Kong Institute of Arbitrators (HKI Arb); Institute of Commercial Law, Penn State Dickinson School of Law; Institute of Computer and Communications Law, Centre for Commercial Law Studies, Queen Mary College, University of London; Institute of Law and Technology, Faculty of Law, Masaryk University, Czech Republic; Institute of International Law, Wuhan University, P.R.China; International Association for Commercial and Contract Management (IACCM); International Chamber of Commerce; International Institute for Conflict Prevention

& Resolution (CPR); International Law Department of China Foreign Affairs University; Internet Bar Organization; İstanbul Bilgi University Institute of ICT and Law, Turkey; Latin American E-commerce Institute; Law Department of the European University Institute; Mediators Beyond Borders; National Institute for Dispute Resolution and Technology; OECD — Committee on Consumer Policy Secretariat; ODR LatinoAmerica; School of International Arbitration, Centre for Commercial Law Studies, Queen Mary College, University of London; School of Law, City University of Hong Kong; and The Mediation Room.

I. Executive summary

The increase and indispensability of information and communications technology (ICT) in the developed and developing world represents significant opportunities for access to justice by buyers and sellers concluding cross-border commercial transactions via Internet and mobile platforms. In tandem with the sharp increase over the last two decades of commercial transactions concluded via the Internet (electronic commerce B2B, B2C, and C2C), there has been extensive discussion regarding the use of systems — either judicial or extrajudicial — to resolve the domestic and cross-border disputes which inevitably arise as part of the management of this type of commercial transaction. Online dispute resolution (ODR)¹ has emerged as a desirable option for the resolution of such disputes. In fact, for small-value, high-volume contracts concluded electronically it is acknowledged by industry and consumer groups that extra-judicial (ADR) procedures — particularly ODR — are desired for the fair and expeditious settlement of these disputes.²

The ODR discussion is not limited to small-value, high volume transactions, however, as government-sponsored and private-sector ODR systems have been

¹ “ODR is a collective noun for dispute resolution techniques outside the courts using [information and communications technology], and, in particular, Internet applications.” J. Hornle, *Cross-Border Internet Dispute Resolution*, p. 75 (2009).

² “Recourse to courts in disputes resulting from international Internet transactions is often complicated by the difficult questions of which law applies, and which authorities have jurisdiction over such disputes. Furthermore, international court proceedings can be expensive, often exceeding the value of the goods and services in dispute. If this were the only means to settle disputes, it would certainly not enhance consumer confidence in international electronic commerce and would strongly encourage merchants to restrict the geographic scope of their offers. This in turn would limit competition and consumer choice. An important catalyst for consumer confidence in electronic commerce is that Internet merchants offer their customers attractive extra-judicial procedures for settling disputes as an alternative to the cumbersome and expensive resorts to courts.” Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce, *Alternative Dispute Resolution Guidelines*, Global Business Dialogue on Electronic Commerce, p. 54-55 (GBDe) (November, 2003) (hereinafter “GBDe Agreement”). The GBDe Agreement reflects a ground-breaking consensus document between industry and consumers declaring the need for extra-judicial procedures for the settling of disputes for contracts concluded electronically, and outlining principles regarding the creation of such a system. See also Conference on Empowering E-Consumers: Strengthening Consumer Protection in the Internet Economy, Background Report, p. 35 (Washington D.C., December 8-10, 2009) (hereinafter “OECD Consumer Background Report”) (“Consumers should be provided with meaningful access to fair and timely alternative dispute resolution and redress without undue cost and burden”).

established over the last decade for B2B, B2C and C2C disputes of different shapes and sizes.³ Indeed, ODR has spawned its own culture and distinctiveness from normal ADR and litigation proceedings given the particularities and opportunities stemming from its online platform. Yet, even with these developments, it is clear that the efforts have remained disjointed, i.e., applying different standards of due process to participants, largely addressing only domestic online disputes, failing to offer effective enforcement mechanisms, and are often not readily apparent options to buyers compared to mainstream litigation and ADR. These shortcomings reflect some of the reasons why many buyers largely refrain from engaging in cross-border electronic and mobile commerce and why it is crucial that a global harmonizing instrument or set of principles be created in the near future to support online dispute resolution systems that can handle cross-border disputes across the commercial spectrum, including the potential millions of small-value B2B, B2C and C2C disputes that occur annually.

UNCITRAL is uniquely positioned to establish instruments or guidelines particularly suited for redress in the online commercial environment, reflecting the needs of the developed and developing world. This Note reflects on the consensus established by experts within the ODR community and enumerates guidelines for the development of harmonized rules and/or guidelines to support such ODR systems.⁴

II. A collaborative effort to create an integrated ODR system

It is essential that the gap in online cross-border redress is filled so that merchants and consumers have a viable option to resolve cross-border electronic commercial disputes. The current channels available — cumbersome and expensive resorts to courts or traditional international arbitration procedures established for more complex disputes — are not useful or necessarily needed for that vast majority of these cross-border disputes. Moreover, as the consumers' position as international traders is more firmly fixed in the global economy, the presence of an effective online dispute resolution system will be a significant factor encouraging consumer confidence in cross-border transactions, which benefits both merchants and consumers. A gateway to a collaborative effort to create an integrated system for ODR is open given the consensus of the experts within the ODR community:⁵

³ See Possible future work on online dispute resolution in cross-border electronic commerce transactions, Note by the Secretariat, A/CN.9/706.

⁴ We also support the recommendation of the Secretariat that “[t]he goal of any work undertaken by UNCITRAL in this field should be to design generic rules which, consistent with the approach adopted in UNCITRAL instruments (such as the Model Law on Electronic Commerce), could apply in both business-to-business and business-to-consumer environments.” Id. para. 51.

⁵ On March 29 and 30, 2010, UNCITRAL, the Pace Law School Institute of International Commercial Law, and Penn State Dickinson School of Law collaborated to present the colloquium, “A Fresh Look at Online Dispute Resolution and Global E-Commerce: Toward a Practical and Fair Redress System for the 21st Century Trader (Consumer and Merchant)” at the Vienna International Centre. Leading experts on ADR/ODR and electronic commerce from the government, private sector, academia, and the non-profit sector, representing all parts of the globe, engaged in a two-day intensive dialog to take this “fresh look” at the subject and came to

- The existence of a global redress system is essential to the continued success and growth of electronic commerce and mobile commerce in the developed and developing world;
- A global online dispute resolution system (ODR) would be a fair, attractive, and affordable redress system to both sellers and buyers and should inspire confidence in the ability of the system to economically, expeditiously, efficiently, fairly, and transparently resolve claims (both B2B and B2C);
- Intergovernmental organizations, the private sector, and non-profit organizations have acknowledged the need for ODR systems in this context and limited online redress systems have succeeded over the last decade, but no global standard set of rules or system has emerged from these efforts;
- Conservative estimates suggest millions of small value disputes (B2B and B2C) could be resolved via a global ODR system annually;
- General principles for the establishment of a fair and efficient global ODR system have achieved consensus amongst the various interested and impacted groups;
- Contrary to the tremendous growth in domestic electronic commerce in the last decade, there is a relative stagnation of growth in cross-border electronic commerce in the developed world due, in part, to a lack of regional and/or global redress system;
- Mobile telephony is experiencing exponential growth in developing countries and will have important and definite implications for doing business in the developing world;
- UNCITRAL could support the creation and functioning of a global ODR system by designing generic rules and/or principles which, consistent with the approach adopted in UNCITRAL instruments (such as the Model Law on Electronic Commerce), could apply in both B2B and B2C environments.⁶

III. The Guiding Principles for the Establishment of Rules and/or Principles to Support a Global Online Dispute Resolution Mechanism for Electronic and Mobile Transactions

Drawing on the lessons learned, systems established, models rules on e-commerce, and guidelines developed in the last two decades, principles have emerged to guide the development of legal instruments to support a global online dispute resolution system. These guidelines are not intended to exclude or trump other rules and/or principles to be incorporated into a B2B, B2C or C2C dispute resolution system.

the same conclusions as outlined in this Note. An oral podcast of the Colloquium and speaker presentations can be found at www.pace.edu/page.cfm?doc_id=35560.

⁶ The UNCITRAL Secretariat has also published a Note on online dispute resolution and the Colloquium. Note by the Secretariat, A/CN.9/706, Possible future work on online dispute resolution in cross-border electronic commerce transactions.

Guiding Principles Impacting the Creation of a Global Online Dispute Resolution Mechanism Common to Electronic and Mobile Commerce B2B, B2C and C2C Disputes:

Electronic commerce

- “[A]n increasing number of transactions in international trade are carried out by means of electronic data interchange and other means of communication, commonly referred to as “electronic commerce”, which involve the use of alternatives to paper-based methods of communication and storage of information”.⁷
- “[T]he increased use of electronic communications improves the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally”.⁸

Rules of procedure

- Sellers should provide access to buyers, so that they may choose to attempt resolution of the dispute directly with seller before resorting to any formal redress systems (e.g., “customer satisfaction systems”).⁹
- “[T]he adoption of uniform rules to remove obstacles to the use of electronic communications in international contracts, including obstacles that might result from the operation of existing international trade law instruments, would enhance legal certainty and commercial predictability for international contracts and help States gain access to modern trade routes.”¹⁰
- “[U]niform rules should respect the freedom of parties to choose appropriate media and technologies, taking account of the principles of technological neutrality and functional equivalence, to the extent that the means chosen by the parties comply with the purpose of the relevant rules of law.”¹¹
- ODR personnel and decision makers should be impartial, and should possess sufficient skills and training. Decision makers must disclose any potential conflicts and parties must have the opportunity to object to a decision maker within a reasonable time after the appointment of the decision maker.¹²

⁷ Model Law on Electronic Commerce with Guide to Enactment, Preamble (1996). Available at www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf.

⁸ United Nations Convention on the Use of Electronic Communications in International Contracts, Preamble (2005). Available at www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.

⁹ See GBDe Agreement, p. 56.

¹⁰ *Id.*

¹¹ *Id.*

¹² See GBDe Agreement, p. 57; see also ICDR Online Dispute Resolution Program for Manufacturer/Supplier Disputes.

- The ODR system should offer dispute resolution methods and remedies that are suitable to the nature of disputes that the system will accept.¹³
- ODR systems should be easily accessible, user-friendly, efficient, timely, transparent and low-cost to the consumer in case of B2C or C2C disputes.¹⁴
- With regard to B2C disputes, ADR dispute resolution officers may decide in equity and/or on the basis of codes of conduct, also taking into account the general principles common to the laws of the member state of the United Nations and usages which are widely known to, and regularly observed by, parties to contracts of the type involved in the particular transaction concerned. This flexibility as regards the grounds for ADR decisions provides an opportunity for the development of high standards of consumer protection worldwide.¹⁵
- Rules or general principles created to support a global ODR system should not create obstacles for the innovative use of technology.¹⁶
- “ADR providers should refer disputes to the relevant law enforcement authorities, with the [buyer’s] permission, when they have reason to believe that there may be fraud, deceit or patterns of abuse on the part of the Internet merchant. In such cases, the merchant should be informed that such action has been taken.”¹⁷

Information to be provided

- Potential buyers should be fully informed about the conditions of access to the ODR system at the time the transaction is concluded (including, costs, type of ODR, i.e., negotiation, mediation, arbitration or other).¹⁸
- Sellers should provide buyers with information regarding ODR providers to which a claim can be filed (e.g., via reference to a code of conduct, trustmark or in the general sales conditions).

ODR providers

- ODR providers should be accredited by third-party accreditation associations or national consumer agencies applying a universal set of criteria.
- There should be close cooperation between the public and private sector to achieve a satisfactory global ODR system, particularly regarding enforcement of decisions rendered by the ODR providers.¹⁹
- ODR providers should provide sellers and buyers with sufficient information to allow an informed choice about participating in ODR, including the methods of dispute resolution used; the scope of the provider’s authority; any

¹³ ISO 10003:2007, Quality management — Customer satisfaction — Guidelines for dispute resolution external to organizations, Annex E.

¹⁴ See GBDe Agreement, p. 57-58; see also OECD Consumer Background Report, p. 35.

¹⁵ See generally GBDe Agreement, p. 59.

¹⁶ Id.; OECD Consumer Background Report, p. 36.

¹⁷ See GBDe Agreement, p. 59.

¹⁸ Id, p. 57.

¹⁹ Id., p. 61; OECD Consumer Background Report, p. 35-36.

fees the parties will have to pay; available remedies; the criteria against which the dispute will be evaluated (e.g., codes of conduct, legal principles, equity); significant differences from court procedures; a statement of the precise dispute or type(s) of dispute to which the consent to participate applies; how to access the process and how to obtain a copy of the applicable dispute resolution procedures; expected time frames for the completion of each different method; and whether the complainant will be giving up the right to go to court if not satisfied with the resolution.²⁰

²⁰ ISO 10003:2007, Quality management — Customer satisfaction — Guidelines for dispute resolution external to organizations, Annex C.

VI. CASE LAW ON UNCITRAL TEXTS (CLOUT)

The secretariat of the United Nations Commission on International Trade Law (UNCITRAL) continues to publish court decisions and arbitral awards that are relevant to the interpretation or application of a text resulting from the work of UNCITRAL. For a description of CLOUT (Case Law on UNCITRAL Texts), see the user's guide (A/CN.9/SER.C/GUIDE/1/Rev.2), published in 2000 and available on the Internet at www.uncitral.org.

A/CN.9/SER.C/ABSTRACTS may be obtained from the UNCITRAL secretariat at the following address:

UNCITRAL secretariat
P.O. Box 500
Vienna International Centre
A-1400 Vienna
Austria

Telephone (+43-1) 26060-4060 or 4061
Telefax: (+43-1) 26060-5813
E-mail: uncitral@uncitral.org

They may also be accessed through the UNCITRAL homepage on the Internet at www.uncitral.org.

Copies of complete texts of court-decisions and arbitral awards, in the original language, reported on in the context of CLOUT are available from the secretariat upon request.

VII. TECHNICAL ASSISTANCE TO LAW REFORM

Note by the Secretariat on technical cooperation and assistance (A/CN.9/695 and Add.1)

[Original: English]

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I. Introduction

1. The United Nations Commission on International Trade Law (UNCITRAL) plays an important role in developing the legal framework for international trade and investment through its mandate to prepare and promote the use and adoption of legislative and non-legislative instruments in a number of key areas of trade law,

including: sales; dispute resolution; government contracting; banking and payments; security interests; insolvency; transport; and electronic commerce. Those instruments are widely accepted, offering solutions appropriate to different legal traditions and to countries at different stages of economic development and include:

(a) In the area of sale of goods, the United Nations Convention on Contracts for the International Sale of Goods (CISG)¹ and the United Nations Convention on the Limitation Period in the International Sale of Goods (the Limitation Convention);²

(b) In the area of dispute resolution, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards³ (the New York Convention, a United Nations convention adopted prior to the establishment of the Commission, but actively promoted by the Commission, which was recently recognized by the General Assembly as the forum where interpretation should be discussed),⁴ the UNCITRAL Arbitration Rules,⁵ the UNCITRAL Conciliation Rules,⁶ the UNCITRAL Model Law on International Commercial Arbitration and revised articles,⁷ the UNCITRAL Notes on Organizing Arbitral Proceedings⁸ and the UNCITRAL Model Law on International Commercial Conciliation;⁹

(c) In the area of government contracting, the UNCITRAL Model Law on Procurement of Goods, Construction and Services,¹⁰ the UNCITRAL Legislative

¹ 11 April 1980, United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3; United Nations publication, Sales No. E.95.V.12; *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; UNCITRAL *Yearbook*, 1974, part three, annex I, sect. B and *Yearbook* 1980, part three, annex I, sect. C.

² United Nations, *Treaty Series*, vol. 1511, No. 26119 and No. 26121; pp. 77 and 99; *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; UNCITRAL *Yearbook* 1974, part three, annex I, sect. B and *Yearbook* 1980, part three, annex I, sect. C.

³ United Nations, *Treaty Series*, vol. 330, No. 4739.

⁴ *New York, 18 December 2006, General Assembly Resolution A/RES/61/33.*

⁵ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, para. 57; UNCITRAL *Yearbook* 1976, part one, chap. II, sect. A.

⁶ United Nations publication, Sales No. E.81.V.6; *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, chap. V, sect. A, para. 106; UNCITRAL *Yearbook* 1980, part three, chap. II.

⁷ *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I; UNCITRAL *Yearbook* 1985, part three, chap. I; *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I.

⁸ UNCITRAL *Yearbook* 1996, part three, annex II.

⁹ United Nations publication, Sales No. E.05.V.4; *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*, annex I; UNCITRAL *Yearbook* 2002, part three.

¹⁰ United Nations publication, Sales No. E.98.V.13; *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17 and Corr.1)*, annex I; UNCITRAL *Yearbook* 1994, part three, annexes I and II.

Guide on Privately Financed Infrastructure Projects¹¹ and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects;¹²

(d) In the area of banking and payments, the United Nations Convention on International Bills of Exchange and International Promissory Notes,¹³ the UNCITRAL Model Law on International Credit Transfers,¹⁴ and the United Nations Convention on Independent Guarantees and Standby Letters of Credit;¹⁵

(e) In the area of security interests, the United Nations Convention on the Assignment of Receivables in International Trade¹⁶ and the UNCITRAL Legislative Guide on Secured Transactions;¹⁷

(f) In the area of insolvency, the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI),¹⁸ the UNCITRAL Legislative Guide on Insolvency Law¹⁹ and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation;²⁰

(g) In the area of transport, the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules),²¹ the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade,²² and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules);²³ and

¹¹ United Nations publication, Sales No. E.01.V.4; A/CN.9/SER.B/4.

¹² United Nations publication, Sales No. E.04.V.11; *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, annex I.

¹³ United Nations publication, Sales No. E.95.V.16; General Assembly resolution A/RES/43/165, annex; UNCITRAL *Yearbook* 1988, part three, annex I.

¹⁴ United Nations publication, Sales No. E.99.V.11; *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, annex I; UNCITRAL *Yearbook* 1992, part III, annex I.

¹⁵ New York, 11 December 1995, United Nations, *Treaty Series*, vol. 2169, No. 38030, p. 163; United Nations publication, Sales No. E.97.V.12; *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)*, annex I.

¹⁶ United Nations publication, Sales No. E.04.V.14; General Assembly resolution A/56/81, annex; UNCITRAL *Yearbook* 2002, part three.

¹⁷ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17 Part II)*, para. 99.

¹⁸ United Nations publication, Sales No. E.99.V.3; *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17 (A/52/17)*, annex I; UNCITRAL *Yearbook* 1997, part three, annex I.

¹⁹ United Nations publication, Sales No. E.05.V.10; *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 55.

²⁰ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 24.

²¹ Hamburg, 31 March 1978, United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3; United Nations publication, Sales No. E.95.V.14; *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; UNCITRAL *Yearbook*, 1978, part three, annex I, sect. B.

²² United Nations publication, Sales No. E.95.V.15; *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; A/CONF.152/13, annex; UNCITRAL *Yearbook*, 1992, part three, annex I.

²³ New York, 11 December 2008, United Nations publication, Sales No. E.09.V.9; General Assembly Resolution A/RES/63/122, annex.

(h) In the area of electronic commerce, the UNCITRAL Model Law on Electronic Commerce (MLEC),²⁴ the UNCITRAL Model Law on Electronic Signatures (MLES)²⁵ and the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC).²⁶

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),²⁷ and are particularly useful for developing countries and economies in transition lacking capacity in the areas of trade law covered by the work of UNCITRAL. Since trade law reform, based on harmonized international instruments, has a clear impact on the ability to participate in international trade, the Secretariat's technical cooperation and assistance work aimed at promoting use and adoption of texts can facilitate economic development.

3. The status of adoption of treaties and enactment of model laws is regularly updated and available on the UNCITRAL website. It is also available in the annual report to the Commission entitled "Status of conventions and model laws", which highlights new treaty actions and enactments of model laws.

4. In its resolution 64/111 of 15 January 2010, the General Assembly reaffirmed the importance, in particular for developing countries and economies in transition, of the technical cooperation and assistance work of the Commission in the field of international trade law and reiterated its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission. The General Assembly also stressed the importance of bringing into effect the conventions emanating from the work of the Commission to further the progressive harmonization and unification of private international law, and to this end urged States that have not yet done so to consider signing, ratifying or acceding to those conventions.

5. This note sets out the technical cooperation and assistance activities of the Secretariat subsequent to the date of the previous note submitted to the Commission at its forty-first session in 2009 (A/CN.9/675 of 20 April 2009), and reports on the development of resources to assist technical cooperation and assistance activities. For a specific report in respect of Transport law, see A/CN.9/695/Add.1.

²⁴ United Nations publication, Sales No. E.99.V.4; *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I; UNCITRAL Yearbook, 1996, part three, annex I.

²⁵ United Nations publication, Sales No. E.02.V.8; *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr. 3), annex II.

²⁶ New York, 23 November 2005, United Nations publication, Sales No. E.07.V.2.; General Assembly resolution A/ RES/60/21, annex.

²⁷ *Official Records of the General Assembly, Forty-second Session, Supplement No. 17* (A/42/17), para. 335.

II. Technical cooperation and assistance activities

6. Technical cooperation and assistance activities undertaken by the UNCITRAL Secretariat promote the adoption of UNCITRAL legislative texts and include providing advice to States considering signature, ratification or accession to UNCITRAL conventions, adoption of an UNCITRAL model law or use of an UNCITRAL legislative guide. They also support implementation of these texts and their uniform interpretation. Technical cooperation and assistance may involve: undertaking briefing missions and participating in seminars and conferences, organized at both regional and national levels, on UNCITRAL texts; assisting countries to review existing legislation and assess their need for law reform in the trade field; assisting with the drafting of national legislation to implement UNCITRAL texts; assisting multilateral and bilateral development agencies to use UNCITRAL texts in their law reform activities and projects; providing advice and assistance to international and other organizations, such as professional associations, organizations of attorneys, chambers of commerce and arbitration centres, on the use of UNCITRAL texts; and organizing training activities to facilitate the implementation and interpretation of legislation based on UNCITRAL texts by judiciaries and legal practitioners.

7. Of the activities included below, those denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

A. Activities addressing multiple topics

1. Regional activities

8. A number of technical cooperation and assistance activities undertaken since the last report covered several of the topic areas noted in paragraph 1 above. These included:

(a) As set forth in the previous note submitted to the Commission on technical cooperation and assistance (A/CN.9/675, para. 8(d)), the Secretariat has provided regular advice to the sub-project Regional Implementation of the Convention on International Sale of Goods and International Commercial Arbitration, a component of the Project Open Regional Fund for South-East Europe — Legal Reform, implemented by the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ). In 2009, activities associated with the project included presentation of UNCITRAL work and technical assistance programme at a round table (Sarajevo, 13 June 2009), participation in a meeting and discussion of the achievements and future activities of the Open Regional Fund Legal Reform Project in the Balkans (Belgrade, 1-3 December 2009) and participating at the Belgrade Arbitration Conference held in conjunction with the Pre-moot (organized as part of the preparation for the XVII Willem C. Vis International Commercial Arbitration Moot in Vienna) and in conjunction with GTZ (Belgrade, 19-21 March 2010);

(b) Participating in the *I Seminario sobre Nociones Actuales del Derecho Comercial Internacional en el contexto de un mundo globalizado* to discuss CISG, arbitration and e-commerce, co-organized by UNCITRAL and the *Centro de Exportación e Inversión de República Dominicana (CEI-RD)* (Santo Domingo, 27-30 January 2010); and

(c) Participating in the Round Table on the EU Green Paper concerning the Union for the Mediterranean (Paris, 29 June-1 July 2009).

2. Country-specific activities

9. At the country level, the Secretariat participated in the following technical cooperation and assistance-related activities covering several of the topics noted in paragraph 1 above:

(a) A seminar on UNCITRAL methods of work and texts on CISG and E-commerce, in cooperation with the local GTZ office and on the occasion of the accession of Armenia to the CISG and of its membership of UNCITRAL (Yerevan, 14-17 June 2009);*

(b) A Round Table organized by UNIDO on Legislative Assessment for the Development of the Private Sector in Iraq, United Nations Private Sector Development Programme for Iraq (Vienna, 17-19 August, 2009); and

(c) As a follow up to the project aimed at assessing and reforming the international trade law framework in Madagascar and building related capacity, a workshop on CISG and arbitration at the *Ecole Nationale de la Magistrature* and seminars on CISG and arbitration with stakeholders, as well as discussions on preparation of e-commerce legislation (Antananarivo, 23-29 November, 2009).*

3. Briefings for Permanent Missions in Vienna

10. The Secretariat provided a briefing on UNCITRAL and its working methods at the Orientation Seminar for Members of Permanent Missions Accredited to the International Organizations in Vienna organized by the United Nations Institute for Training and Research (UNITAR) at the United Nations Office at Vienna on 23 March 2010. Briefings on various working group topics are regularly being offered in Vienna by the Secretariat.

4. Other activities addressing multiple topics

11. These activities included:

(a) In the framework of the Joint ITC-ILO University of Turin UNCITRAL MSc Programme on Public Procurement for Sustainable Development, conducted at the ITC-ILO in Turin and jointly managed by UNCITRAL, participating in the meeting of the Scientific Committee of the MSc and represented UNCITRAL at the official opening of the course, as well as providing lectures on (a) the UNCITRAL Public Procurement Model Law (Turin, Italy, 2-4 September 2009 and 2-3 March 2010); (b) international sale of goods (21-23 October 2009) and (c) electronic commerce (10-11 December 2009);

(b) Attending the opening session of the “International Trade Law Post-Graduate Course” and delivering a lecture on “Issues of harmonization of laws on international trade from the perspective of UNCITRAL: the past and the current work” (Turin, Italy, 23-24 March 2010);

(c) Upon invitation by the Center for Asian Legal Exchange (CALE) of the University of Nagoya, participating in discussions on joint technical assistance

activities relating to trade law reform in Asia and delivering lectures on trade law reform and on the CISG (Nagoya, Japan, 14-18 March 2010); and

(d) Participating in the 2009 Alliance for Financial Inclusion (AFI) Global Policy Forum to assess possible future UNCITRAL work related to microfinance and to payments effected with mobile devices (Nairobi, 14-20 September 2009).*

B. Sale of goods

12. The Secretariat has been active in promoting adoption and uniform interpretation of the CISG, at the regional level, as well as through Permanent Missions to the United Nations in Vienna, Geneva and New York and directly with relevant officials in the capitals. As part of these activities, the Secretariat participated in:

(a) A conference on the CISG co-hosted with the Vice Minister of Economy of Albania to celebrate Albania's ratification of the CISG and a training session on the CISG at the Judicial Training Centre (Tirana, 11-13 May 2009);

(b) A seminar on the CISG hosted by the Brazilian branch of the International Law Association (ILA-Brasil) (Rio de Janeiro, 23-30 June 2009);

(c) The International Conference on CISG, Universidad de Rioja (Logroño, Spain, 4-7 November 2009); and

(d) Represented UNCITRAL in a CISG Seminar in Jakarta co-organized by Unidroit (Jakarta, 18-20 November 2009).

C. Procurement

13. In accordance with requests of Working Group I (Procurement), the Secretariat has established links with other organizations interested in procurement to foster cooperation, particularly with regard to UNCITRAL's work on revising the UNCITRAL Model Law on Procurement of Goods, Construction and Services, as well as undertaking activities to promote knowledge and acceptance of the Model Law at both regional and national levels.²⁸ The Secretariat participated in the following regional activities:

(a) An expert group meeting on procurement with an emphasis on alternative procurement methods, socioeconomic criteria, remedies, frameworks and Electronic Reverse Auctions (ERAs) involving participants from the African region (Nairobi, 29 September-1 October, 2009);

(b) The Electronic Government Procurement (eGP) Conference, at the invitation of the African Development Bank, Asian Development Bank, Inter-American Development Bank and the World Bank, presented and moderated a Round Table on Regulatory Framework for eGP (Washington DC, 8-14 November 2009);

²⁸ See documents A/CN.9/575, paras. 52 and 67, and A/CN.9/615, para. 14.

(c) A high-level forum on public procurement in Africa, hosted by the African Development Bank and all major agencies in Africa active in procurement law reform and harmonization (Tunis, 16-17 November 2009); and

(d) A meeting of the MDB e-GP Working Group on upgrading of substantive and technical skills held at the African Development Bank (Tunis, 1-4 June 2009).

14. Other activities included participation at the following activities:

(a) A meeting on Promoting Capacity-Building in PPPs organized by the PPP Forum in cooperation with the UNECE Team of Specialists on Public-Private Partnerships (London, 12-15 September 2009);

(b) A WTO workshop on the WTO Agreement on Government Procurement (GPA) (Geneva, 11-12 February 2010); and

(c) The Annual Chiefs of Procurement Conference (for UN and related agencies) and the World Bank Fiduciary Forum on public procurement (New York/Washington DC, 1-5 March 2010).

15. The Secretariat also provides regular briefings to UNODC country offices staff on the implementation of the procurement-related aspects of the United Nations Convention against Corruption using the UNCITRAL Model Law on Procurement as implementing legislation (see below, III. Coordination activities).

D. Dispute resolution

16. 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 events included:

(a) Participating at the 5th Advanced Training Course on Managing Investment Disputes for Latin American countries, jointly organized by UNCTAD and OAS (Santiago de Chile, 12-14 November 2009);*

(b) Taking part in a round table of European experts on arbitration and a representative of the EU Commission to discuss the Green Paper issued by the EU Commission on 21/4/2009 on a revision of Council Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgements in civil and commercial matters; the purpose of the round table was to exchange views on the proposal to include arbitration in the scope of a revised Regulation (Brussels, 29 June 2010); and

(c) Participating in a colloquium organized by *le Conseil national des Barreaux, le Barreau de Paris, la Conférence des Bâtonniers, la Délégation des Barreaux de France, la Chambre nationale des Huissiers de justice ainsi que l'Ordre des avocats au Conseil d'Etat et à la Cour de Cassation*, with the support of the French Ministry of Justice, on a proposal to set up a regional agreement for the promotion of investments and a system of arbitration for the Union for the Mediterranean (Paris, 30 June-1 July 2009).

17. Other activities included:

(a) Giving a presentation at the General Assembly of the Centre Belge d'arbitrage et de médiation (CEPANI) (Brussels, 11-12 June 2009);

(b) Participating in an Experts Meeting on the Vietnamese Draft Commercial Arbitration Law, Hanoi, involving participants from Government, national and international experts and local practitioners (Hanoi, 22-26 September 2009);

(c) Participating at the National Symposium on Trade Law hosted by the Liberian Commercial Law Reform Program National Steering Committee with the goal of providing support to the Liberian Government in its ongoing efforts regarding the Commercial Law Reform Program. Emphasis was given to the UNCITRAL Model Law on International Commercial Arbitration (Monrovia, 28 September-3 October 2009);*

(d) Giving a presentation at a conference on arbitration agreements entered into by public entities at the invitation of the French *Conseil d'État* and holding consultations with various French public authorities (Paris, 29 September-2 October 2009);

(e) Giving a presentation at the conference "Conciliation in civil and commercial law", to assist the Government of Italy to adopt a new law on conciliation consistent with UNCITRAL Model Law and EU Directive on Mediation (Rome, 22 October 2009);

(f) Participating in the seminar "The New York, European and Panama Conventions: Do They Have a Future?", organized by the University of Miami, School of Law and lecturing on the work of UNCITRAL in the area of international arbitration, concerning in particular the New York Convention (Miami, USA, 30 October-2 November 2009);

(g) Lecturing on the New York Convention and UNCITRAL texts on arbitration in the context of a workshop organized by US Department of Commerce for high-level Iraqi officials (Paris, 18-19 November 2009); and

(h) Giving a presentation at the Workshop on Arbitration and Mediation of Intellectual Property Disputes in Guangzhou, jointly organized by UNCITRAL, UNCTAD, WIPO and CITYU and hosted by The Intellectual Property Office of Guangdong Province (Guangzhou, China, 22-25 November 2009).

18. The Secretariat collaborated with a number of arbitral institutions and organizations, including participating as a speaker at the Singapore International Arbitration Forum, at the invitation of the Singapore International Arbitration Centre (Singapore, 18-23 January 2010).

E. Electronic commerce

19. The Secretariat has participated in joint activities with national governments and agencies to promote UNCITRAL legislative texts on electronic commerce, as well as regional activities.

20. At the regional level, this included:

(a) Representing UNCITRAL at the 1st session of the Committee on Development Information Science and Technology (CODIST-I) on Scientific Development, Innovation and the Knowledge Economy (Addis Ababa, 27 April-1 May 2009);

(b) In the context of cooperation with UNCTAD and the East African Community (EAC) to prepare EC legislation for EAC Member States, participating in a workshop on legal aspects of electronic commerce organized by the Second Vice-Presidency of the Republic of Burundi (Bujumbura, 20-25 September 2009);*

(c) Pursuant to a partnership agreement concluded with the secretariat of EurAsEC to cooperate on the drafting of model legislation in the field of electronic commerce, for adoption by the 6 Member States of EurAsEC, participating in a joint session of the IPA EurAsEC standing committees on trade matters and international cooperation and on custom regulation and border policy (Minsk, 13-16 October 2009) and in a workshop on e-commerce legislation organized by UNECE and EurAsEC (St. Petersburg, Russia, 19-20 November 2009);

(d) Representing UNCITRAL at the *Conference francophone regionale sur le droit des technologies de l'information et de la communication* (Hanoi, 18-19 November 2009); and

(e) Participating at the conference “e-transactions Security - the Public Key Infrastructure (PKI)” organized by the Arab Information and Communication Technologies Organization (AICTO) Working Group on electronic certification and cyber-security (Tunis, 25-27 January 2010).

21. Other activities included:

(a) Participating in a conference to promote the adoption of the Electronic Communications Convention by Korea hosted by KITLA and the Korean Ministry of Justice and gathering information on the legal aspects of the use of electronic single window and of electronic documents of title in Korea through bilateral meetings with Korean institutions active in the field of e-commerce (Seoul, 9-13 November 2009);

(b) Participating at the Legal Focus Group of the IT-PGRFA (FAO) (Rome, 27 October 2009); and

(c) Representing UNCITRAL and presenting a paper at the Conference for the 30th anniversary of the Research Centre on IT and Law (CRID) of the University of Namur (Namur, Belgium, 20-22 January 2010).

F. Insolvency

22. The Secretariat has promoted the use and adoption of insolvency texts, particularly the Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law, through participation in various international forums. Regional activities included:

(a) Presenting a paper on UNCITRAL's insolvency work at the Seminar on Global Financial Crises and Insolvency Laws and Creditor Rights Systems Reforms

organized by the Abu Dhabi Chamber of Commerce, Hawkamah Institute for Corporate Governance, INSOL, World Bank and the OECD (Abu Dhabi, 26-27 May 2009);*

(b) Organizing and speaking at the 8th Multinational Judicial Colloquium, organized jointly by UNCITRAL, INSOL and the World Bank (Vancouver, Canada, 20-23 June 2009);*

(c) Participating at the INSOL Regional Insolvency Conference, Dubai, UAE, attending a round table involving practitioners and officials from the African region to discuss insolvency law and reform and the possibility of convening a forum on those issues in Africa and speaking at the first meeting of the Forum on Insolvency Reform in MENA (FIRM), (Dubai, UAE, 21-23 February 2010); and

(d) Participating at the 7th Forum on Asian Insolvency Reform (FAIR) Conference to discuss the UNCITRAL Legislative Guide on Insolvency Law and its application in the context of the insolvency of small and medium enterprises (Delhi, 8-9 April 2010).

23. Country-specific activities included:

(a) Participating in a round table with the Indian Ministry of Corporate Affairs on insolvency law reform, including on cross-border insolvency and the UNCITRAL Model Law, organized in conjunction with INSOL (Delhi, 27-28 April 2009);

(b) Participating at the Judicial Symposium 2009, International Trends in Business Insolvency Procedures, at the invitation of the Supreme Court of Korea, a conference organized to mark the 60th anniversary of the Supreme Court of Korea and attending a meeting of the Supreme Court Insolvency Group to discuss cross-border insolvency (Seoul, 22-27 September 2009);

(c) Participating in a round table on insolvency law reform, organized by the Government of Ukraine, and the Investment Climate Advisory Services of the World Bank Group, involving discussion of the use of the UNCITRAL Legislative Guide on Insolvency Law (Kiev, 15-17 December 2009);

(d) Participating at New Zealand's 9th Annual Insolvency Conference to present a session on developments in cross-border insolvency, including finalization of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (Auckland, 4-5 March 2010); and

(e) Participating in a judicial training program on insolvency law, including cross-border insolvency, conducted for judges of the High Court, District Court, senior Government law officers and officers from the Delhi Judicial Academy (Delhi, 10 April 2010).

G. Security interests

24. The Secretariat participated in a number of activities to disseminate information on the United Nations Convention on the Assignment of Receivables in International Trade, the UNCITRAL Legislative Guide on Secured Transactions and the draft Supplement to the Guide dealing with security rights in intellectual

property, currently being prepared by Working Group VI (Security interests). These included:

(a) Chairing a session of the Subcommittee of Enforcement and Creditor's Rights of the Section on Insolvency, Restructuring and Creditors' Rights on construction industry insolvencies at the annual International Bar Association Conference (Madrid, 7 October 2009);

(b) Delivering a presentation at a seminar on intellectual property (IP) rights and the UNCITRAL secured transaction project on the new rules and the consequences for British lenders and IP owners and managers (London, 13-15 October 2009); and

(c) Speaking on security interests at a time of financial crisis at the Greek Commercial Law Association Conference (Heraklion, Greece, 22-26 October 2009).

H. Assistance with legislative drafting

25. Comments were also provided on various draft laws, including:

(a) A 2009 revision of the Serbian bankruptcy law, which includes provisions enacting the UNCITRAL Model Law on Cross-Border Insolvency (May 2009);

(b) In the context of cooperation with UNCTAD and the East African Community (EAC) to prepare EC legislation for EAC Member States (see above, E. Electronic commerce), reviewing legislation of Uganda on electronic transactions and e-signatures (June 2009);

(c) A revised version of the OHADA Uniform Securities Act, in cooperation with the Investment Climate Advisory Service (FIAS) of the World Bank Group with a view to ensuring consistency with the UNCITRAL Legislative Guide on Secured Transactions (September 2009);

(d) Commercial arbitration-related clauses in the draft commercial code of Liberia based on the UNCITRAL Model Law on International Commercial Arbitration (October 2009);

(e) A revision of the arbitration law of Viet Nam, in cooperation with the *Maison du droit Vietnam-française* (October 2009-April 2010);

(f) The Draft Public Contracts Law for Iraq, at the request of UNIDO (November-December 2009);

(g) A draft arbitration law for Malawi (December 2009);

(h) Draft Mediation Rules in the context of court annexed mediation in Papua New Guinea (December 2009), at the request of the IFC;

(i) A draft law on mediation for Serbia, at the request of the IFC (January 2010);

(j) A draft arbitration law for Ethiopia at the request of the IFC (January 2010); and

(k) A draft law on mediation for Macedonia, at the request of the IFC (April 2010).

III. Coordination activities

26. In accordance with its mandate,²⁹ the UNCITRAL Secretariat participates in a number of the working groups and meetings of other organizations active in the field of international trade law to facilitate coordination of the work being undertaken.

1. International Institute for the Unification of Private Law (Unidroit)

27. The Secretariat participated in the following meetings of Unidroit:

(a) The 88th session of the Governing Council of Unidroit (Rome, 20-23 April 2009); and

(b) The Diplomatic Conference for the adoption of the draft Unidroit Convention on Substantive Rules Regarding Intermediated Securities (Geneva, Switzerland, 5-9 October 2009).

2. Hague Conference on Private International Law

28. The Secretariat participated at the Working Group on Choice of Law in International Contracts (The Hague, 20-22 January, 2010); and

29. The Secretariat also attended the tripartite meeting between UNCITRAL, Unidroit and the Hague Conference (Rome, 8-9 June 2009). Further to previous meetings held among the secretariats of the Hague Conference on Private International Law, Unidroit and UNCITRAL, a paper dealing with the interrelationship among the texts on security interests by those organizations is being prepared to assist States considering the implementation of those texts.

3. Other organizations

30. Other coordination activities undertaken by the Secretariat have included providing comments on documents drafted by other Organizations and participation and, in some cases, presentations on the work of UNCITRAL at various meetings:

(a) General

The World Legal Forum, to deliver presentations on international financial dispute resolution and private international regulation and public supervision (The Hague, 7-8 December 2009).

(b) Procurement

The Electronic Government Procurement (eGP) Conference, at the invitation by the African Development Bank, Asian Development Bank, Inter-American Development Bank and the World Bank, to present and moderate a Round Table on Regulatory Framework for eGP and participate in informal consultations on the

²⁹ General Assembly resolution 2205 (XXI), sect. II, para. 8.

draft revised UNCITRAL Model Law on Procurement (Washington, DC, 8-14 November 2009).

(c) Electronic commerce

(i) The first meeting of the WCO-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window to study the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document on legal aspects of creating and managing a single window (Brussels, 8-11 February 2010); and

(ii) Provided comments on UN/CEFACT draft recommendation 35 on cross-border electronic single window facilities (March 2010).

(d) Security interests

(i) At the request of FIAS, provided comments on the World Bank Toolkit on Secured Transactions (September 2009);

(ii) The Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) organized by the Organization of the American States (OAS) adopting the OAS Model Registry Regulations under the Model Inter-American Law on Secured Transactions (Washington, DC, 7-9 October 2009); and

(iii) The Third International Colloquium on Secured Transactions to discuss possible future work in the area of security interests provided an opportunity to ensure effective coordination with relevant international organizations, including Unidroit, the World Bank and WIPO (Vienna, 1-3 March 2010).

(e) Commercial fraud

At the request of DTA/UNODC and in the context of UNCITRAL cooperation with UNODC on issues of commercial fraud and corruption, participated in the workshop on “use of legal persons by criminal organizations as means to legally own proceeds from offences committed by the latter” (16 November 2009, Palermo, Italy).

IV. Dissemination of information

31. 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. Website

32. The website, available in the six official languages of the United Nations, provides access to full-text UNCITRAL documentation and other materials relating to the work of UNCITRAL, such as publications, treaty status information, press releases, latest events and news. Most official documents are provided via linking to

the Official Document System (ODS), whereas some older documents are available directly from the UNCITRAL website. The website is maintained and developed at no additional cost to the Secretariat.

33. During 2009, the UNCITRAL website had over one million visits from various parts of the world. Approximately 60 per cent of the traffic is directed to pages in English, 25 per cent to pages in French and Spanish, and the remaining 15 per cent to pages in Arabic, Chinese and Russian.

34. The content of the website is updated and expanded on an ongoing basis. In particular, UNCITRAL official documents relating to earlier Commission sessions are continuously uploaded in the ODS and made available on the website under a project on digitization of UNCITRAL archives conducted jointly with the UNOV Documents Management Unit in Vienna. In 2009, about 120 additional official documents from 1985 were made available on the UNCITRAL website.

35. In addition, in 2010, the new interface design of the Case Law on UNCITRAL Texts (CLOUT) abstract and the UNCITRAL Digest of case law on the United Nations Convention on the International Sales of Goods (2008 revision) have been implemented in view of accommodating and enhancing visibility, efficiency and usability of CLOUT.

B. Library

36. Since its establishment in 1979, the UNCITRAL Law Library has been serving research needs of Secretariat staff and participants in intergovernmental meetings convened by UNCITRAL. It has also provided research assistance to staff of Permanent Missions, other Vienna-based international organizations, external researchers and law students.

37. The collection of the UNCITRAL Law Library focuses primarily on international trade law and currently holds over 10,000 monographs, 150 active journal titles, legal and general reference material, including non-UNCITRAL United Nations documents, and documents of other international organizations; and electronic resources (restricted to in-house use only). Particular attention is given to expanding the holdings in all of the six United Nations official languages.

38. 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.

39. The UNCITRAL Law Library staff prepares for the Commission an annual Bibliography of writings related to the work of UNCITRAL. The bibliography includes references to books, articles and dissertations in a variety of languages, classified according to subject (see document A/CN.9/693). Individual records of the Bibliography are entered into the OPAC, and the full-text collection of all cited materials is maintained in the Library collection. Monthly updates from the date of

the latest annual Bibliography are featured in the bibliography section of the UNCITRAL website.³⁰

40. In 2009, an advanced version of the consolidated bibliography of writings related to the work of UNCITRAL was made available on the UNCITRAL website.³¹ The consolidated bibliography aims to compile all entries of the bibliographical reports submitted annually to the Commission since 1968. It currently contains over 3,500 entries, reproduced in the English and the original language versions, verified and standardized to the extent possible. The final version of the consolidated bibliography will be made available as an official UNCITRAL publication.

C. Publications

41. In addition to official documents, UNCITRAL traditionally maintains two series of publications, which include the texts of all instruments developed by the Commission and the *UNCITRAL Yearbook*. Publications are regularly provided to support technical cooperation and assistance activities undertaken by the Secretariat, as well as by other organizations where the work of UNCITRAL is discussed, and in the context of national law reform efforts.

42. The official text of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) was published in 2009. The *Yearbook* for 2005 was submitted for publication in 2009 and it is anticipated that the *Yearbooks* for 2006 and 2007 will be submitted prior to the forty-fourth session. The UNCITRAL Legislative Guide on Secured Transactions, the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation and the collection of UNCITRAL legal texts on CD-ROM will be published in 2010.

D. Press releases

43. To improve the availability of up-to-date information on the status and development of UNCITRAL texts, efforts have been made to ensure that press releases are issued when treaty actions are taken or information is received on the adoption of a model law. Those press releases are provided to interested parties by e-mail and are posted on the UNCITRAL website, as well as on the website of the United Nations Information Service (UNIS) in Vienna.

44. To improve the accuracy and timeliness of information received with respect to adoption of UNCITRAL model laws since such adoption does not require a formal action with the United Nations Secretariat such as is required with respect to treaties, and to facilitate the issue of press releases, the Commission may wish to request Member States to advise the Secretariat when enacting legislation to implement a model law.

³⁰ www.uncitral.org/uncitral/en/publications/bibliography_monthly.html.

³¹ www.uncitral.org/uncitral/en/publications/bibliography_consolidated.html.

E. General enquiries

45. 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.

F. Information lectures in Vienna

46. 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, USA, Germany and Korea, associations of law students and to officials of the ILO.

V. Resources and funding

A. UNCITRAL Trust Fund for symposia

47. In the period under review, contributions were received from Cameroon and Singapore, to whom the Commission may wish to express its appreciation.

48. The costs of technical cooperation and assistance activities are not covered by the regular budget. The ability of the Secretariat to implement the technical cooperation and assistance component of the UNCITRAL work programme is therefore contingent upon the availability of extra-budgetary funding.

49. The UNCITRAL Trust Fund for symposia supports technical cooperation and assistance activities for the members of the legal community in developing countries, funding the participation of UNCITRAL staff or other experts at seminars where UNCITRAL texts are presented for examination and possible adoption and fact-finding missions for law reform assessments in order to review existing domestic legislation and assess country needs for law reform in the commercial field.

50. The Commission may wish to note that, in spite of efforts by the Secretariat to solicit new donations, funds remaining in the Trust Fund will be sufficient only for a very small number of technical cooperation and assistance activities on an ongoing basis. Some funds remain available despite the projected expenditure for 2009 as efforts have been made to organize the requested technical cooperation and assistance activities at the lowest possible cost and with co-funding and cost sharing whenever possible. Once exhausted, requests for technical cooperation and assistance involving the expenditure of funds for travel or to meet other associated costs will have to be declined unless new donations to the Trust Fund are received or other alternative sources of funds can be found.

51. The Commission may once again wish to appeal to all States, relevant United Nations Agencies and bodies, international organizations and other interested entities to make contributions to the Trust Fund, if possible in the form of multi-year contributions, so as to facilitate planning and to enable the Secretariat to meet the

demand for technical cooperation and assistance activities and to develop a more sustained and sustainable technical assistance programme. The Commission may also wish to request Member States to assist the Secretariat to identify sources of funding within their Governments.

B. UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL

52. In the period under review, no contributions for this trust fund were received.

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.

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.

A/CN.9/695/Add.1 (Original: English)**Note by the Secretariat on technical cooperation and assistance****ADDENDUM****Transport law****CONTENTS**

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I. Introduction

1. This note by the Secretariat should be read in conjunction with A/CN.9/695, outlining the general technical cooperation and assistance activities of the secretariat of the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Convention on contracts for the international carriage of goods wholly or partly by sea, known as the “Rotterdam Rules”,¹ was adopted by the United Nations General Assembly in December 2008.² Further to that resolution of the General Assembly, the Convention was opened for signature on 23 September 2009. As the most recently adopted UNCITRAL convention, and in keeping with General Assembly Resolution 64/111 of 15 January 2010 which reaffirmed the importance of bringing into effect the conventions emanating from the work of the Commission, the Rotterdam Rules have been the focus of particular technical cooperation and assistance efforts by the Secretariat during the past year. This note is intended to provide the Commission with greater detail on those efforts. Activities that are denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

II. Technical cooperation and assistance activities**1. The signing ceremony and colloquium**

2. Coordination with the hosts of the signing ceremony allowed the Secretariat to play a planning role in all aspects of the event, including the planning of the Dutch host’s website; documentation, accreditation and registration procedures; and the planning and preparation of the press strategy and press background materials.

3. Prior to the signing ceremony, an international colloquium on the Convention was held from 21-22 September in Rotterdam under the auspices of UNCITRAL and

¹ New York, 11 December 2008, General Assembly Resolution A/RES/63/122, annex.

² UNGA Resolution 63/122.

the *Comité Maritime International* (CMI). The Secretariat participated in the planning of the programme for the colloquium, ensuring full coverage of the main issues arising under the Rotterdam Rules, as well as ensuring that speakers represented appropriate geographic and legal diversity. Papers were presented by some of the world's leading experts in the area of maritime transport, and through the efforts of the Secretariat and others, they were made available to the public online immediately following the event.³

4. The signing ceremony for the Rotterdam Rules was successful, with 16 countries signing the Convention on the first day it was opened for signature, the highest number of opening day signatures for a convention negotiated under the auspices of UNCITRAL. The original signatories were: Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States of America. At the date of this note, the Convention has been signed by 21 States representing over 25 per cent of world trade volume.⁴

2. Country-specific activities

5. A large number of country-specific activities were conducted by the Secretariat, including: general communication and outreach regarding the Convention and signing ceremony, responding to inquiries regarding participation and attendance at the signing ceremony, answering general questions about the text, and responding to more specific, detailed inquiries regarding the Rotterdam Rules.

3. Regional activities

6. In order to achieve the greatest possible impact in terms of breadth of coverage and cost-effectiveness, the Secretariat took mainly a regional approach in its initial efforts at promoting the Rotterdam Rules. Since certain geographical areas were not as regularly and actively represented in the Working Group on Transport Law as others, the UNCITRAL secretariat focused on organizing and participating in events in those regions that may have had more limited exposure to the Convention.

Events planned by other organizations

7. In some cases, the Secretariat took part in events planned by other organizations in order to raise general awareness concerning the Convention, to provide an update on the latest developments, to coordinate with other organizations active in transport matters and to answer any questions. Examples of those types of activities include:

(a) An international congress regarding the Rotterdam Rules organized by the Carlos III University (Madrid, 17-18 September 2009) conducted in English, Spanish and French, focused mainly on Spanish-speaking countries and Africa;

(b) An expert meeting of the International Symposium on Maritime Transport and the Maritime Economy in countries in West and Central Africa,

³ See www.rotterdamrules2009.com/cms/index.php?page=text-speakers-rotterdam-rules-2009 (last checked on the date of submission of this Note).

⁴ According to information obtained from the United Nations 2008 International Merchandise Trade Statistics Yearbook.

organized in conjunction with the Maritime Organisation of West and Central Africa (Cotonou, Benin, 28 September-2 October 2009);

(c) The 2nd Session of the African Union Conference of Ministers responsible for Maritime Transport (Durban, South Africa, 12-16 October 2009), where interest was shown in particular by Government officials from States that have not yet signed the Convention, nor participated in the negotiations, including Burundi, Somalia and Cape Verde;

(d) The 7th International Conference on Maritime Law of the China Maritime Law Association partially showcasing the Rotterdam Rules (Shanghai, China, 13-15 November 2009); and

(e) The 18th Economic and Environmental Forum of the Organization for Security and Co-operation in Europe, "Promoting good governance at border crossings, improving the security of land transportation and facilitating international transport by road and rail in the OSCE region" (Vienna, 1-2 February 2010).

8. Future events of this type to which the Secretariat will send representation are:

(a) An international conference, "The Rotterdam Rules: The Maritime Transport Law for the 21st Century?" (Marseille, France, 20-21 May 2010), sponsored by the Mediterranean Institute of Maritime Transport and the Maritime Law and Transport Centre;

(b) An international conference on the Rotterdam Rules at Koç University (Istanbul, Turkey, 6-7 May 2010); and

(c) Part 2 of the 18th Economic And Environmental Forum of the Organization for Security and Co-operation in Europe, "Promoting good governance at border crossings, improving the security of land transportation and facilitating international transport by road and rail in the OSCE region" (Prague, 24-26 May 2010).

9. General awareness-raising has also been accomplished through providing background materials and presentations on the Rotterdam Rules to speakers participating on behalf of UNCITRAL at events on other topics (participation in a seminar for government officials co-organized by Unidroit in Jakarta, Indonesia, 18-20 November 2009), or in transport-specific events (meeting of the Slovenian Maritime Law Association, Slovenia, 5 March 2010).

10. When it was not feasible to send a representative of UNCITRAL to a particular meeting or conference, the Secretariat has arranged for there to be appropriate representation in support of the Rotterdam Rules (for example, at the 22 June 2010 meeting of the European Shippers' Council in Antwerp, or prior to and during the meeting of the International Chamber of Commerce Committee on Maritime Transport at which it considered its official position on the Rotterdam Rules, 27 May 2009).

Events designed by, or in coordination with, the Secretariat

11. In some regional activities, the Secretariat went beyond general awareness-raising, and designed a programme with local partners that focused on issues of concern to the region and to the expected participants. The Secretariat also secured appropriate speakers for the event, gave presentations and updated the audience on

the latest developments, answering any questions and providing backgrounders for appropriate media coverage. These events were as follows:

(a) The 3rd Arab Conference for Commercial and Maritime Law, “Rotterdam Rules 2009: Uniformity versus Diversity of the Law of Carriage of Goods by Sea (Alexandria, Egypt, 17-19 April 2009) in cooperation with the Arab Society for Commercial and Maritime Law, the Arab Academy for Science, Technology and Maritime Transport and the CMI;

(b) International Seminar for West and Central Africa on “The Rotterdam Rules: What contribution for Africa?” (Yaoundé, Cameroon, 18-19 March 2010),* under the patronage of the Prime Minister and in cooperation with the Cameroon National Shippers’ Council, the Union of African Shippers’ Councils and the CMI, which saw participation from an estimated 15 States from the region;

(c) Lecturing at a special event organized in conjunction with the industry-oriented Shanghai International Shipping Institute (Shanghai, China, 16 November 2009); and

(d) Arranging appropriate UNCITRAL participation in the Arab League Workshop on the Rotterdam Rules (Alexandria, Egypt, 2-3 February 2010).

4. Future regional events

12. Future regional events are planned in order to allow the Secretariat to reach out to additional geographical areas where no events have yet been held. Regions for which such events are currently in the planning stages are South America, the Persian Gulf States, West Africa, Central America, OSCE Participating States,⁵ and Eastern and Southern Africa.

III. Coordination activities

13. In performing its activities, the UNCITRAL Secretariat has also consulted and cooperated with a broad range of interested parties, including Governments, international governmental organizations, non-governmental organizations, industry representatives and academics. The following is a list of some of those coordination activities:

(a) The Secretariat gave a presentation on the Convention and participated in a meeting of the United Nations Economic Commission for Europe Working Party on Intermodal Transport and Logistics (Geneva, Switzerland, 12-13 October 2009) in the context of that body’s consideration of the desirability of a European multimodal transport instrument;

(b) The Secretariat sent copies of the text of the Rotterdam Rules and an explanatory letter to be distributed by the United Nations Economic and Social

* Participation of one member of the Secretariat funded by the UNCITRAL Trust Fund for Symposia.

⁵ Ten of the 56 OSCE Participating States have already signed the Rotterdam Rules (Armenia, Denmark, France, Greece, The Netherlands, Norway, Poland, Spain, Switzerland and the United States of America), and the Secretariat has been invited to prepare a project proposal for a future seminar on the Rotterdam Rules for all OSCE Participating States.

Commission for Asia and the Pacific to participants in its Forum for Asian Ministers of Transport (Bangkok, Thailand, 14-18 December 2009);

(c) The Secretariat has assisted Bimco (the Baltic and International Maritime Council) in its efforts to contact decision makers in key States of its global membership (Belgium, China, Cyprus, Denmark, France, Germany, Greece, India, Italy, Japan, the Republic of Korea, the Netherlands, Norway, the Russian Federation, Singapore, Sweden, Switzerland, Turkey, the United Arab Emirates, the United Kingdom and the United States of America) to encourage them to sign and ratify the Rotterdam Rules in a timely fashion;

(d) As noted (see paras. 3, 11 and 14), the Secretariat has planned and engaged in several events in coordination with the CMI and expects to continue to do so in the future; and

(e) The Secretariat has coordinated with the International Institute for the Unification of Private Law (Unidroit) in the promotion of the Convention through the publication of a special volume of Unidroit's Uniform Law Review devoted to articles on the Rotterdam Rules.⁶

IV. Dissemination of information

1. Website

14. As the Commission noted at its last session,⁷ in light of the rapidly growing body of information and views being published in respect of the Rotterdam Rules, the UNCITRAL website has expanded its web page on the Convention to include a selection of materials, including podcasts, and links to other relevant websites with information on the Convention. The Secretariat has continued to add to those resources, and they now include a link to the collection of papers delivered at the colloquium that preceded the signing ceremony, and a link to a detailed question and answer document dealing with specific concerns raised regarding the Convention, as drafted by the CMI in conjunction with the Secretariat.

2. Publications

15. The Secretariat has prepared a number of publications of various types in order to promote the Rotterdam Rules. In addition to the numerous papers and presentations prepared for the conferences noted above, a chapter of a forthcoming book and a list of articles written and published by the Secretariat in magazines and legal journals may be found in A/CN.9.693. In addition, following the conclusion of the forty-second session of the Commission in 2009, the text of the Rotterdam Rules itself was published in time for its circulation at the signing ceremony on 23 September 2009.

⁶ Uniform Law Review, NS — Vol. XIV, 2009-4.

⁷ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 325.

3. Press releases

16. The Secretariat has used press releases as a tool in its technical cooperation and assistance activities in respect of the Rotterdam Rules. In addition to preparing the press strategy, backgrounders and press releases for the colloquium and signing ceremony for the Convention in coordination with the Dutch hosts of the event and the United Nations Information Service,⁸ the Secretariat has sought to use public information to maintain momentum for signatures and other treaty actions in respect of the Rotterdam Rules. For example, the Secretariat prepared a press release to mark the occasion of the 20th signature of the Convention.⁹ In addition, the Secretariat has arranged for certain important press releases in respect of the Convention to be translated into languages other than English in order to reach a broader audience. Further, the UNCITRAL secretariat has arranged for other key events marking the progress of the Convention toward entry into force to be publicly flagged through press releases, for example, the information that the Alexandria Declaration, which arose from the Arab League Workshop on the Rotterdam Rules (see para. 11 (d) above), recommended that Arab League countries should jointly sign the Convention¹⁰ was picked up by several major news outlets.¹¹

17. The Secretariat has also used other means of communication in its outreach activities in respect of the Rotterdam Rules. Several podcasts are available on the Rotterdam Rules page of the UNCITRAL website, including a general overview of the Convention, as well as a post-signing ceremony discussion.¹² Further, the Secretariat coordinated with the European Company Lawyers' Association to record a podcast to explain the Rotterdam Rules in broad terms.

⁸ See, for example, Media Advisory UNIS/L/132, 18 September 2009 (www.unis.unvienna.org/unis/pressrels/2009/unisl132.html), Fact Sheet UNIS/L/131, 18 September 2009, and www.rotterdamrules2009.com/cms/index.php?page=press (last visited on the date of submission of this Note).

⁹ "Rotterdam Rules Gain Momentum as 20th State Signs", UNIS/L/133, 23 October 2009, www.unis.unvienna.org/unis/pressrels/2009/unisl133.html.

¹⁰ www.uncitral.org/pdf/english/news/ArabPressReleaseRR.pdf (last visited on the date of submission of this Note).

¹¹ See, for example, Lloyd's List, 5 February 2010, or www.lloydslist.com/ll/news/arab-league-states-urged-to-sign-rotterdam-rules/1265284130439.htm?jsessionid=F6ABB8CD907A88B4171EA9DD8BC55BC6.5d25bd3d240cca6cbbee6afc8c3b5655190f397f (last visited on the date of submission of this Note).

¹² www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html (last visited on the date of submission of this Note).

VIII. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

Status of conventions and model laws (A/CN.9/694)

[Original: English]

1. At its thirteenth session, in 1980, the United Nations Commission on International Trade Law (UNCITRAL) decided¹ that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.
2. The present note sets forth the status of the conventions and model laws emanating from the work of the Commission. It also shows the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,² which, although adopted prior to the establishment of the Commission, is closely related to the work of the Commission in the area of international commercial arbitration.
3. This note indicates the changes since 14 May 2009, when the last annual report in this series (A/CN.9/674) was issued. The information contained herein is current up to 26 May 2010. Information on the status of conventions and model laws is regularly updated on the UNCITRAL website (www.uncitral.org). Authoritative information on the status of the treaties deposited with the Secretary-General of the United Nations may be obtained by contacting the Treaty Section of the Office of Legal Affairs of the United Nations (tel.: (+1-212) 963-5047; fax: (+1-212) 963-3693; e-mail: treaty@un.org; website: <http://treaties.un.org>).
4. This note covers the following texts, incorporating as indicated new treaty actions (the term “action” is used generically to denote the deposit of an instrument of ratification, approval, acceptance or accession in respect of a treaty, or participation in a treaty as a result of an action to a related treaty, or the withdrawal or modification of a declaration or of a reservation) and enactments of Model Laws based on information received since the last report:
5. (a) [Unamended] Convention on the Limitation Period in the International Sale of Goods, 1974 (New York)³ (28 States parties);
6. (b) Convention on the Limitation Period in the International Sale of Goods, as amended, 1980 (New York)⁴ (20 States parties);
7. (c) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)⁵ (34 States parties);

¹ *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 163.

² United Nations, *Treaty Series*, vol. 330, No. 4739.

³ *Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I.

⁴ United Nations publication, Sales No. E.95.V.13.

8. (d) United Nations Convention on Contracts for the International Sale of Goods, 1980 (Vienna).⁶ New action by Albania (ratification); 74 States parties;
9. (e) United Nations Convention on International Bills of Exchange and International Promissory Notes, 1988 (New York)⁷ (The Convention has five States parties; it requires ten States parties for entry into force);
10. (f) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, 1991 (Vienna)⁸ (The Convention has four States parties; it requires five States parties for entry into force);
11. (g) United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 1995 (New York)⁹ (8 States parties);
12. (h) United Nations Convention on the Assignment of Receivables in International Trade, 2001 (New York)¹⁰ (The Convention has one State party; it requires five States parties for entry into force);
13. (i) United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (New York)¹¹ (The Convention requires three States parties for entry into force);
14. (j) United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (Rotterdam).¹² New actions by Armenia, Cameroon, Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Madagascar, Mali, Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and United States of America (signatures). The Convention requires 20 States parties for entry into force;
15. (k) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York).¹³ New action by The former Yugoslav Republic of Macedonia (withdrawal of reservation); 144 States parties;
16. (l) UNCITRAL Model Law on International Commercial Arbitration (1985),¹⁴ with amendments as adopted in 2006¹⁵ (new legislation based on the Model Law has been adopted in Honduras (2000); new legislation based on the Model Law as amended in 2006, has been adopted in Ireland (2010), Rwanda (2008) and, in the United States of America, in the State of Florida (2010));
17. (m) UNCITRAL Model Law on International Credit Transfers (1992);¹⁶

⁵ United Nations publication, Sales No. E.95.V.14.

⁶ United Nations publication, Sales No. E.95.V.12.

⁷ United Nations publication, Sales No. E.95.V.16.

⁸ *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.

⁹ United Nations publication, Sales No. E.97.V.12.

¹⁰ United Nations publication, Sales No. E.04.V.14.

¹¹ United Nations publication, Sales No. E.07.V.2.

¹² United Nations publication, Sales No. E.09.V.9.

¹³ United Nations, *Treaty Series*, vol. 330, No. 4739.

¹⁴ United Nations publication, Sales No. E.95.V.18.

¹⁵ United Nations publication, Sales No. E.08.V.4.

¹⁶ United Nations publication, Sales No. E.99.V.11.

18. (n) UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)¹⁷ (new legislation based on the Model Law has been adopted in Armenia (2005) and Georgia (1999));
19. (o) UNCITRAL Model Law on Electronic Commerce (1996)¹⁸ (new legislation based on the Model Law has been adopted in Iran (Islamic Republic of) (2004) and Jamaica (2006);
20. (p) UNCITRAL Model Law on Cross-Border Insolvency (1997)¹⁹ (new legislation based on the Model Law has been adopted in Canada (2009) and Mauritius (2009));
21. (q) UNCITRAL Model Law on Electronic Signatures (2001)²⁰ (new legislation based on the Model Law has been adopted in Jamaica (2006); legislation influenced by the principles on which the Model Law is based has been adopted in India (2009));
22. (r) UNCITRAL Model Law on International Commercial Conciliation (2002)²¹ (new legislation based on the Model Law has been adopted in Albania (2003), Honduras (2000), and, in the United States of America, in the States of Vermont, Idaho, South Dakota and Utah, and in the District of Columbia).

I. Participation in conventions

A. Convention on the Limitation Period in the International Sale of Goods, 1974 (New York)^a

<i>State^b</i>	<i>Signature</i>	<i>Ratification, accession, succession or participation under article XI of the Protocol of 11 April 1980^c</i>	<i>Entry into force</i>
Argentina		9 October 1981 ^d	1 August 1988
Belarus	14 June 1974	23 January 1997 ^e	1 August 1997
Belgium		1 August 2008 ^d	1 March 2009
Bosnia and Herzegovina		12 January 1994 ^f	6 March 1992
Brazil	14 June 1974		
Bulgaria	24 February 1975		
Burundi		4 September 1998 ^d	1 April 1999
Costa Rica	30 August 1974		
Cuba		2 November 1994 ^e	1 June 1995
Czech Republic ^g		30 September 1993 ^f	1 January 1993
Dominican Republic		23 December 1977 ^d	1 August 1988
Egypt		6 December 1982 ^e	1 August 1988
Ghana	5 December 1974	7 October 1975	1 August 1988
Guinea		23 January 1991 ^d	1 August 1991

¹⁷ United Nations publication, Sales No. E.98.V.13.

¹⁸ United Nations publication, Sales No. E.99.V.4.

¹⁹ United Nations publication, Sales No. E.99.V.3.

²⁰ United Nations publication, Sales No. E.02.V.8.

²¹ United Nations publication, Sales No. E.05.V.4.

<i>State^b</i>	<i>Signature</i>	<i>Ratification, accession, succession or participation under article XI of the Protocol of 11 April 1980^c</i>	<i>Entry into force</i>
Hungary	14 June 1974	16 June 1983	1 August 1988
Liberia		16 September 2005 ^d	1 April 2006
Mexico		21 January 1988 ^d	1 August 1988
Moldova		28 August 1997 ^e	1 March 1998
Mongolia	14 June 1974		
Montenegro		23 October 2006 ^f	3 June 2006
Nicaragua	13 May 1975		
Norway ^h	11 December 1975	20 March 1980	1 August 1988
Paraguay		18 August 2003 ^d	1 March 2004
Poland	14 June 1974	19 May 1995	1 December 1995
Romania		23 April 1992 ^d	1 November 1992
Russian Federation ⁱ	14 June 1974		
Serbia ^j		12 March 2001 ^f	27 April 1992
Slovakia ^g		28 May 1993 ^f	1 January 1993
Slovenia		2 August 1995 ^e	1 March 1996
Uganda		12 February 1992 ^d	1 September 1992
Ukraine	14 June 1974	13 September 1993	1 April 1994
United States of America		5 May 1994 ^d	1 December 1994
Uruguay		1 April 1997 ^d	1 November 1997
Zambia		6 June 1986 ^e	1 August 1988

Parties: 28

^a The Convention was concluded in equally authentic Chinese, English, French, Russian and Spanish texts. On 11 August 1992, the Secretary-General, in accordance with a request of UNCITRAL, circulated a proposal for the adoption of an authentic Arabic text of the Convention. No objections having been raised, the Arabic text was deemed adopted on 9 November 1992 with the same status as that of the other authentic texts referred to in the Convention.

^b The Convention was signed by the former German Democratic Republic on 14 June 1974 and ratified by it on 31 August 1989 and entered into force on 1 March 1990.

^c In accordance with article XI of the Protocol, the contracting parties to the amended Convention are considered to be also contracting parties to the unamended Convention in relation to any contracting party to the unamended Convention not yet a contracting party to the 1980 Protocol, unless the depositary is notified to the contrary.

^d Accession.

^e Participation.

^f Succession.

^g The former Czechoslovakia signed the Convention on 29 August 1975 and deposited an instrument of ratification on 26 May 1977, with the Convention entering into force for the former Czechoslovakia on 1 August 1988. On 28 May and 30 September 1993, respectively, Slovakia and the Czech Republic deposited instruments of succession with effect from 1 January 1993, the date of succession of both States.

^h Declarations and reservations. Upon signature, Norway declared, and confirmed upon ratification, that, in accordance with article 34, the Convention would not govern contracts of sale where the seller and the buyer both had their relevant places of business within the territories of the Nordic States (i.e. Denmark, Finland, Iceland, Norway and Sweden).

ⁱ The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as

from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and the multilateral treaties deposited with the Secretary-General.

^j The former Yugoslavia acceded to the Convention on 27 November 1978. On 12 March 2001, the former Federal Republic of Yugoslavia declared the following:

“The Government of the Federal Republic of Yugoslavia, having considered [the Convention], succeeds to the same and undertakes faithfully to perform and carry out the stipulations therein contained as from April 27, 1992, the date upon which the Federal Republic of Yugoslavia assumed responsibility for its international relations.”

B. Convention on the Limitation Period in the International Sale of Goods, as amended, 1980 (New York)^a

<i>State^b</i>	<i>Accession, succession or participation under article VIII or X^c of the Protocol of 11 April 1980^d</i>	<i>Entry into force</i>
Argentina	19 July 1983 ^e	1 August 1988
Belarus	23 January 1997 ^e	1 August 1997
Belgium	1 August 2008 ^e	1 March 2009
Cuba	2 November 1994 ^e	1 June 1995
Czech Republic ^{f, g}	30 September 1993 ^h	1 January 1993
Egypt	6 December 1982 ^e	1 August 1988
Guinea	23 January 1991 ^e	1 August 1991
Hungary	16 June 1983 ^e	1 August 1988
Liberia	16 September 2005 ⁱ	1 April 2006
Mexico	21 January 1988 ^e	1 August 1988
Moldova	28 August 1997 ^e	1 March 1998
Paraguay	18 August 2003 ^e	1 March 2004
Poland	19 May 1995 ⁱ	1 December 1995
Romania	23 April 1992 ⁱ	1 November 1992
Slovakia ^f	28 May 1993 ^h	1 January 1993
Slovenia	2 August 1995 ⁱ	1 March 1996
Uganda	12 February 1992 ⁱ	1 September 1992
United States of America ^g	5 May 1994 ⁱ	1 December 1994
Uruguay	1 April 1997 ⁱ	1 November 1997
Zambia	6 June 1986 ^e	1 August 1988

Parties: 20

^a The text of the Convention, as amended, has been established by the Secretary-General, as provided for by article XIV of the Protocol.

^b The German Democratic Republic was a participant by virtue of its accession on 31 August 1989 to the Protocol of 11 April 1980.

^c In accordance with its article VIII, paragraph 1, the Protocol is open for accession by all States.

In accordance with article VIII, paragraph 2, of the Protocol, accession to the Protocol by any State that is not a contracting party to the unamended Convention shall have the effect of accession to the amended Convention, subject to the provisions of article XI of the Protocol. In accordance with article X of the Protocol, ratification of or accession to the unamended Convention after the entry into force of the Protocol shall also constitute a ratification of or accession to the amended Convention if the State notifies the depositary accordingly.

^d For information on which States listed above are parties to the 1980 amending Protocol, contact the Treaty Section, which performs the functions of the depositary in respect of the Protocol (see para. 4 above).

^e Accession.

^f Czechoslovakia was a participant to the Convention and the Protocol by virtue of its accession to the Protocol on 5 March 1990.

^g Declarations and reservations. Upon accession, Czechoslovakia and the United States of America declared that, pursuant to article XII, they did not consider themselves bound by article I.

^h Succession.

ⁱ Participation.

C. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)

<i>State</i>	<i>Signature or succession</i>	<i>Ratification, accession or succession</i>	<i>Entry into force</i>
Albania		20 July 2006 ^a	1 August 2007
Austria	30 April 1979	29 July 1993	1 August 1994
Barbados		2 February 1981 ^a	1 November 1992
Botswana		16 February 1988 ^a	1 November 1992
Brazil	31 March 1978		
Burkina Faso		14 August 1989 ^a	1 November 1992
Burundi		4 September 1998 ^a	1 October 1999
Cameroon		21 October 1993 ^a	1 November 1994
Chile	31 March 1978	9 July 1982	1 November 1992
Czech Republic ^{b, c}	2 June 1993 ^d	23 June 1995	1 July 1996
Democratic Republic of the Congo	19 April 1979		
Denmark	18 April 1979		
Dominican Republic		28 September 2007 ^a	1 October 2008
Ecuador	31 March 1978		
Egypt	31 March 1978	23 April 1979	1 November 1992
Finland	18 April 1979		
France	18 April 1979		
Gambia		7 February 1996 ^a	1 March 1997
Georgia		21 March 1996 ^a	1 April 1997
Germany	31 March 1978		
Ghana	31 March 1978		
Guinea		23 January 1991 ^a	1 November 1992
Holy See	31 March 1978		
Hungary	23 April 1979	5 July 1984	1 November 1992
Jordan		10 May 2001 ^a	1 June 2002
Kazakhstan		18 June 2008 ^a	1 July 2009
Kenya		31 July 1989 ^a	1 November 1992
Lebanon		4 April 1983 ^a	1 November 1992
Lesotho		26 October 1989 ^a	1 November 1992
Liberia		16 September 2005 ^a	1 October 2006
Madagascar	31 March 1978		

<i>State</i>	<i>Signature or succession</i>	<i>Ratification, accession or succession</i>	<i>Entry into force</i>
Malawi		18 March 1991 ^a	1 November 1992
Mexico	31 March 1978		
Morocco		12 June 1981 ^a	1 November 1992
Nigeria		7 November 1988 ^a	1 November 1992
Norway	18 April 1979		
Pakistan	8 March 1979		
Panama	31 March 1978		
Paraguay		19 July 2005 ^a	1 August 2006
Philippines	14 June 1978		
Portugal	31 March 1978		
Romania		7 January 1982 ^a	1 November 1992
Saint Vincent and the Grenadines		12 September 2000 ^a	1 October 2001
Senegal	31 March 1978	17 March 1986	1 November 1992
Sierra Leone	15 August 1978	7 October 1988	1 November 1992
Singapore	31 March 1978		
Slovakia ^b	28 May 1993 ^d		
Sweden	18 April 1979		
Syrian Arab Republic		16 October 2002 ^a	17 October 2003
Tunisia		15 September 1980 ^a	1 November 1992
Uganda		6 July 1979 ^a	1 November 1992
United Republic of Tanzania		24 July 1979 ^a	1 November 1992
United States of America	30 April 1979		
Venezuela (Bolivarian Republic of)	31 March 1978		
Zambia		7 October 1991 ^a	1 November 1992

Parties: 34

^a Accession.

^b The former Czechoslovakia signed the Convention on 6 March 1979. Upon signature, the former Czechoslovakia declared in accordance with article 26 the formula for converting the amounts of liability referred to in paragraph 2 of that article into the Czechoslovak currency and the amount of the limits of liability to be applied in the territory of Czechoslovakia as expressed in the Czechoslovak currency.

On 28 May and on 2 June 1993, respectively, Slovakia and the Czech Republic deposited their instruments of succession to the signature and the Czech Republic deposited its instrument of ratification on 23 June 1995.

^c Declarations and reservations (excludes other reservations and declarations of a political nature). The Czech Republic, upon ratification, withdrew the declaration referred to in footnote b that had been made by the former Czechoslovakia, and declared that limits of carrier's liability in the territory of the Czech Republic adhered to the provision of article 6 of the Convention.

^d Succession.

D. United Nations Convention on Contracts for the International Sale of Goods, 1980 (Vienna)

<i>State</i>	<i>Signature</i>	<i>Ratification, accession, approval, acceptance or succession</i>	<i>Entry into force</i>
Albania		13 May 2009 ^b	1 June 2010
Argentina ^a		19 July 1983 ^b	1 January 1988
Armenia ^{a, i}		2 December 2008 ^b	1 January 2010
Australia ^f		17 March 1988 ^b	1 April 1989
Austria	11 April 1980	29 December 1987	1 January 1989
Belarus ^a		9 October 1989 ^b	1 November 1990
Belgium		31 October 1996 ^b	1 November 1997
Bosnia and Herzegovina		12 January 1994 ^c	6 March 1992
Bulgaria		9 July 1990 ^b	1 August 1991
Burundi		4 September 1998 ^b	1 October 1999
Canada ^d		23 April 1991 ^b	1 May 1992
Chile ^a	11 April 1980	7 February 1990	1 March 1991
China ^{a, i}	30 September 1981	11 December 1986 ^f	1 January 1988
Colombia		10 July 2001 ^b	1 August 2002
Croatia ^g		8 June 1998 ^c	8 October 1991
Cuba		2 November 1994 ^b	1 December 1995
Cyprus		7 March 2005 ^b	1 April 2006
Czech Republic ^{h, i}		30 September 1993 ^c	1 January 1993
Denmark ^{e, j}	26 May 1981	14 February 1989	1 March 1990
Ecuador		27 January 1992 ^b	1 February 1993
Egypt		6 December 1982 ^b	1 January 1988
El Salvador		27 November 2006 ^b	1 December 2007
Estonia ^k		20 September 1993 ^b	1 October 1994
Finland ⁱ	26 May 1981	15 December 1987	1 January 1989
France	27 August 1981	6 August 1982 ^f	1 January 1988
Gabon		15 December 2004 ^b	1 January 2006
Georgia		16 August 1994 ^b	1 September 1995
Germany ^{l, m}	26 May 1981	21 December 1989	1 January 1991
Ghana	11 April 1980		
Greece		12 January 1998 ^b	1 February 1999
Guinea		23 January 1991 ^b	1 February 1992
Honduras		10 October 2002 ^b	1 November 2003
Hungary ^{a, n}	11 April 1980	16 June 1983	1 January 1988
Iceland ^j		10 May 2001 ^b	1 June 2002
Iraq		5 March 1990 ^b	1 April 1991
Israel		22 January 2002 ^b	1 February 2003
Italy	30 September 1981	11 December 1986	1 January 1988
Japan		1 July 2008 ^b	1 August 2009
Kyrgyzstan		11 May 1999 ^b	1 June 2000
Latvia ^a		31 July 1997 ^b	1 August 1998
Lebanon		21 November 2008 ^b	1 December 2009

<i>State</i>	<i>Signature</i>	<i>Ratification, accession, approval, acceptance or succession</i>	<i>Entry into force</i>
Lesotho	18 June 1981	18 June 1981	1 January 1988
Liberia		16 September 2005 ^b	1 October 2006
Lithuania ^a		18 January 1995 ^b	1 February 1996
Luxembourg		30 January 1997 ^b	1 February 1998
Mauritania		20 August 1999 ^b	1 September 2000
Mexico		29 December 1987 ^b	1 January 1989
Moldova		13 October 1994 ^b	1 November 1995
Mongolia		31 December 1997 ^b	1 January 1999
Montenegro		23 October 2006 ^c	3 June 2006
Netherlands ^s	29 May 1981	13 December 1990 ^o	1 January 1992
New Zealand ^t		22 September 1994 ^b	1 October 1995
Norway ^j	26 May 1981	20 July 1988	1 August 1989
Paraguay ^a		13 January 2006 ^b	1 February 2007
Peru		25 March 1999 ^b	1 April 2000
Poland	28 September 1981	19 May 1995	1 June 1996
Republic of Korea		17 February 2004 ^b	1 March 2005
Romania		22 May 1991 ^b	1 June 1992
Russian Federation ^{a, p}		16 August 1990 ^b	1 September 1991
Saint Vincent and the Grenadines ⁱ		12 September 2000 ^b	1 October 2001
Serbia ^q		12 March 2001 ^c	27 April 1992
Singapore ⁱ	11 April 1980	16 February 1995	1 March 1996
Slovakia ^{h, i}		28 May 1993 ^c	1 January 1993
Slovenia		7 January 1994 ^c	25 June 1991
Spain		24 July 1990 ^b	1 August 1991
Sweden ^j	26 May 1981	15 December 1987	1 January 1989
Switzerland		21 February 1990 ^b	1 March 1991
Syrian Arab Republic		19 October 1982 ^b	1 January 1988
The former Yugoslav Republic of Macedonia		22 November 2006 ^c	17 November 1991
Uganda		12 February 1992 ^b	1 March 1993
Ukraine ^a		3 January 1990 ^b	1 February 1991
United States of America ⁱ	31 August 1981	11 December 1986	1 January 1988
Uruguay		25 January 1999 ^b	1 February 2000
Uzbekistan		27 November 1996 ^b	1 December 1997
Venezuela (Bolivarian Republic of)	28 September 1981		
Zambia		6 June 1986 ^b	1 January 1988

Parties: 74

^a Declarations and reservations. This State declared, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29, or part II of the Convention that allowed a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing, would not apply where any party had its place of business in its territory.

^b Accession.

^c Succession.

^d Declarations and reservations. Upon accession, Canada declared that, in accordance with article 93 of the Convention, the Convention would extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. (Upon accession, Canada declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it would not be bound by article 1, paragraph (b), of the Convention. In a notification received on 31 July 1992, Canada withdrew that declaration.) In a declaration received on 9 April 1992, Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to the Yukon Territory. In a notification received on 18 June 2003, Canada extended the application of the Convention to the Territory of Nunavut.

^e Declarations and reservations. Upon ratification, Denmark declared that the Convention shall not apply to the Faroe Islands and Greenland.

^f Approval.

^g Upon succeeding to the Convention, Croatia has decided, on the basis of the Constitutional Decision on Sovereignty and Independence of the Republic of Croatia of 25 June 1991 and the Decision of the Croatian Parliament of 8 October 1991 and by virtue of succession of the Socialist Federal Republic of Yugoslavia in respect of the territory of Croatia, to be considered a party to the Convention with effect from 8 October 1991, the date on which Croatia severed all constitutional and legal connections with the Socialist Federal Republic of Yugoslavia and took over its international obligations.

^h The former Czechoslovakia signed the Convention on 1 September 1981 and deposited an instrument of ratification on 5 March 1990, with the Convention entering into force for the former Czechoslovakia on 1 April 1991. On 28 May and 30 September 1993, respectively, Slovakia and the Czech Republic deposited instruments of succession, with effect from 1 January 1993, the date of succession of both States.

ⁱ Declarations and reservations. This State declared that it would not be bound by paragraph 1 (b) of article 1.

^j Declarations and reservations. Upon ratifying the Convention, Denmark, Finland, Norway and Sweden declared, in accordance with article 92, paragraph 1, that they would not be bound by part II of the Convention ("Formation of the Contract"). Upon ratifying the Convention, Denmark, Finland, Norway and Sweden declared, pursuant to article 94, that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden. In a notification effected on 12 March 2003, Iceland declared, pursuant to article 94, paragraph 1, that the Convention would not apply to contracts of sale or to their formation where the parties had their places of business in Denmark, Finland, Iceland, Norway or Sweden.

^k Declarations and reservations. On 9 March 2004, Estonia withdrew the reservation made upon ratification mentioned in footnote a.

^l The Convention was signed by the former German Democratic Republic on 13 August 1981 and ratified on 23 February 1989 and entered into force on 1 March 1990.

^m Declarations and reservations. Upon ratifying the Convention, Germany declared that it would not apply article 1, paragraph 1 (b), in respect of any State that had made a declaration that that State would not apply article 1, paragraph 1 (b).

ⁿ Declarations and reservations. Upon ratifying the Convention, Hungary declared that it considered the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance to be subject to the provisions of article 90 of the Convention.

^o Acceptance.

^p The Russian Federation continues, from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, from that date, full responsibility for all the rights and obligations of USSR under the Charter of the United Nations and the multilateral treaties deposited with the Secretary-General.

^q The former Yugoslavia signed and ratified the Convention on 11 April 1980 and 27 March 1985, respectively.

^r Declarations and reservations. Upon accession, Australia declared that the Convention shall not apply to the territories of Christmas Island, the Cocos (Keeling) Islands and the Ashmore and Cartier Islands.

^s Declarations and reservations. Upon acceptance, the Netherlands declared that the Convention shall apply to the Kingdom in Europe and Aruba only.

^t Declarations and reservations. Upon accession, New Zealand declared that the Convention shall not apply to the Cook Islands, Niue and Tokelau.

E. United Nations Convention on International Bills of Exchange and International Promissory Notes, 1988 (New York)

<i>State</i>	<i>Signature</i>	<i>Ratification or accession</i>
Canada	7 December 1989	
Gabon		15 December 2004 ^a
Guinea		23 January 1991 ^a
Honduras		8 August 2001 ^a
Liberia		16 September 2005 ^a
Mexico		11 September 1992 ^a
Russian Federation ^b	30 June 1990	
United States of America	29 June 1990	

Parties: 5

^a Accession.

^b The Russian Federation continues, from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, from that date, full responsibility for all the rights and obligations of USSR under the Charter of the United Nations and the multilateral treaties deposited with the Secretary-General.

F. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, 1991 (Vienna)

<i>State</i>	<i>Signature</i>	<i>Ratification or accession</i>
Egypt		6 April 1999 ^a
France	15 October 1991	
Gabon		15 December 2004 ^a
Georgia		21 March 1996 ^a
Mexico	19 April 1991	
Paraguay		19 July 2005 ^a
Philippines	19 April 1991	
Spain	19 April 1991	
United States of America	30 April 1992	

Parties: 4

^a Accession.

G. United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 1995 (New York)

<i>State</i>	<i>Signature</i>	<i>Ratification or accession</i>	<i>Entry into force</i>
Belarus	3 December 1996	23 January 2002	1 February 2003
Ecuador		18 June 1997 ^a	1 January 2000
El Salvador	5 September 1997	31 July 1998	1 January 2000
Gabon		15 December 2004 ^a	1 January 2006
Kuwait		28 October 1998 ^a	1 January 2000
Liberia		16 September 2005 ^a	1 October 2006
Panama	9 July 1997	21 May 1998	1 January 2000
Tunisia		8 December 1998 ^a	1 January 2000
United States of America	11 December 1997		

Parties: 8

^a Accession.

H. United Nations Convention on the Assignment of Receivables in International Trade, 2001 (New York)

<i>State</i>	<i>Signature</i>	<i>Ratification or accession</i>
Liberia		16 September 2005 ^b
Luxembourg ^a	12 June 2002	
Madagascar	24 September 2003	
United States of America	30 December 2003	

Party: 1

^a Declarations and reservations. Upon signature, Luxembourg lodged the following declaration:

“Pursuant to article 39 of the Convention, the Grand Duchy of Luxembourg declares that it does not wish to be bound by chapter V, which contains autonomous conflict-of-laws rules that allow too wide an application to laws other than those of the assignor and that moreover are difficult to reconcile with the Rome Convention. The Grand Duchy of Luxembourg, pursuant to article 42, paragraph 1 (c), of the Convention, will be bound by the priority rules set forth in section III of the annex, namely those based on the time of the contract of assignment.”

^b Accession.

I. United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (New York)

<i>State</i>	<i>Signature</i>
Central African Republic	27 February 2006
China	6 July 2006
Colombia	27 September 2007
Honduras	16 January 2008

<i>State</i>	<i>Signature</i>
Iran (Islamic Republic of)	26 September 2007
Lebanon	22 May 2006
Madagascar	19 September 2006
Montenegro	27 September 2007
Panama	25 September 2007
Paraguay	26 March 2007
Philippines	25 September 2007
Republic of Korea	15 January 2008
Russian Federation	25 April 2007
Saudi Arabia	12 November 2007
Senegal	7 April 2006
Sierra Leone	21 September 2006
Singapore	6 July 2006
Sri Lanka	6 July 2006

Parties: --

J. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 (Rotterdam)

<i>State</i>	<i>Signature</i>
Armenia	29 September 2009
Cameroon	29 September 2009
Congo	23 September 2009
Denmark	23 September 2009
France	23 September 2009
Gabon	23 September 2009
Ghana	23 September 2009
Greece	23 September 2009
Guinea	23 September 2009
Madagascar	25 September 2009
Mali	26 October 2009
Netherlands	23 September 2009
Niger	22 October 2009
Nigeria	23 September 2009
Norway	23 September 2009
Poland	23 September 2009
Senegal	23 September 2009
Spain	23 September 2009
Switzerland	23 September 2009
Togo	23 September 2009
United States of America	23 September 2009

Parties: --

K. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York)

<i>State</i>	<i>Signature</i>	<i>Ratification(r), accession(a) or succession(s)</i>	<i>Entry into force</i>
Afghanistan ^{a, b}		30 November 2004 ^(a)	28 February 2005
Albania		27 June 2001 ^(a)	25 September 2001
Algeria ^{a, b}		7 February 1989 ^(a)	8 May 1989
Antigua and Barbuda ^{a, b}		2 February 1989 ^(a)	3 May 1989
Argentina ^{a, b}	26 August 1958	14 March 1989	12 June 1989
Armenia ^{a, b}		29 December 1997 ^(a)	29 March 1998
Australia		26 March 1975 ^(a)	24 June 1975
Austria		2 May 1961 ^(a)	31 July 1961
Azerbaijan		29 February 2000 ^(a)	29 May 2000
Bahamas		20 December 2006 ^(a)	20 March 2007
Bahrain ^{a, b}		6 April 1988 ^(a)	5 July 1988
Bangladesh		6 May 1992 ^(a)	4 August 1992
Barbados ^{a, b}		16 March 1993 ^(a)	14 June 1993
Belarus ^e	29 December 1958	15 November 1960	13 February 1961
Belgium ^a	10 June 1958	18 August 1975	16 November 1975
Benin		16 May 1974 ^(a)	14 August 1974
Bolivia		28 April 1995 ^(a)	27 July 1995
Bosnia and Herzegovina ^{a, b, f}		1 September 1993 ^(s)	6 March 1992
Botswana ^{a, b}		20 December 1971 ^(a)	19 March 1972
Brazil		7 June 2002 ^(a)	5 September 2002
Brunei Darussalam ^a		25 July 1996 ^(a)	23 October 1996
Bulgaria ^{a, e}	17 December 1958	10 October 1961	8 January 1962
Burkina Faso		23 March 1987 ^(a)	21 June 1987
Cambodia		5 January 1960 ^(a)	4 April 1960
Cameroon		19 February 1988 ^(a)	19 May 1988
Canada ^h		12 May 1986 ^(a)	10 August 1986
Central African Republic ^{a, b}		15 October 1962 ^(a)	13 January 1963
Chile		4 September 1975 ^(a)	3 December 1975
China ^{a, b, j}		22 January 1987 ^(a)	22 April 1987
Colombia		25 September 1979 ^(a)	24 December 1979
Cook Islands		12 January 2009 ^(a)	12 April 2009
Costa Rica	10 June 1958	26 October 1987	24 January 1988
Côte d'Ivoire		1 February 1991 ^(a)	2 May 1991
Croatia ^{a, b, f}		26 July 1993 ^(s)	8 October 1991
Cuba ^{a, b, e}		30 December 1974 ^(a)	30 March 1975
Cyprus ^{a, b}		29 December 1980 ^(a)	29 March 1981
Czech Republic		30 September 1993 ^(s)	1 January 1993
Denmark ^{a, b, c}		22 December 1972 ^(a)	22 March 1973
Djibouti		14 June 1983 ^(s)	27 June 1977
Dominica		28 October 1988 ^(a)	26 January 1989

<i>State</i>	<i>Signature</i>	<i>Ratification(r), accession(a) or succession(s)</i>	<i>Entry into force</i>
Dominican Republic		11 April 2002 ^(a)	10 July 2002
Ecuador ^{a, b}	17 December 1958	3 January 1962	3 April 1962
Egypt		9 March 1959 ^(a)	7 June 1959
El Salvador	10 June 1958	26 February 1998	27 May 1998
Estonia		30 August 1993 ^(a)	28 November 1993
Finland	29 December 1958	19 January 1962	19 April 1962
France ^a	25 November 1958	26 June 1959	24 September 1959
Gabon		15 December 2006 ^(a)	15 March 2007
Georgia		2 June 1994 ^(a)	31 August 1994
Germany ^a	10 June 1958	30 June 1961	28 September 1961
Ghana		9 April 1968 ^(a)	8 July 1968
Greece ^{a, b}		16 July 1962 ^(a)	14 October 1962
Guatemala ^{a, b}		21 March 1984 ^(a)	19 June 1984
Guinea		23 January 1991 ^(a)	23 April 1991
Haiti		5 December 1983 ^(a)	4 March 1984
Holy See ^{a, b}		14 May 1975 ^(a)	12 August 1975
Honduras		3 October 2000 ^(a)	1 January 2001
Hungary ^{a, b}		5 March 1962 ^(a)	3 June 1962
Iceland		24 January 2002 ^(a)	24 April 2002
India ^{a, b}	10 June 1958	13 July 1960	11 October 1960
Indonesia ^{a, b}		7 October 1981 ^(a)	5 January 1982
Iran (Islamic Republic of) ^{a, b}		15 October 2001 ^(a)	13 January 2002
Ireland ^a		12 May 1981 ^(a)	10 August 1981
Israel	10 June 1958	5 January 1959	7 June 1959
Italy		31 January 1969 ^(a)	1 May 1969
Jamaica ^{a, b}		10 July 2002 ^(a)	8 October 2002
Japan ^a		20 June 1961 ^(a)	18 September 1961
Jordan	10 June 1958	15 November 1979	13 February 1980
Kazakhstan		20 November 1995 ^(a)	18 February 1996
Kenya ^a		10 February 1989 ^(a)	11 May 1989
Kuwait ^a		28 April 1978 ^(a)	27 July 1978
Kyrgyzstan		18 December 1996 ^(a)	18 March 1997
Lao People's Democratic Republic		17 June 1998 ^(a)	15 September 1998
Latvia		14 April 1992 ^(a)	13 July 1992
Lebanon ^a		11 August 1998 ^(a)	9 November 1998
Lesotho		13 June 1989 ^(a)	11 September 1989
Liberia		16 September 2005 ^(a)	15 December 2005
Lithuania ^e		14 March 1995 ^(a)	12 June 1995
Luxembourg ^a	11 November 1958	9 September 1983	8 December 1983
Madagascar ^{a, b}		16 July 1962 ^(a)	14 October 1962
Malaysia ^{a, b}		5 November 1985 ^(a)	3 February 1986
Mali		8 September 1994 ^(a)	7 December 1994
Malta ^{a, f}		22 June 2000 ^(a)	20 September 2000

<i>State</i>	<i>Signature</i>	<i>Ratification(r), accession(a) or succession(s)</i>	<i>Entry into force</i>
Marshall Islands		21 December 2006 ^(a)	21 March 2007
Mauritania		30 January 1997 ^(a)	30 April 1997
Mauritius ^a		19 June 1996 ^(a)	17 September 1996
Mexico		14 April 1971 ^(a)	13 July 1971
Moldova ^{a, f}		18 September 1998 ^(a)	17 December 1998
Monaco ^{a, b}	31 December 1958	2 June 1982	31 August 1982
Mongolia ^{a, b}		24 October 1994 ^(a)	22 January 1995
Montenegro ^{a, b, f}		23 October 2006 ^(s)	3 June 2006
Morocco ^a		12 February 1959 ^(a)	7 June 1959
Mozambique ^a		11 June 1998 ^(a)	9 September 1998
Nepal ^{a, b}		4 March 1998 ^(a)	2 June 1998
Netherlands ^{a, d}	10 June 1958	24 April 1964	23 July 1964
New Zealand ^a		6 January 1983 ^(a)	6 April 1983
Nicaragua		24 September 2003 ^(a)	23 December 2003
Niger		14 October 1964 ^(a)	12 January 1965
Nigeria ^{a, b}		17 March 1970 ^(a)	15 June 1970
Norway ^{a, i}		14 March 1961 ^(a)	12 June 1961
Oman		25 February 1999 ^(a)	26 May 1999
Pakistan ^a	30 December 1958	14 July 2005	12 October 2005
Panama		10 October 1984 ^(a)	8 January 1985
Paraguay		8 October 1997 ^(a)	6 January 1998
Peru		7 July 1988 ^(a)	5 October 1988
Philippines ^{a, b}	10 June 1958	6 July 1967	4 October 1967
Poland ^{a, b}	10 June 1958	3 October 1961	1 January 1962
Portugal ^a		18 October 1994 ^(a)	16 January 1995
Qatar		30 December 2002 ^(a)	30 March 2003
Republic of Korea ^{a, b}		8 February 1973 ^(a)	9 May 1973
Romania ^{a, b, e}		13 September 1961 ^(a)	12 December 1961
Russian Federation ^e	29 December 1958	24 August 1960	22 November 1960
Rwanda		31 October 2008	29 January 2009
Saint Vincent and the Grenadines ^{a, b}		12 September 2000 ^(a)	11 December 2000
San Marino		17 May 1979 ^(a)	15 August 1979
Saudi Arabia ^a		19 April 1994 ^(a)	18 July 1994
Senegal		17 October 1994 ^(a)	15 January 1995
Serbia ^{a, b, f}		12 March 2001 ^(s)	27 April 1992
Singapore ^a		21 August 1986 ^(a)	19 November 1986
Slovakia ⁱ		28 May 1993 ^(s)	1 January 1993
Slovenia ^{a, f, k}		6 July 1992 ^(s)	25 June 1991
South Africa		3 May 1976 ^(a)	1 August 1976
Spain		12 May 1977 ^(a)	10 August 1977
Sri Lanka	30 December 1958	9 April 1962	8 July 1962
Sweden	23 December 1958	28 January 1972	27 April 1972
Switzerland	29 December 1958	1 June 1965	30 August 1965
Syrian Arab Republic		9 March 1959 ^(a)	7 June 1959

<i>State</i>	<i>Signature</i>	<i>Ratification(r), accession(a) or succession(s)</i>	<i>Entry into force</i>
Thailand		21 December 1959 ^(a)	20 March 1960
The former Yugoslav Republic of Macedonia ^{b, f, l}		10 March 1994 ^(s)	17 November 1991
Trinidad and Tobago ^{a, b}		14 February 1966 ^(a)	15 May 1966
Tunisia ^{a, b}		17 July 1967 ^(a)	15 October 1967
Turkey ^{a, b}		2 July 1992 ^(a)	30 September 1992
Uganda ^a		12 February 1992 ^(a)	12 May 1992
Ukraine ^e	29 December 1958	10 October 1960	8 January 1961
United Arab Emirates		21 August 2006 ^(a)	19 November 2006
United Kingdom of Great Britain and Northern Ireland ^{a, g}		24 September 1975 ^(a)	23 December 1975
United Republic of Tanzania ^a		13 October 1964 ^(a)	12 January 1965
United States of America ^{a, b}		30 September 1970 ^(a)	29 December 1970
Uruguay		30 March 1983 ^(a)	28 June 1983
Uzbekistan		7 February 1996 ^(a)	7 May 1996
Venezuela (Bolivarian Republic of) ^{a, b}		8 February 1995 ^(a)	9 May 1995
Viet Nam ^{a, b, e}		12 September 1995 ^(a)	11 December 1995
Zambia		14 March 2002 ^(a)	12 June 2002
Zimbabwe		29 September 1994 ^(a)	28 December 1994

Parties: 144

^a Declarations and reservations. This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.

^b Declarations and reservations. This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

^c On 10 February 1976, Denmark declared that the Convention shall apply to the Faeroe Islands and Greenland.

^d On 24 April 1964, the Netherlands declared that the Convention shall apply to the Netherlands Antilles.

^e Declarations and reservations. With regard to awards made in the territory of non-contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment.

^f Declarations and reservations. This State will apply the Convention only to those arbitral awards which were adopted after the entry into effect of the Convention.

^g The United Kingdom extended the territorial application of the Convention, for the case of awards made only in the territory of another contracting State, to the following territories: Gibraltar (24 September 1975), Isle of Man (22 February 1979), Bermuda (14 November 1979), Cayman Islands (26 November 1980), Guernsey (19 April 1985), Jersey (28 May 2002).

^h Declarations and reservations. Canada declared that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada, except in the case of the Province of Quebec, where the law did not provide for such limitation.

ⁱ This State will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the State, or a right in or to such property.

^j Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the Convention to Hong Kong, Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. On 19 July 2005, China declared that the Convention shall apply to the Macao Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention.

^k On 4 June 2008, Slovenia withdrew the declarations made upon succession mentioned in footnotes (a) and (b).

^l On 16 September 2009, the former Yugoslav Republic of Macedonia withdrew the declaration made upon succession mentioned in footnote(a).

II. Enactments of model laws

A. UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006)

23. Legislation based on the UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985 has been enacted in Armenia (2006), Australia (1991), Austria (2005), Azerbaijan (1999), Bahrain (1994), Bangladesh (2001), Belarus (1999), Bulgaria (2002), Cambodia (2006), Canada (1986), Chile (2004), China (the Hong Kong Special Administrative Region (1996) and the Macao Special Administrative Region (1998)), Croatia (2001), Cyprus, Denmark (2005), Dominican Republic (2008), Egypt (1994), Estonia (2006), Germany (1998), Greece (1999), Guatemala (1995), Honduras (2000), Hungary (1994), India (1996), Iran (Islamic Republic of) (1997), Ireland (1998, 2010*), Japan (2003), Jordan (2001), Kenya (1995), Lithuania (1996), Madagascar (1998), Malta (1995), Mauritius (2008*), Mexico (1993), New Zealand (1996, 2007*), Nicaragua (2005), Nigeria (1990), Norway (2004), Oman (1997), Paraguay (2002), Peru (1996, 2008*), the Philippines (2004), Poland (2005), the Republic of Korea (1999), the Russian Federation (1993), Rwanda (2008*), Serbia (2006), Singapore (2001), Slovenia (2008*), Spain (2003), Sri Lanka (1995), Thailand (2002), the former Yugoslav Republic of Macedonia (2006), Tunisia (1993), Turkey (2001), Uganda (2000), Ukraine (1994), the United Kingdom of Great Britain and Northern Ireland (Scotland (1990) and Bermuda, an overseas territory of the United Kingdom), the United States of America (the States of California (1996), Connecticut (2000), Florida (2010*), Illinois (1998), Louisiana (2006), Oregon and Texas), Venezuela (Bolivarian Republic of) (1998), Zambia (2000) and Zimbabwe (1996).

B. UNCITRAL Model Law on International Credit Transfers (1992)

24. A directive of the European Parliament and of the Council of the European Union based on the principles of the UNCITRAL Model Law on International Credit Transfers was issued on 27 January 1997.

* Indicates legislation based on the text of the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006.

C. UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994)**

25. Legislation based on or largely inspired by the UNCITRAL Model Law on Procurement of Goods, Construction and Services has been adopted in various States, including Afghanistan (2006), Albania, Armenia (2005), Azerbaijan, Bangladesh, Croatia, Estonia, Gambia (2001), Georgia (1999), Ghana, Guyana, Kazakhstan, Kenya, Kyrgyzstan, Madagascar, Malawi (2003), Mauritius, Moldova, Mongolia, Nepal, Nigeria (2007), Poland, Romania, Rwanda, Slovakia, the United Republic of Tanzania, Uganda, Uzbekistan and Zambia.

D. UNCITRAL Model Law on Electronic Commerce (1996)

26. Legislation implementing provisions of the Model Law has been adopted in Australia (1999), Brunei Darussalam (2000), Cape Verde (2003), China (2004), Colombia (1999), the Dominican Republic (2002), Ecuador (2002), France (2000), Guatemala (2008), India (2000), Iran (Islamic Republic of) (2004), Ireland (2000), Jamaica (2006), Jordan (2001), Mauritius (2000), Mexico (2000), New Zealand (2002), Pakistan (2002), Panama (2001), the Philippines (2000), the Republic of Korea (1999), Singapore (1998), Slovenia (2000), South Africa (2002), Sri Lanka (2006), Thailand (2002), the United Arab Emirates (2006), Venezuela (Bolivarian Republic of) (2001) and Viet Nam (2005).

27. The Model Law has also been adopted in the Bailiwick of Guernsey (2000), the Bailiwick of Jersey (2000) and the Isle of Man (2000), all Crown Dependencies of the United Kingdom of Great Britain and Northern Ireland; in Bermuda (1999), the Cayman Islands (2000) and the Turks and Caicos Islands (2000), all overseas territories of the United Kingdom of Great Britain and Northern Ireland; and in the Hong Kong Special Administrative Region of China (2000).

28. Uniform legislation influenced by the Model Law and the principles on which it is based has been prepared in the United States (Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law) and enacted by the States of Alabama (2001), Alaska (2004), Arizona (2000), Arkansas (2001), California (1999), Colorado (2002), Connecticut (2002), Delaware (2000), District of Columbia (2001), Florida (2000), Hawaii (2000), Idaho (2000), Indiana (2000), Iowa (2000), Kansas (2000), Kentucky (2000), Louisiana (2001), Maine (2000), Maryland (2000), Massachusetts (2003), Michigan (2000), Minnesota (2000), Mississippi (2001), Missouri (2003), Montana (2001), Nebraska (2000), Nevada (2001), New Hampshire (2001), New Jersey (2000), New Mexico (2001), North Carolina (2000), North Dakota (2001), Ohio (2000), Oklahoma (2000), Oregon (2001), Pennsylvania (1999), Rhode Island (2000), South Carolina (2004), South Dakota (2000), Tennessee (2001), Texas (2001), Utah (2000), Vermont (2003), Virginia (2000), West Virginia (2001),

** The UNCITRAL Model Law on Procurement of Goods, Construction and Services is in the process of revision, inter alia so as to make provision for modern procurement practices including electronic procurement, and certain States have already modernized their legislative texts in this regard.

Wisconsin (2004) and Wyoming (2001). The State of Illinois had already enacted the Model Law in 1998.

29. Uniform legislation influenced by the Model Law and the principles on which it is based has also been prepared in Canada (Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada) and enacted in a number of provinces and territories, including Alberta (2001), British Columbia (2001), Manitoba (2000), New Brunswick (2001), Newfoundland and Labrador (2001), Nova Scotia (2000), Nunavut (2004), Ontario (2001), Prince Edward Island (2001), Saskatchewan (2000) and Yukon (2000). Legislation influenced by the Model Law and the principles on which it is based has also been adopted in the Province of Quebec (2001).

E. UNCITRAL Model Law on Cross-Border Insolvency (1997)

30. Legislation based on the UNCITRAL Model Law on Cross-Border Insolvency has been adopted in Australia (2008), the British Virgin Islands, overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000) and the United States of America (2005).

F. UNCITRAL Model Law on Electronic Signatures (2001)

31. Legislation based on the UNCITRAL Model Law on Electronic Signatures has been adopted in Cape Verde (2003), China (2004), Guatemala (2008), Jamaica (2006), Mexico (2003), Thailand (2001), the United Arab Emirates (2006) and Viet Nam (2005).

32. Legislation influenced by the principles on which the Model Law is based has been enacted in Costa Rica (2005) and India (2009).

G. UNCITRAL Model Law on International Commercial Conciliation (2002)

33. Legislation based on the UNCITRAL Model Law on International Commercial Conciliation has been enacted in Albania (2003), Canada (2005), Croatia (2003), Hungary (2002), Nicaragua (2005) and Slovenia (2008).

34. Uniform legislation influenced by the Model Law and the principles on which it is based has been prepared in: the United States of America (Uniform Mediation Act, adopted in 2001 (amended in 2003) by the National Conference of Commissioners on Uniform State Law) and enacted by the States of: Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington and by the District of Columbia.

III. Chronological table of actions in respect of conventions

A. Convention on the Limitation Period in the International Sale of Goods, 1974 (New York)^a

<i>State</i>	<i>Date of accession</i>
Ghana	7 October 1975
Dominican Republic	23 December 1977
Norway	20 March 1980
Argentina	9 October 1981
Egypt	6 December 1982
Hungary	16 June 1983
Zambia	6 June 1986
Mexico	21 January 1988
Guinea	23 January 1991
Uganda	12 February 1992
Romania	23 April 1992
Slovakia ^c	28 May 1993
Ukraine	13 September 1993
Czech Republic ^b	30 September 1993
Bosnia and Herzegovina ^c	12 January 1994
United States of America	5 May 1994
Cuba	2 November 1994
Poland	19 May 1995
Slovenia ^c	2 August 1995
Belarus	23 January 1997
Uruguay	1 April 1997
Moldova	28 August 1997
Burundi	4 September 1998
Serbia ^c	12 March 2001
Paraguay	18 August 2003
Liberia	16 September 2005
Montenegro ^c	23 October 2006
Belgium	1 August 2008

^a The former German Democratic Republic ratified the Convention on 31 August 1989.

^b Succession: the former Czechoslovakia ratified the Convention on 26 May 1977.

^c Succession: the former Yugoslavia acceded to the Convention on 27 November 1978.

B. Convention on the Limitation Period in the International Sale of Goods, as amended, 1980 (New York)^a

<i>State</i>	<i>Date of accession</i>
Egypt	6 December 1982
Hungary	16 June 1983
Argentina	19 July 1983

<i>State</i>	<i>Date of accession</i>
Zambia	6 June 1986
Mexico	21 January 1988
Guinea	23 January 1991
Uganda	12 February 1992
Romania	23 April 1992
Slovakia ^b	28 May 1993
Czech Republic ^b	30 September 1993
United States of America	5 May 1994
Cuba	2 November 1994
Poland	19 May 1995
Slovenia	2 August 1995
Belarus	23 January 1997
Uruguay	1 April 1997
Moldova	28 August 1997
Paraguay	18 August 2003
Liberia	16 September 2005
Belgium	1 August 2008

^a The former German Democratic Republic acceded to the Protocol on 31 August 1989.

^b Succession: the former Czechoslovakia acceded to the Protocol on 5 March 1990.

C. United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg)

<i>State</i>	<i>Date of accession</i>
Egypt	23 April 1979
Uganda	6 July 1979
United Republic of Tanzania	24 July 1979
Tunisia	15 September 1980
Barbados	2 February 1981
Morocco	12 June 1981
Romania	7 January 1982
Chile	9 July 1982
Lebanon	4 April 1983
Hungary	5 July 1984
Senegal	17 March 1986
Botswana	16 February 1988
Sierra Leone	7 October 1988
Nigeria	7 November 1988
Kenya	31 July 1989
Burkina Faso	14 August 1989
Lesotho	26 October 1989
Guinea	23 January 1991
Malawi	18 March 1991
Zambia	7 October 1991
Austria	29 July 1993
Cameroon	21 October 1993

<i>State</i>	<i>Date of accession</i>
Czech Republic	23 June 1995
Gambia	7 February 1996
Georgia	21 March 1996
Burundi	4 September 1998
Saint Vincent and the Grenadines	12 September 2000
Jordan	10 May 2001
Syrian Arab Republic	16 October 2002
Paraguay	19 July 2005
Liberia	16 September 2005
Albania	20 July 2006
Dominican Republic	28 September 2007
Kazakhstan	18 June 2008

D. United Nations Convention on Contracts for the International Sale of Goods, 1980 (Vienna)

<i>State</i>	<i>Date of accession</i>
Lesotho	18 June 1981
France	6 August 1982
Syrian Arab Republic	19 October 1982
Egypt	6 December 1982
Hungary	16 June 1983
Argentina	19 July 1983
Zambia	6 June 1986
China	11 December 1986
Italy	11 December 1986
United States of America	11 December 1986
Finland	15 December 1987
Sweden	15 December 1987
Austria	29 December 1987
Mexico	29 December 1987
Australia	17 March 1988
Norway	20 July 1988
Denmark	14 February 1989
Belarus	9 October 1989
Germany ^a	21 December 1989
Ukraine	3 January 1990
Chile	7 February 1990
Switzerland	21 February 1990
Iraq	5 March 1990
Bulgaria	9 July 1990
Spain	24 July 1990
Russian Federation ^b	16 August 1990
Netherlands	13 December 1990
Guinea	23 January 1991

<i>State</i>	<i>Date of accession</i>
Canada	23 April 1991
Romania	22 May 1991
Ecuador	27 January 1992
Uganda	12 February 1992
Slovakia ^c	28 May 1993
Estonia	20 September 1993
Czech Republic ^c	30 September 1993
Slovenia ^d	7 January 1994
Bosnia and Herzegovina ^d	12 January 1994
Georgia	16 August 1994
New Zealand	22 September 1994
Moldova	13 October 1994
Cuba	2 November 1994
Lithuania	18 January 1995
Singapore	16 February 1995
Poland	19 May 1995
Belgium	31 October 1996
Uzbekistan	27 November 1996
Luxembourg	30 January 1997
Latvia	31 July 1997
Mongolia	31 December 1997
Greece	12 January 1998
Croatia ^d	8 June 1998
Burundi	4 September 1998
Uruguay	25 January 1999
Peru	25 March 1999
Mauritania	20 August 1999
Kyrgyzstan	11 May 1999
Saint Vincent and the Grenadines	12 September 2000
Serbia ^d	12 March 2001
Iceland	10 May 2001
Colombia	10 July 2001
Israel	22 January 2002
Honduras	10 October 2002
Republic of Korea	17 February 2004
Gabon	15 December 2004
Cyprus	7 March 2005
Liberia	16 September 2005
Paraguay	13 January 2006
Montenegro ^d	23 October 2006
The former Yugoslav Republic of Macedonia ^d	22 November 2006
El Salvador	27 November 2006
Japan	1 July 2008
Lebanon	21 November 2008
Armenia	2 December 2008
Albania	13 May 2009

^a The former German Democratic Republic ratified the Convention on 23 February 1989.

^b The Russian Federation continues, from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, from that date, full responsibility for all the rights and obligations of USSR under the Charter of the United Nations and the multilateral treaties deposited with the Secretary-General.

^c Succession: the former Czechoslovakia ratified the Convention on 5 March 1990.

^d Succession: the former Yugoslavia signed and ratified the Convention on 11 April 1980 and 27 March 1985, respectively.

E. United Nations Convention on International Bills of Exchange and International Promissory Notes, 1988 (New York)

<i>State</i>	<i>Date of accession</i>
Guinea	23 January 1991
Mexico	15 September 1992
Honduras	8 August 2001
Gabon	15 December 2004
Liberia	16 September 2005

F. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, 1991 (Vienna)

<i>State</i>	<i>Date of accession</i>
Georgia	21 March 1996
Egypt	6 April 1999
Gabon	15 December 2004
Paraguay	19 July 2005

G. United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 1995 (New York)

<i>State</i>	<i>Date of accession</i>
Ecuador	18 June 1997
Panama	21 May 1998
El Salvador	31 July 1998
Kuwait	28 October 1998
Tunisia	8 December 1998
Belarus	23 January 2002
Gabon	15 December 2004
Liberia	16 September 2005

H. United Nations Convention on the Assignment of Receivables in International Trade, 2001 (New York)

<i>State</i>	<i>Date of accession</i>
Liberia	16 September 2005

I. United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (New York)

(No State party)

J. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2009 (Rotterdam Rules)

(No State party)

K. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York)

<i>State</i>	<i>Date of accession</i>
Israel	5 January 1959
Morocco	12 February 1959
Egypt	9 March 1959
Syrian Arab Republic	9 March 1959
France	26 June 1959
Thailand	21 December 1959
Cambodia	5 January 1960
India	13 July 1960
Russian Federation ^a	24 August 1960
Ukraine	10 October 1960
Belarus	15 November 1960
Norway	14 March 1961
Austria	2 May 1961
Japan	20 June 1961
Germany ^b	30 June 1961
Romania	13 September 1961
Poland	3 October 1961
Bulgaria	10 October 1961
Ecuador	3 January 1962
Finland	19 January 1962
Hungary	5 March 1962
Sri Lanka	9 April 1962
Greece	16 July 1962

<i>State</i>	<i>Date of accession</i>
Madagascar	16 July 1962
Central African Republic	15 October 1962
Netherlands	24 April 1964
United Republic of Tanzania	13 October 1964
Niger	14 October 1964
Switzerland	1 June 1965
Trinidad and Tobago	14 February 1966
Philippines	6 July 1967
Tunisia	17 July 1967
Ghana	9 April 1968
Italy	31 January 1969
Nigeria	17 March 1970
United States of America	30 September 1970
Mexico	14 April 1971
Botswana	20 December 1971
Sweden	28 January 1972
Denmark	22 December 1972
Republic of Korea	8 February 1973
Benin	16 May 1974
Cuba	30 December 1974
Australia	26 March 1975
Holy See	14 May 1975
Belgium	18 August 1975
Chile	4 September 1975
United Kingdom of Great Britain and Northern Ireland	24 September 1975
South Africa	3 May 1976
Spain	12 May 1977
Kuwait	28 April 1978
San Marino	17 May 1979
Colombia	25 September 1979
Jordan	15 November 1979
Cyprus	29 December 1980
Ireland	12 May 1981
Indonesia	7 October 1981
Monaco	2 June 1982
New Zealand	6 January 1983
Uruguay	30 March 1983
Djibouti	14 June 1983
Luxembourg	9 September 1983
Haiti	5 December 1983
Guatemala	21 March 1984
Panama	10 October 1984
Malaysia	5 November 1985
Canada	12 May 1986
Singapore	21 August 1986

<i>State</i>	<i>Date of accession</i>
China	22 January 1987
Burkina Faso	23 March 1987
Costa Rica	26 October 1987
Cameroon	19 February 1988
Bahrain	6 April 1988
Peru	7 July 1988
Dominica	28 October 1988
Antigua and Barbuda	2 February 1989
Algeria	7 February 1989
Kenya	10 February 1989
Argentina	14 March 1989
Lesotho	13 June 1989
Guinea	23 January 1991
Côte d'Ivoire	1 February 1991
Uganda	12 February 1992
Latvia	14 April 1992
Bangladesh	6 May 1992
Turkey	2 July 1992
Slovenia	6 July 1992
Barbados	16 March 1993
Slovakia	28 May 1993
Croatia	26 July 1993
Estonia	30 August 1993
Bosnia and Herzegovina	1 September 1993
Czech Republic	30 September 1993
The former Yugoslav Republic of Macedonia	10 March 1994
Saudi Arabia	19 April 1994
Georgia	2 June 1994
Mali	8 September 1994
Zimbabwe	29 September 1994
Senegal	17 October 1994
Portugal	18 October 1994
Mongolia	24 October 1994
Venezuela (Bolivarian Republic of)	8 February 1995
Lithuania	14 March 1995
Bolivia	28 April 1995
Viet Nam	12 September 1995
Kazakhstan	20 November 1995
Uzbekistan	7 February 1996
Mauritius	19 June 1996
Brunei Darussalam	25 July 1996
Kyrgyzstan	18 December 1996
Mauritania	30 January 1997
Paraguay	8 October 1997
Armenia	29 December 1997
El Salvador	26 February 1998

<i>State</i>	<i>Date of accession</i>
Nepal	4 March 1998
Mozambique	11 June 1998
Lao People's Democratic Republic	17 June 1998
Lebanon	11 August 1998
Moldova	18 September 1998
Oman	25 February 1999
Azerbaijan	29 February 2000
Malta	22 June 2000
Saint Vincent and the Grenadines	12 September 2000
Honduras	3 October 2000
Serbia ^c	12 March 2001
Albania	27 June 2001
Iran (Islamic Republic of)	15 October 2001
Iceland	24 January 2002
Zambia	14 March 2002
Dominican Republic	11 April 2002
Brazil	7 June 2002
Jamaica	10 July 2002
Qatar	30 December 2002
Nicaragua	24 September 2003
Afghanistan	30 November 2004
Pakistan	14 July 2005
Liberia	16 September 2005
United Arab Emirates	21 August 2006
Montenegro	23 October 2006
Gabon	15 December 2006
Bahamas	20 December 2006
Marshall Islands	21 December 2006
Rwanda	31 October 2008
Cook Islands	12 January 2009

^a The Russian Federation continues, from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, from that date, full responsibility for all the rights and obligations of USSR under the Charter of the United Nations and the multilateral treaties deposited with the Secretary-General.

^b The former German Democratic Republic acceded to the Convention on 20 February 1975.

^c Succession: the former Yugoslavia acceded to the Convention on 26 February 1982.

IX. COORDINATION AND COOPERATION

Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/707 and Add.1)

[Original: English]

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I. Introduction

1. In resolution 34/142 of 17 December 1979, the General Assembly requested the Secretary-General to place before the United Nations Commission on International Trade Law a report on the legal activities of international organizations in the field of international trade law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of coordinating the activities of other organizations in the field.

2. In resolution 36/32 of 13 November 1981, the General Assembly endorsed various suggestions by the Commission to implement further its coordinating role in the field of international trade law.¹ Those suggestions included presenting, in addition to a general report of activities of international organizations, reports on specific areas of activity focusing on work already under way and areas where unification work was not under way but could appropriately be undertaken.²

3. This general report, prepared in response to resolution 34/142, is the fifth in a recent 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

¹ *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, paras. 93-101.

² *Ibid.*, para. 100.

(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.9/628/Add.1, May 2007) were prepared for the fortieth session of the Commission. The fourth paper (A/CN.9/657 and A/CN.9/657/Add.1) and a related paper on public procurement law (A/CN.9/657/Add.2) were prepared for the forty-first session of the Commission. The present paper and addenda focuses on activities of international organizations primarily undertaken since preparation of the fourth paper, while A/CN.9/707/Add.1 relates solely to current activities of international organizations related to the harmonization of cross-border insolvency law. This fifth paper in the series is again based upon publicly available material and consultations sought with the listed organizations. This paper does not repeat information contained in the previous papers unless necessary to facilitate understanding of a particular issue.

II. General coordination in the United Nations

4. The United Nations has in recent years taken greater steps aimed at improved and more effective coordination amongst its various bodies, and the UNCITRAL Secretariat actively participates in those general coordination activities. The following paragraphs list some of the more recent examples of such general coordination activities.

5. Pursuant to resolutions 61/39 and 62/70, the General Assembly requested the Secretary-General to prepare an inventory of the current rule of law activities of the United Nations. The interim and final reports (A/62/261 and A/63/64) submitted to the General Assembly on 15 August 2007 and 12 March 2008 respectively, contain 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. The UNCITRAL Secretariat played an active role in ensuring that its activities were properly reflected in this inventory of United Nations rule of law activities.

6. Section II of the final report on the rule of law at the national and international levels (A/63/64) contains an inventory of the current rule of law activities of the United Nations which includes, under the auspices of the Office of Legal Affairs (International Trade Law Division), a number of activities undertaken by the UNCITRAL Secretariat. Those activities concern the 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 monitoring, collecting information and reporting on domestic implementation of international law.³

7. The UNCITRAL Secretariat has also contributed to the preparation of the annual reports of the Secretary-General on strengthening and coordinating

³ For a complete list of UNCITRAL's rule of law activities as reflected in the final report, see A/63/64, paras. 46, 47, 48, 50, 62, 63, 79, 103, 109, 110, 160, 161, 227, 228, 236, 255, 274, 290, 291, 333, 413, 414, 415, 448, 466 and 467.

United Nations rule of law activities (see A/63/226 for 2008 and A/64/298 for 2009) and to the creation of a rule of law website (www.unrol.org) which was launched in November 2009. Finally, the UNCITRAL Secretariat has played an active role on the Task Force of the Office of Legal Affairs that was given the task of preparing a draft Guidance Note on the Rule of Law at the International Level. The Guidance Note is in the process of being finalized and will be published on the rule of law website in due course.

III. Harmonization and unification of international trade law

A. International commercial contracts

Hague Conference on Private International Law⁴

8. Further to preparatory work carried out by the Permanent Bureau since 2006, the Council on General Affairs and Policy of the Hague Conference on Private International Law (the Hague Conference) decided that work should continue for the benefit of the promotion of party autonomy in the field of international commercial contracts. To that end, the Council invited the Permanent Bureau in 2009 to form a Working Group consisting of experts in the field of private international law, international commercial law and international arbitration law and to continue its exploration of the development of a draft non-binding instrument concerning choice of law in international business-to-business contracts. The Working Group held its first meeting in The Hague on 21-22 January 2010, at which the UNCITRAL Secretariat participated as an observer, in order to exchange views on the development and possible scope of a future draft instrument. The Permanent Bureau is setting up a restricted electronic discussion platform to facilitate discussions on the draft instrument amongst the members of the Working Group, and that platform is expected to soon be operational. The Permanent Bureau will coordinate further research and the drafting of proposals on issues examined by the Working Group in January 2010, as well as make preparations for the second meeting of the Working Group, scheduled from 15-17 November 2010.

International Institute for the Unification of Private Law⁵

9. Pursuant to the recommendation of the Governing Council of the International Institute for the Unification of Private Law (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 the unwinding of failed contracts, illegality, plurality of obligors and/or obligees, conditional obligations 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, including the UNCITRAL Secretariat, has held four sessions in Rome, in 2006, 2007, 2008 and, most recently, in

⁴ www.hcch.net.

⁵ www.unidroit.org.

May 2009. Draft chapters have been prepared on each of the five topics suggested for inclusion in the new edition. However, the draft chapter on termination of long term contracts for just cause was thought to be at a less refined stage than the other draft chapters and the decision was made not to include it in the third edition of the PICC, but to include it in a possible fourth edition. The 5th session of the Working Group is scheduled for May 2010.

B. Microfinance

10. Further to a request made by the Commission at its forty-second session,⁶ the Secretariat has prepared a study on microfinance in the context of international economic development, in close coordination with the main organizations already active in that field. The study, which is before the Commission at its forty-third session (A/CN.9/698), provides an overview of the issues relating to the regulatory and legal framework of microfinance, including information from the Bank for International Settlements (BIS) — Basel Committee on Banking Supervision, the Consultative Group to Assist the Poor (CGAP), the G-20 Financial Inclusion Experts Group — Access through Innovation Sub-Group, the Inter-American Development Bank (IDB), the International Development Law Organization (IDLO), and the International Monetary Fund (IMF).

C. International carriage of goods

General

11. The UNCITRAL Convention on contracts for the international carriage of goods wholly or partly by sea, known as the “Rotterdam Rules”, which aims at harmonizing and modernizing the legal framework that governs modern container transport, was adopted by the United Nations General Assembly in December 2008.⁷ As authorized in the resolution adopting the Convention, a ceremony for the opening for signature of the Convention was held in Rotterdam, the Netherlands, on 23 September 2009. That event was preceded by a Colloquium on the Rotterdam Rules, held from 21-22 September 2009 in Rotterdam in coordination with the Comité Maritime International (CMI) and the Government of the Netherlands, the City of Rotterdam and Port of Rotterdam Authority. Other events promoting the Convention have been coordinated with the CMI and other organizations (see A/CN.9/695/Add.1), including Unidroit, which devoted a separate volume of its Uniform Law Review to a collection of articles on the Rotterdam Rules.⁸

12. The Rotterdam Rules, which, at the time of writing, have been signed by 21 States representing over 25 per cent of world trade volume, have been characterized as a “maritime plus” convention in light of their application to door-to-door contracts of carriage. Their scope of application could therefore include certain inland transport ancillary to the international maritime leg.

⁶ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 432-433.

⁷ UNGA Resolution 63/122.

⁸ Uniform Law Review, NS — Vol. XIV, 2009-4.

13. 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 intermodal or multimodal transport instruments or arrangements. In light of the “maritime plus” nature of the 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 Rotterdam Rules and in their consideration of whether to become party to them, the Secretariat has closely monitored the activities of such other organizations, with a view to ensuring the integrity of the Convention and its inter-operability with other international initiatives.

14. The Commission may also wish to note that the Rotterdam Rules provide the legal basis for electronic bills of lading, called “electronic transport records” in the Convention. 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

(a) UNCTAD⁹

15. UNCTAD released in December 2009 its Review of Maritime Transport 2009, which provides a detailed account of main developments affecting world seaborne trade (which accounts for more than 80 per cent of international trade in goods), freight markets and rates, ports, surface transport, logistics services as well as world fleet-related issues, including ownership, control, age, tonnage and productivity. Of particular interest is the recognition of the importance of UNCITRAL’s most recent convention, the Rotterdam Rules, which is specifically highlighted as an important legal development in the sector.

16. Overall, the 2009 Review of Maritime Transport indicates that while the global financial crisis and economic downturn have slowed growth generally, the amount of seaborne trade in 2009 nonetheless increased, although at a slower rate than in the past. Several key developments set out in the 2009 edition are worthy of note in light of the Rotterdam Rules: in 2008, world seaborne trade in loaded goods increased by 3.6 per cent (compared with a 2007 growth rate of 4.5 per cent) to reach 8.17 billion tons; at the beginning of 2009, the world fleet expanded by 6.7 per cent from 2008, reaching 1.19 billion deadweight tons. Further, in 2008, world container port throughput increased by only 3.5 per cent to reach 506 million twenty-foot equivalent units (TEUs). Finally, freight rates have fallen from their 2008 highs, and trade volumes in the bulk cargo and liner sectors saw dramatic declines from late 2008 into 2009. The tanker market volume was slightly more resilient in 2008, but was also in decline by mid-2009.

⁹ www.unctad.org.

(b) European Commission¹⁰

17. Noting that 90 per cent of the freight exchanges of Europe with the rest of the world are seaborne, and the overall importance of the shipping sector to the economic health of the European Union in general, the European Commission released in January 2009 its maritime transport policy for 2018.¹¹ The strategic recommendations made in the policy paper concern seven main issues: ensuring the competitiveness of European shipping; human factors, such as improving the employment conditions of seafarers; implementation of “greener” maritime transport; ensuring a safe and secure system; focusing on a comprehensive international regulatory framework for shipping; recognizing the importance to Europe of short sea shipping and ports and providing measures to support those industries; and improving innovation and technological development.

2. Transport by land**(a) UNECE¹²**

18. At the 99th session of the UNECE Working Party on Road Transport (SC.1) in October 2005, an editorial committee, comprising a representative of the UNCITRAL Secretariat, 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 Road¹³ (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 Additional Protocol to the CMR was opened for signature. Eight countries have signed the Protocol, and three have ratified it. The Protocol, which will allow for the first time the use of electronic consignment notes in international road transport, will enter into force ninety days after five States have deposited their instruments of ratification or accession.

19. The 72nd annual session of the UNECE Inland Transport Committee was held in February 2010. Delegates to the session recognized that better infrastructure planning, efficient border-crossing and transit procedures, technologically progressive vehicle construction norms and a greater role for environmentally friendly modes such as rail and inland navigation were all necessary steps to improving current and future European transport.

(b) Intergovernmental Organization for International Carriage by Rail (OTIF)¹⁴

20. 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

¹⁰ <http://ec.europa.eu>.

¹¹ The study on which the policy is based is entitled, “Benchmarking strategic options for European shipping and for the European maritime transport system in the horizon 2008-2018”, found at http://ec.europa.eu/transport/maritime/policy/index_en.htm.

¹² www.unece.org.

¹³ Entry into force: 2 July 1961, United Nations, *Treaty Series*, vol. 399, p. 189. Source: www.untreaty.org.

¹⁴ www.otif.org.

the Convention concerning International Carriage by Rail (CIM-COTIF),¹⁵ as amended by the Protocol of Modification of 1999 (the Vilnius Protocol), Member States continue to ratify and accede to the Protocol, which is currently in force in 38 States.

3. Inland waterway transport

(a) UNECE¹⁶

21. 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 13 Contracting Parties. 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.

22. The 72nd annual session of the UNECE Inland Transport Committee held in February 2010 focused on transport on inland waterways, and included a round table dedicated to inland navigation, which was said to have the potential to relieve congested roads and provide better financial value with less pollution. Delegates emphasized the need for strategic investment and regulatory reforms, as well as integration of the fragmented market to tap into the potential economic and environmental benefits of transport by inland waterway.

4. Transport by air

(a) International Air Transport Association¹⁷

23. The International Air Transport Association (IATA) is implementing an industry-wide “e-freight” programme involving carriers, freight forwarders, ground handlers, shippers and customs authorities, with the goal of 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 World Customs Organization (WCO) and Freight Forward International, and is aligned with the WCO's and United Nations' global e-customs initiatives. The e-freight programme has been implemented on key trade routes linking 24 countries including 127 airports, with 36 more countries en route to full implementation. Locations that account for 81 per cent of all international air freight are expected to be e-freight capable by the end of 2010. It is expected that 20 of the paper documents required per shipment will be eliminated in 2010, representing greatly improved savings and efficiency.

¹⁵ Budapest, 22 June, 2001. Entered into force 1 April 2005.

¹⁶ www.unece.org.

¹⁷ www.iata.org.

5. Intermodal or multimodal transport

(a) UNECE¹⁸

24. The UNCITRAL Secretariat participated in the fifty-second session (Geneva, 12-13 October 2009) of the UNECE Working Party on Intermodal Transport and Logistics, and provided participants with information on the origin, main innovations, and status of the Rotterdam Rules, explaining their character as a “maritime plus” convention. Following an exchange of views on the possible impact and advantages of the Rotterdam Rules, particularly in respect of European intermodal transport, the Working Party decided to continue its consideration of civil liability regimes to increase the competitiveness of intermodal transport within Europe. Further, the fifty-third session of the Working Party, which was to take place in March 2010, was postponed to October 2010, in order to permit implementation of the newly proposed procedural and substantive features agreed in October 2009. In particular, the new features will establish an informal expert group to focus on the roles of government and industry in intermodal transport on European inland waterways and coastal shipping, as well as review the infrastructure and benchmarks for the European Agreement on Important International Combined Transport Lines and Related Installations.

(b) Regional multimodal discussions — UNESCWA¹⁹ and the League of Arab States²⁰

25. The regional multimodal initiatives that had previously been reported²¹ as being underway under the auspices of the United Nations Economic and Social Commission for Western Asia (UNESCWA) and the League of Arab States (the Arab League) are not currently proceeding.

(c) European Commission²²

26. A study conducted for the European Commission’s Directorate-General for Energy and Transport was released in June 2009.²³ The study assesses the details and added value of the establishment of a single European transport document and liability regime for all carriage of goods, irrespective of mode, with regard to their ability to facilitate multimodal freight transport. Consultations with EU Member States have been taking place since the publication of the study, and while it is intended to be one of the pieces of information that the Commission is assembling before making a decision on whether or not to proceed with a legislative proposal, no such decision has yet been made.

¹⁸ www.unece.org.

¹⁹ www.escwa.un.org.

²⁰ www.arableagueonline.org.

²¹ See A/CN.9/657, para. 28.

²² <http://ec.europa.eu>.

²³ The report is available at http://ec.europa.eu/transport/strategies/studies/doc/2009_05_19_multimodal_transport_report.pdf.

D. Security interests

General

27. Coordination is continuing to ensure that comprehensive and consistent guidance is offered to States in the area of secured transactions law.

28. In accordance with the decision of the Commission at its forty-second session,²⁴ an international colloquium on secured transactions was held in Vienna, from 1 to 3 March 2010. The purpose of the colloquium was to obtain the views and advice of experts with regard to possible future work in the area of security interests. A summary of the UNCITRAL texts on security interests was provided and the importance of implementation of such texts was emphasized. Topics for future work included: a Supplement to the Guide covering certain types of securities not covered by the Unidroit Convention on Substantive Rules for Intermediated Securities; regulations on registration of security rights; a model law on secured transactions based on the recommendations of the UNCITRAL Legislative Guide on Secured Transactions; a contractual guide on secured financing; and a contractual guide on intellectual property licensing. Experts from governments, international organizations and the private sector participated in this three-day event and the discussions provided a basis for the note prepared by the Secretariat on future work on security interests (see A/CN.9/702). The Colloquium also provided an opportunity to ensure effective coordination with relevant international organizations, including the World Bank, WIPO and Unidroit. Selected papers presented at the Colloquium will be published in coordination with Unidroit in an upcoming issue of its Uniform Law Review.

29. Further to meetings held among the secretariats of the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (Unidroit) and UNCITRAL,²⁵ a paper dealing with the interrelationship among the texts on security interests by those organizations is being prepared. The paper will assist States considering the implementation of those texts by summarizing ways in which these texts may be adopted to establish a modern comprehensive and consistent legislative regime on secured transactions.

1. Unidroit²⁶

(a) Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009)

30. The Diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities was held in two sessions, under the auspices of Unidroit, at the invitation of the Government of Switzerland, in Geneva, from 1 to 12 September 2008 and from 5 to 9 October 2009. The Convention was adopted and opened for signature on 9 October 2009. The UNCITRAL Secretariat was an active participant in both sessions of the Diplomatic Conference to ensure, as far as possible, consistency between the draft Convention and the UNCITRAL Legislative

²⁴ *Official Records of the General Assembly, Sixty-fourth session, Supplement No. 17 (A/64/17)*, paras. 317-319.

²⁵ A/CN.9/657/Add.1, paras. 1-2.

²⁶ www.unidroit.org.

Guides on Insolvency Law and Secured Transactions. At the time of writing, the Convention has received one signatory.

(b) Unidroit Model Law on Leasing (2008)

31. On 13 November 2008, the Joint Session of the Unidroit General Assembly and the Unidroit Committee of governmental experts for the finalization and adoption of a draft model law on leasing formally adopted the Unidroit Model Law on Leasing.

(c) Protocols to the Convention on International Interests in Mobile Equipment (Cape Town Convention)

Preliminary draft Protocol to the Convention on Matters specific to Space Assets

32. The Unidroit Governing Council appointed a Steering and Revisions Committee to advance the work on the preliminary draft Protocol on Matters specific to Space Assets. The Steering Committee held two meetings, the first in Berlin, at the invitation of the Government of Germany, from 7 to 9 May 2008 and the second in Paris, at the invitation of the European Centre for Space Law, on 14 and 15 May 2009. Following these meetings and consultation with the Chairman of the Committee of governmental experts, who had also acted as Chairman of the Steering Committee, the third session of the Committee of governmental experts was convened in Rome from 7 to 11 December 2009. The fourth session of the Committee of governmental experts is scheduled for May 2010.

Possible future Protocol to the Convention on Matters specific to Agricultural, Construction and Mining Equipment

33. Preliminary studies are underway to assess the need for a protocol on secured financing of agricultural, construction and mining equipment.

2. European Commission²⁷

(a) Study on the law applicable to third-party effects of assignments of receivables

34. The European Commission is conducting consultations in order to prepare a study on the law applicable to third-party effects of assignments of receivables. 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.

3. World Intellectual Property Organization²⁸

35. An information and coordination meeting was held by World Intellectual Property Organization (WIPO) in Geneva on 9 March 2009 with the participation of members of the UNCITRAL Secretariat and experts on intellectual property financing. The progress made by Working Group VI and possible future work by WIPO was discussed at both that meeting and the March 2010 UNCITRAL Colloquium.

²⁷ ec.europa.eu.

²⁸ www.wipo.int.

4. The Hague Conference²⁹

36. The work of the Hague Conference on security interests in the past year 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 Convention).

37. In addition, the Permanent Bureau of the Hague Conference was involved in the preparation of the conflict-of-laws chapter of the draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions on security rights in intellectual property.

5. Organization of American States³⁰

38. The Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) was convened in Washington D.C. from 7 to 9 October 2009. The Conference approved the Model Registry Regulations under the Model Inter-American Law on Secured Transactions. The UNCITRAL Secretariat participated in the deliberations of CIDIP-VII.

6. World Bank

39. The UNCITRAL Secretariat has provided comments to the Investment Climate Advisory Service (FIAS) of the World Bank Group on a revised version of the OHADA Uniform Securities Act, with a view to ensuring consistency with the UNCITRAL Legislative Guide on Secured Transactions. With the same goal in mind, the UNCITRAL Secretariat has also provided comments to FIAS on the World Bank Toolkit on Secured Transactions.

E. Electronic commerce

40. At its fortieth session, in 2007, the Commission requested the Secretariat to continue to closely monitor legal developments in the field of electronic commerce legislation.³¹ Accordingly, an update on the relevant activities of international organizations related to the harmonization and unification of international trade law in the field of electronic commerce will be provided in the separate document to be submitted for the consideration of the Commission (A/CN.9/692, Possible future work on electronic commerce).

41. In particular, reference is made to the WCO-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window (the “Joint Legal Task Force”). The Joint Legal Task Force was constituted pursuant to the Commission’s request that the Secretariat should engage actively with the World Customs Organization (WCO) and the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT), and with the involvement of experts, in the study of the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive

²⁹ www.hcch.net.

³⁰ www.oas.org.

³¹ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part I, para. 195.

international reference document on legal aspects of creating and managing a single window (A/CN.9/678, paras. 6-12). A report on the progress of the work of the Joint Legal Task Force is included in the separate document submitted to the Commission, (see A/CN.9/692).

F. Sale of goods

1. Organization for the Harmonization of Business Law in Africa

42. The Organization for the Harmonization of Business Law in Africa (OHADA), with the support of the World Bank Group's multi-donor Investment Climate Advisory Service (FIAS), is in the process of reviewing the eight existing OHADA uniform acts to take into account economic and legal developments subsequent to their adoption. This exercise aims at improving the quality and effectiveness of the OHADA legal and institutional framework, thus fostering trade and investment in OHADA member States.

43. After completing a diagnostic assessment of six of the eight Uniform Acts, recommendations were made for their modernization based on the findings of that assessment. Currently, the review exercise is in its second phase, with the goal of supporting OHADA with the adoption of amendments to the Uniform Acts based on the recommendations made during the assessment phase.

44. Among the uniform acts under review is the Uniform Act on General Commercial Law (the Act). The Act is considered a fundamental component of the OHADA legal system as it contains several provisions of general application in the commercial law field. It also contains provisions on the contract for sale of goods closely inspired by those contained in the United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG).

45. The draft amendments to the provisions of the Act relating to sale of goods are inspired by, among other sources, prevailing international legislative standards, including the CISG. Therefore, the adoption of the draft amendments, in their current form, could contribute to further aligning the provisions on sale of goods of the Act with the corresponding provisions of the CISG.

46. The draft amendments are to be circulated to OHADA member States for comment and discussed at a Plenary Council of OHADA National Commissions, so that the OHADA Council of Ministers may eventually deliberate on them.

47. In a separate exercise, OHADA, in cooperation with Unidroit, has prepared a draft uniform act on contract law, which could apply also to contracts for the sale of goods. This draft act is inspired by the Unidroit Principles of International Commercial Contracts that in turn were, at least in part, influenced in the relevant parts by the CISG. A Colloquium on the draft uniform act on contract law took place in Ouagadougou, Burkina Faso, on 15-17 November 2007. The UNCITRAL Secretariat was invited at that Colloquium and had the opportunity to refer to the importance of ensuring legal harmonization both at the regional and at the global level, including by further promoting the adhesion of OHADA member States to the CISG.

2. European Union

48. The mandate of the European Union requires facilitation of cross-border transactions in the internal market, including by establishing a conducive contract law environment. In light of the experience acquired by adopting measures relating to specific contracts or sectors, a more comprehensive approach has been undertaken, referred to as the Common Frame of Reference (CFR). The CFR intends to support the revision of existing, and the preparation of new, legislation in the area of contract law by providing fundamental principles of contract law, definitions of key concepts and model provisions.

49. As an academic document, the CFR is inspired by the Principles of European Contract Law and by the Unidroit Principles of International Commercial Contracts, and therefore also, at least in part, by the CISG. The European Union provides regular updates on the developments related to the CFR and other academic projects currently being considered in the field of contract law.³² Moreover, the CFR has also attracted significant interest from the academic community.

3. Global Sales Law Online Survey

50. The Global Sales Law Project was designed to provide researchers and practitioners with a comprehensive compilation of basic research in the field of international sales law.³³ An online survey was prepared by the Global Sales Law Project with a view to collecting data on practice in the field of international sale of goods.

51. The results of the survey may be useful for monitoring the application and uniform interpretation of the CISG and of the Convention on the Limitation Period in the International Sale of Goods, 1974 (amended in 1980). The Secretariat has supported the Global Sales Law online survey, whose results will be shared for independent use. A report on the results of the online survey will be submitted to the Commission at its forty-fourth session.

³² http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.

³³ www.globalsaleslaw.org/.

A/CN.9/707/Add.1 (Original: English)**Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law****CONTENTS**

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III. Harmonization and unification of international trade law**G. Commercial arbitration and conciliation****American Arbitration Association¹**

1. The American Arbitration Association (AAA) administers cases and provides administrative services in the United States and abroad through its International Centre for Dispute Resolution (ICDR), including assisting in the appointment of mediators and arbitrators. Additional services include the design and development of alternative dispute resolution systems for corporations, unions, government agencies, law firms and courts. The AAA also offers education, training, and publications providing a deeper understanding of alternative dispute resolution.

2. Effective 1 October 2009, the AAA announced revised Construction Industry Arbitration Rules and Mediation Procedures.² In May 2009, changes were made to the Supplementary Procedures for the Arbitration of Anti-Doping Rules Violations to ensure greater consistency and application of the procedural framework for these cases.³ In April 2009, the AAA Non-Binding Arbitration Rules were developed for use with business and consumer disputes, as well as for employee and employer disputes. The AAA's Non-Binding Arbitration Rules offer parties a means of resolving their cases using the procedural process of arbitration, with an informal hearing on the merits of the dispute, but without the finality of a binding decision. In February 2008, new rules and procedures to assist in resolving disputes related to insurance took effect.⁴

American Bar Association⁵

3. The American Bar Association (ABA) carries out a Rule of Law Initiative, a public service project which is dedicated to promoting the rule of law around the world. The project seeks to enhance, among others, the competence and expertise of

¹ www.adr.org.

² www.adr.org/sp.asp?id=36626.

³ www.adr.org/sp.asp?id=36206.

⁴ www.adr.org/sp.asp?id=33856.

⁵ www.abanet.org.

legal practitioners by providing technical assistance. The project includes substantive legal training on alternative dispute resolution and mediation.⁶

Asian-African Legal Consultative Organization⁷

4. At the Doha Session, in 1978, the Asian-African Legal Consultative Organization (AALCO) decided to establish Regional Centres for International Commercial Arbitration under their auspices in different parts of Asia and Africa so that the flow of arbitration cases to arbitral institutions outside the Afro-Asian region could be minimized. AALCO maintains the following objectives: (a) Promoting international commercial arbitration in Asian and African regions; (b) Coordinating and assisting the activities of existing arbitral institutions, particularly among those within the two regions; (c) Rendering assistance in the conduct of ad hoc arbitrations, particularly those held under the UNCITRAL Arbitration Rules; (d) Assisting in the enforcement of arbitral awards; and (e) Providing for arbitration under the auspices of the two centres where appropriate.⁸

5. A report on the development of these centres was presented to the AALCO's forty-eighth annual session in August, 2009.⁹

Asia Pacific Regional Arbitration Group¹⁰

6. The Asia Pacific Regional Arbitration Group (APRAG) is a regional federation of arbitration associations which aims to improve standards and knowledge of international arbitration and will make submissions on behalf of the region to national and international organizations. A new member, the Arbitration Association of Chinese Taipei, joined APRAG in March 2009. The Beijing Arbitration Commission (BAC) brought new Construction Dispute Board Rules into effect in March 2009.¹¹ In May 2009, the China International Economic and Trade Arbitration Commission (CIETAC) implemented its Online Arbitration Rules.

Association of the Bar of the State of New York¹²

7. The Association of the Bar of the State of New York (the NYSBA) maintains a NYSBA Dispute Resolution Section, which is a forum for improving these processes and the understanding of dispute resolution alternatives, for enhancing the proficiency of practitioners and increasing the knowledge and availability of party-selected solutions.¹³ In April 2009, the NYSBA Executive Committee and House of Delegates unanimously approved the Report by the Arbitration Committee of Dispute Resolution Section on Arbitration Discovery in Domestic Commercial Cases. The Report is to serve as a guide for Arbitrators on effectively handling

⁶ www.abanet.org/rol/programs/resource_legal_profession_reform.html.

⁷ www.aalco.int.

⁸ www.aalco.int/Regional%20Arbitration%20Centre.htm.

⁹ The report on AALCO Regional Centres for Arbitration was adopted as a resolution (RES/48/ORG 3), see www.aalco.int/Report%202009/Summary%20Report-09-final.pdf.

¹⁰ www.aprag.org.

¹¹ www.aprag.org/downloads/Newsletter/APRAG%20Newsletter%20200906.pdf.

¹² www.nysba.org.

¹³ www.nysba.org/AM/Template.cfm?Section=Dispute_Resolution_Home&Template=/CustomSource/SectionHome.cfm&Sec=DRS.

discovery in domestic commercial cases in a way that is both cost-effective and fair.¹⁴ In November 2009, the NYSBA will host a session on Securities Arbitration and Mediation that will present a detailed review of the major issues facing counsel in securities arbitration and will share step-by-step advice on the most effective ways to conduct hearings.¹⁵

Commonwealth Telecommunications Organization¹⁶

8. The primary function of the Commonwealth Telecommunications Organization (CTO) ADR Centre is to provide for the settlement of disputes in the field of Information and Communication Technologies (ICT). It maintains partnership relationships with the Chartered Institute of Arbitrators, the Centre for Effective Dispute Resolution and the ADR Group. The CTO ADR Centre and the Claims Room.com Ltd jointly operate an online dispute resolution platform.¹⁷ Recognizing the need to build capacity within developing countries and in the industry sector itself, the CTO ADR Centre conducts training programmes.

European Company Lawyers Association¹⁸

9. European Company Lawyers Association (ECLA) is forming a working group on mediation for the purpose of monitoring: (1) the implementation of the EU Directive 2008/52/EC on cross-border mediation in civil and commercial matters; and (2) the legal situation in the member associations' countries on mediation in civil and commercial matters, including the preparation of national legislation on mediation and/or mediators.¹⁹

International Chamber of Commerce²⁰

10. The International Chamber of Commerce (ICC) Commission on Arbitration has constituted six task forces covering amiable composition and *ex aequo et bono*, guidelines for ICC expertise proceedings, trusts and arbitration, national rules of procedure for recognition and enforcement of foreign arbitral awards pursuant to the New York Convention of 1958, Electronic Documents in Arbitration and "Arbitration involving states or state entities".

11. The information gathered as a result of the studies of the task force on amiable composition and *ex aequo et bono*²¹ provided the basis for the draft report on Amiable Composition and *ex equo et bono* which was presented to Commission members for discussion in April 2008. The task force will revise the report on the basis of all comments submitted by the members in that discussion.

¹⁴ www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=%2028055.

¹⁵ www.nysba.org/AM/Template.cfm?Section=Events1&Template=/Conference/ConferenceDescByRegClass.cfm&ConferenceID=3726.

¹⁶ www.cto.int.

¹⁷ www.ctomediation.com.

¹⁸ www.ecla.org.

¹⁹ www.ecla.org/documents/March.2009.pdf.

²⁰ www.iccwbo.org.

²¹ Further information is available at www.iccwbo.org/policy/arbitration/id6566/index.html. See also A/CN.9/657, para. 31.

12. The task force on Guidelines for Expertise Proceedings is preparing explanatory notes for the use of experts covering issues that include: the use of experts in ICC Arbitration; the use of experts under the ICC Rules for Expertise as fact-finders; and the use of neutral experts as facilitators under the ICC ADR and Dispute Board Rules.²²

13. The ICC published a guide to national rules of procedure for enforcing awards to mark the 50th anniversary of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in September 2009.²³ The report is the product of the work of the ICC task force on national rules of procedure for recognition and enforcement of foreign arbitral awards pursuant to the New York Convention has been set-up in view of the 50th anniversary of that Convention in 2008.²⁴ The task force on Arbitration involving States or State entities was created in March 2009 with the mandate to study and identify the essential and distinctive features of arbitrations involving States or State entities and determine whether there are special procedural considerations that should apply to such proceedings, including investment disputes pursuant to bilateral and multilateral treaties or state investment laws.²⁵ It has the further mandate to look at the ICC arbitration procedures and the Court's practices and determine whether there should be any specific requirements for ICC arbitrations involving states or state entities. Specifically, it should determine whether and how the presence of a State or State entity may or should affect the conduct of the arbitration and the role of the institution administering the proceeding. Finally, it should make any proposals for enhancing the role of the ICC International Court of Arbitration in the settlement of disputes involving States and State entities, including investment disputes pursuant to bilateral and multilateral treaties or state investment laws.

14. The task force on Electronic Documents in Arbitration was created in August 2008 with the mandate to study and identify the essential features and effects of the disclosure of electronic documents in international arbitration and prepare a report, possibly in the form of notes or recommendations for the production of electronic documents in international arbitration.²⁶

15. The task force on Trusts and Arbitration has the mission to study and identify specific issues related to trusts and arbitration and, if deemed appropriate, prepare a report; and to study the possibility of suggesting the inclusion of a draft ICC model arbitration clause in the trust deed, and, if appropriate, to develop a clause and to prepare an explanatory note. The draft document produced by the task force was approved by the members of the Commission subject to redrafting by a small committee whose task is to take into account the various comments made by the members and the National Committees.

²² Information on the task force on guidelines for ICC expertise proceedings is available at www.iccwbo.org/policy/arbitration/id1785/index.html.

²³ Information on the report is available at www.iccwbo.org/index.html?id=32917.

²⁴ Information on the task force on national rules of procedure for recognition and enforcement of foreign arbitral awards is available at www.iccwbo.org/policy/arbitration/id15588/index.html.

²⁵ Information on the task force on Arbitration involving states or state entities is available at www.iccwbo.org/policy/arbitration/id8222/index.html.

²⁶ Information on the task force on Trusts and Arbitration is available at www.iccwbo.org/policy/arbitration/id8222/index.html.

International Finance Corporation²⁷

16. The International Finance Corporation (IFC), the private sector arm of the World Bank Group, through the IFC Advisory Services in Middle East and North Africa (MENA), provides technical assistance and advisory services aimed at private sector development. As part of its interventions, IFC promotes alternative dispute resolution (ADR) to mitigate expensive and lengthy court procedures and to expand access to justice. In 2005, the IFC launched an ADR project that led to the establishment of the *Karachi Center for Dispute Resolution* (KCDR) in Pakistan. Currently, the IFC is working on expanding recourse to ADR in Pakistan. UNCITRAL and the IFC are exploring possibilities for future collaboration in that area.

International Bar Association²⁸

17. On 15 June 2009, the Arbitration Committee submitted a paper to the European Commission commenting on key aspects of the Commission's Report and accompanying Green Paper concerning possible changes to the operation of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Regulation). The paper addresses those aspects of the Report and Green Paper regarding the interface between the Regulation and arbitration and in particular the proposed deletion of the arbitration exclusion from the Regulation.²⁹

International Council for Commercial Arbitration³⁰

18. The International Council for Commercial Arbitration (ICCA) is a worldwide organization devoted to promoting the use and improving the processes of arbitration, conciliation and other forms of resolving international commercial disputes. Its activities include convening international arbitration congresses and conferences, sponsoring authoritative dispute resolution publications, and promoting the harmonization of arbitration and conciliation rules, laws, procedures and standards.

19. The ICCA publishes a Yearbook which provides an annual update on key developments in the Arbitration world, including: institutional and ad hoc arbitral awards, court decisions on arbitration from around the world, court decisions on major multilateral arbitration conventions, commentary on the court decisions on the New York Convention, updates on developments in arbitration law and practice, an investment treaty awards and decisions digest and a bibliography of the latest texts. It also publishes an International Handbook on Commercial Arbitration which covers arbitral law and practice in over 70 countries (last supplemented in March of 2009).³¹

²⁷ www.ifc.org.

²⁸ www.ibanet.org.

²⁹ www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx.

³⁰ www.arbitration-icca.org.

³¹ www.arbitration-icca.org/publications.html.

Organisation for Economic Cooperation and Development³²

20. In 2007, the OECD has agreed to modify the Organisation for Economic Cooperation and Development (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.³³

21. In July 2008, the OECD Council approved the contents of the 2008 Update to the OECD Model Tax Convention, with the aforementioned possibility of arbitration in cross-border dispute over taxation if they remain unresolved for more than two years.³⁴

Organization for the Harmonization of Business Law in Africa³⁵

22. The Organization for the Harmonization of Business Law in Africa (OHADA) with the support of FIAS³⁶ is currently in the process of systematically analysing its eight Uniform Acts with a view to their possible revision, in order to assess their application and ensure their contribution to the development of the private sector in the African region. The UNCITRAL Secretariat is involved in the analysis of the OHADA's Uniform Arbitration act,³⁷ which is based on the UNCITRAL Model Law on International Commercial Arbitration. The Act is completed by the Rules of Arbitration of the Common Court of Justice and Arbitration which sets out the functions of the Court with regard to arbitration and other jurisdictional matters.

Permanent Court of Arbitration³⁸

23. In 2008, the Permanent Court of Arbitration (PCA) received thirty-four new requests for designation of an appointing authority or services as appointing authority under the UNCITRAL Arbitration Rules. The PCA co-sponsored the symposium "Multiple Parties, Multiple Problems" at The Hague in May 2007. The symposium has given rise to the compilation volume "Multiple Party Actions in International Arbitration", which presents a collection of articles examining international multiparty arbitration from both a conceptual and a practical perspective.³⁹

UNCTAD⁴⁰

24. UNCTAD continues to implement its project on "Building capacity through training in dispute settlement in International Trade, Investment and Intellectual

³² www.oecd.org.

³³ www.oecd.org/dataoecd/17/59/38055311.pdf. See also A/CN.9/657, paras. 37-38.

³⁴ The 2008 Update to the OECD Model Tax Convention can be found at www.oecd.org/dataoecd/20/34/41032078.pdf.

³⁵ www.ohada.org.

³⁶ FIAS is the World Bank Group's Investment Climate Advisory Service, see www.fias.net.

³⁷ www.ohada.org/actes-uniformes/actes/publish.html.

³⁸ www.pca-cpa.org.

³⁹ The 2008 PCA Annual Report can be found at www.pca-cpa.org/upload/files/03%20Report%201-17.pdf.

⁴⁰ www.unctad.org.

Property”.⁴¹ 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 of international organizations, such as 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, and UNCITRAL.

25. Capacity-building workshops are being held to train officials, academics, legal practitioners and business from developing countries, including LDCs, and countries in transition. Since it started in May 2002, the project has successfully cooperated with United Nations bodies and international organizations, such as the WTO, the WIPO, ICC, the ICSID, 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. Recent developments included the conclusion of a memorandum of understanding between UNCTAD and the City University of Hong Kong⁴² on capacity-building in international dispute settlement on 10 March 2008 and a workshop on Dispute Settlement workshop in Riyadh, 1-4 June 2008.⁴³

World Intellectual Property Organization⁴⁴

26. World Intellectual Property Organization (WIPO) maintains a WIPO Arbitration and Mediation Center (the Center), which provides services in the area of arbitration, mediation and domain name dispute resolution. The WIPO Center provides various information on its website, including WIPO caseload, case examples, publications about the Center and its services.⁴⁵ It holds workshops and conferences on dispute resolution, including a workshop on Alternative Dispute Resolution in Research and Development Collaborations held in Belgium on 13 November 2009 and a conference commemorating the tenth anniversary of the Uniform Domain Name Dispute Resolution Policy (UDRP) on 12 October 2009. The conference sought to take stock of the UDRP experience and draw lessons with a view to informing other processes relating to the future of the Domain Name System in the broader context of intellectual property. In December 2008, the WIPO Center sent a proposal to the Corporation for Assigned Names and Numbers (ICANN) to remove the requirement to submit and distribute paper copies of pleadings relating to the URRP process, which is currently under consideration by ICANN. The purpose of that proposal is to benefit all parties by eliminating the use of paper and improving the timelines of UDRP proceeding without prejudicing either complainants or respondents.

⁴¹ See A/CN.9/657, paras. 37-38. Further information can be found at www.unctad.org/Templates/WebFlyer.asp?intItemID=4403&lang=1.

⁴² www.unctad.org/Templates/Page.asp?intItemID=4492&lang=1.

⁴³ www.unctad.org/Templates/Meeting.asp?intItemID=2068&lang=1&m=15358&year=2008&month=6.

⁴⁴ www.wipo.int.

⁴⁵ www.wipo.int/amc/en.

H. Procurement

1. Background and relevance to the work of the UNCITRAL Working Group

27. Public procurement is regulated through a hierarchy of international, regional and national instruments. The UNCITRAL Model Law on Procurement of Goods, Construction and Services is a national instrument, and its provisions are expressly subject to any treaty or other agreement between an enacting State and one or more states or international organizations, so that where any law conflicts with obligations under these treaties or agreements, the latter prevail (article 3 of the text).

28. At the international level, the United Nations Convention Against Corruption (A/Res/58/4, UNCAC) 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,⁴⁶ 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.

29. The Working Group has therefore recognized that the Model Law should be consistent with the requirements of these other texts and agreements, so that it can be enacted by all States that are parties to them, in addition to the general aim coordination and cooperation in procurement-related activities so as to facilitate the harmonization of procurement legislation and practice.

30. A number of international and regional organizations are regularly represented at the Working Group's sessions, and provide information to the Working Group at its sessions on their activities in policymaking and legislative work in general and electronic procurement. In addition, the UNCITRAL Secretariat is actively engaged in the work of the Multilateral Development Banks (MDBs), the OECD, and UNODC as set out in this note, and is in regular communication with other relevant organizations. The UNCITRAL Secretariat has also cooperated with the WTO secretariat on various issues related to legislative and technical assistance work.

2. Current activities of international organizations

Africa

African Development Bank

31. The AfDB and the Korea Public Procurement Service (PPS) signed a memorandum of understanding (MOU) in September 2009, to enhance collaboration

⁴⁶ Such as the APEC, COMESA, the European Commission, 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)'s Agreement on Government Procurement (GPA). The scope and content of the Model Law differs from those from international procurement rules designed to promote cross-border trade, both in terms of level of detail for procedures, and to some extent in objectives — the latter focus on cross-border trade and not on achieving the objectives of a national procurement system (such as value for money and avoidance of corruption). The multilateral development banks have also issued procurement guidelines for procurement they fund.

on public procurement reforms. The PPS is the Korean government's central procurement agency, and established the Korea Online E-Procurement System (KONEPS) in 2002. KONEPS has been noted as an example of good practice by the international community and PPS has, in this regard, begun sharing its knowledge and experience with other developing countries. Under the MOU, the two institutions will collaborate on policymaking, institutional development and capacity-building, support multinational and other special initiatives and networks on public procurement reforms in Africa, will provide technical assistance and feasibility studies on potential projects involving public procurement reforms and in particular, e-procurement; and develop and exchange human resources through training programmes, secondment of experts, and seminars in the region.

Common Market for Eastern and Southern Africa

32. Earlier reports to the Commission have advised of the work of COMESA on the Enhancing Procurement Reforms and Capacity Project (EPRCP) under the Public Procurement Reform Project (PPRP).⁴⁷

33. COMESA has continued its work in consolidating the reforms under the EPRCP and PPRP in COMESA states, with the support of the AfDB, to publicize and inform about 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.

34. COMESA issued draft public procurement regulations in support of the directive in June 2009. These regulations address the integration of public procurement in COMESA, financial thresholds, preferences and rules of origin for trade within and procurement within COMESA, the procurement process, record-keeping and challenge mechanisms, standards of conduct and ethics, and also discuss procurement reform in member States and supporting regional instructions including technical committees, dispute settlement mechanisms and cooperation among member States.

Asia

Asia Pacific Economic Cooperation

35. During the period under review, the APEC Government Procurement Expert Group (GPEG)⁴⁸ has continued its work the APEC Transparency Standards on Government Procurement (the Transparency Standards) as earlier reported; has continued its capacity-building projects, including progressing SME initiatives, providing information on the Transparency Standards and encouraging member economies to share information on their procurement frameworks, including e-procurement initiatives, on multilateral and bilateral trade arrangements

⁴⁷ 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). COMESA member states are Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

⁴⁸ The Group was established in 1995 as a sub-forum of the APEC Committee on Trade and Investment.

negotiated by member economies. It has also developed a framework for e-Procurement Guidelines, and assessed member economies' procurement systems and policies in an effort to facilitate the entry by private businesses/enterprises into the government procurement markets of APEC economies.

Europe

European Commission

36. During the period under review, the EC issued Directive 2009/81/EC on defence and security procurement, which entered into force on 21 August 2009. The Directive seeks to create a European defence market, supporting the development of the European defence-related supplier base. Previously, the vast majority of defence and sensitive security procurement contracts were exempted from the EU internal market rules. One of the reasons for the exemption was that the existing EU procurement rules were considered to be ill-suited for most defence- and security-related purchases. The defence procurement Directive provides special procurement rules for defence and security contracts, which are normally complex and sensitive and raise security interests. They apply to the procurement of arms, munitions and war material and also to sensitive non-military contracts in areas such as protection against terrorism, which are considered to have similar features to defence contracts.

EBRD

37. Although modified and updated several times since their adoption in 1992, the EBRD's Procurement Policies and Rules (PP&R) had not been subjected to a comprehensive review, so in 2008 the EBRD launched a process to overhaul them, to address increased efforts in fighting fraud and corruption, the incorporation within the PP&R of provisions reflecting the Bank's policies in other areas (private-public-partnerships, socio-environment), adjustments to reflect local conditions (local laws, local language, currency, taxes) to enable the Bank to continue to work in a sub-Sovereign environment within the framework of the Bank's PP&R, and adjustments to modernize and update to reflect current practices and acknowledgement of web-based technology. The review included a public consultation during 2008, inviting comment on the proposed revisions. Revised PP&R were presented to the EBRD's Board of Directors in May 2009. The main changes were: new provisions to reflect best practice in environmental and social matters, enhanced drafting of principles, considerations and guidance and the review or challenge mechanism, direct links to anti-corruption mechanisms within the EBRD, amendments to financial thresholds, relaxation of some English-language and currency requirements, permission to take account of import duties and taxes in evaluation, and reference to selection of private parties to concessions.

Multilateral development banks (MDBs)

38. A joint working group on Harmonization of Electronic Government Procurement (e-GP) (the "Joint Working Group"),⁴⁹ was set up at the beginning

⁴⁹ 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

of 2003 by the ADB, the IADB, and the World Bank, and was subsequently joined by the AfDB, and EBRD.⁵⁰

39. The Joint Working Group's preparation of documents to support electronic procurement under MDB financed projects is ongoing, and includes an e-GP toolkit, containing a strategic planning guide and a strategic overview, a roadmap, a standards framework, a discussion of authentication issues, a buyer and supplier activation guide, and a readiness assessment. These documents will support the E-Tendering Requirements published in October 2005 and the E-reverse Auction Guidelines published in December 2005,⁵¹ and will supplement and not replace existing requirements in procurement processes for MDB funded activities.

40. The World Bank has continued its consultations regarding the use of country systems for procurement. The aim is to build national institutions that have effective systems and sound capacity, to support. The Bank is conducting pilot programmes in 10 countries with procurement systems that meet its standards, in accordance with international best practices, to strengthen capacity for quality procurement and institutional development. It also seeks to enhance international competitive bidding, to allow international companies to compete for both World Bank-financed projects and local projects and procurement. Consultations have taken place with businesses and governments from 78 countries, with organizations, and with the country governments that would be the ultimate beneficiaries of the piloting programme.

OECD

41. During the period under review, the OECD has continued its efforts to support the "Draft Checklist for Enhancing Integrity in Public Procurement", previously reported, by consulting with an expert network on procurement (including the UNCITRAL Secretariat) on a draft Toolbox on Enhancing Integrity in Public Procurement. The OECD stresses that this draft document is an essential part of a package supporting the OECD strategy for building a stronger, cleaner and fairer world economy, reflecting countries' calls for guidelines, practical tools and analysis addressing vulnerabilities linked to the financial and economic crisis.

42. The OECD's Public Governance Committee has endorsed continuing work and the anticipated launch of consultations on the Toolbox in order to turn the tools into a web-based live document, which will operate at both international and regional levels on public procurement reform from the perspective of public governance, development aid and the prevention of corruption in public procurement.

United Nations and UNODC

43. The UN has decided to establish two independent mechanisms, an Acquisition Review Board (ARB), a body to consider challenges to procurement decisions, and a Senior Review Committee (SVRC), on a pilot basis, at the United Nations Headquarters. Although these measures are designed to address procurement carried

Commission at its thirty-eighth session (the "2005 Secretariat Note"), A/CN.9/584, para. 50.

⁵⁰ The UNCITRAL Secretariat participates in meetings of the Joint Working Group as an observer.

⁵¹ Discussed in A/CN.9/598/Add.1, paras. 14-20.

out by an international organization, rather than in a State, the reform is a clear signal that challenge mechanisms, which are required by the UNCAC, and by the UNCITRAL Model Law in its draft revised text, are now a common feature of procurement systems.

44. The Conference of States Parties to the UNCAC held its third and final session in Doha, Qatar, from 9-13 November 2009. The session, coordinated by the UNODC as custodian of the UNCAC, and at which the UNCITRAL Secretariat was represented, concentrated on two key issues regarding review of the implementation of the Convention: asset recovery and technical assistance, which includes procurement reform. An open-ended Intergovernmental Working Group on Technical Assistance is continuing its work, with the UNCITRAL Secretariat participating 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.

45. The Technical Assistance Working Group held an Intersessional Meeting in the period under review (Vienna, 18-19 December 2008) and a series of informal meetings, at which the UNCITRAL Secretariat was also represented, and at which the importance of procurement reform as an aspect of Preventive Measures under the Convention was stressed.

Part Three

ANNEXES

I. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules

Summary record of the 901st meeting, Held at Headquarters,
New York, on Monday, 21 June 2010, at 10.30 a.m.

[A/CN.9/SR.901]

Temporary Chairperson: Mr. Sorieul (Secretary of the Commission)

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

The meeting was called to order at 11.15 a.m.

Opening of the session

1. **Ms. O'Brien** (Under-Secretary-General for Legal Affairs, The Legal Counsel) 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. For more than 40 years, the Commission's work had contributed to forming the basis for the orderly functioning of an open economy, thus helping developing countries in particular to share the benefits of the global marketplace.

2. One of the main items on the agenda for the forty-third session was the finalization and adoption of a revised version of the UNCITRAL Arbitration Rules to take account of developments in arbitration practice since the adoption of the Rules in 1976. The revisions were aimed at enhancing the efficiency of arbitration, and the Rules would certainly continue to contribute to the development of harmonious international economic relations.

3. The Commission would also be considering a draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security

rights in intellectual property. In line with the overall objective of the Guide, the draft supplement was intended to make credit more easily available to intellectual property owners and other intellectual property rights holders, thus enhancing the value of intellectual property rights without interfering with fundamental policies of law relating to intellectual property.

4. Since 2006, and particularly in the wake of the global financial crisis, there had been increasing interest in the development of mechanisms to better handle the insolvency of large multinational enterprise groups. The Commission would have before it a draft text — intended to become part three of the UNCITRAL Legislative Guide on Insolvency Law — which, once finalized and adopted, would provide timely guidance in that regard.

5. The Commission was engaged in the revision of its 1994 Model Law on Procurement of Goods, Construction and Services and the consideration of its possible future work in the areas of electronic commerce, security interests and insolvency law. It would also have before it a paper on microfinance in the context of international economic development and possible further action in that field. In addition, it would be considering the challenges associated with facilitating online dispute resolution in cross-border electronic commerce transactions, a subject which continued to gain significance with the rapid expansion of international electronic commerce.

6. In addition to assisting the Commission with the fulfilment of its legislative mandate, the

International Trade Law Division was working to promote UNCITRAL legal texts and ways of ensuring their uniform interpretation and application, in particular through technical assistance and cooperation activities, the system of collection and dissemination of case law on UNCITRAL texts (CLOUT) and digests of case law. Case law collected through the CLOUT network facilitated cross-fertilization among jurisdictions, increasing certainty and predictability in commercial law, while the forthcoming digests would identify trends in the interpretation of a given convention or model law. Both sources would benefit judges, arbitrators and others in their everyday work. The Division also assisted the Commission with the coordination of activities with relevant international organizations, the review of its working methods, and monitoring of the implementation of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

7. The Commission contributed to the broader work of the United Nations aimed at strengthening the rule of law, since effective commercial law helped to address the root causes of many international problems, such as migration and inequitable access to shared resources. The Commission had discussed its role in promoting the rule of law at its forty-first and forty-second sessions and had included comments on the issue in its subsequent reports to the General Assembly. At the current session, the Commission would be holding a panel discussion on laws and practices of Member States in implementing international law, which had been chosen as a sub-topic for the debate on the rule of law at the sixty-fifth session of the General Assembly and would no doubt be of benefit to the Assembly's deliberations.

8. The Commission might also wish to address the rule of law and transitional justice in conflict and post-conflict situations, a topic that was equally of interest to the Assembly. The fields of arbitration and conciliation and public procurement, and possible future work in the area of microfinance, seemed particularly relevant in that regard.

Election of officers

9. **The Temporary Chairperson** said that the delegation of Costa Rica, on behalf of the Group of

Latin American and Caribbean States, had nominated Mr. Ricardo Sandoval (Chile) for the office of Chairperson of the forty-third session of the Commission.

10. *Mr. Sandoval (Chile) was elected Chairperson by acclamation.*

11. **The Temporary Chairperson** said that the Chairperson would not be present until the third week of the session. Noting that the Commission was meeting as a Committee of the Whole for the consideration of agenda item 4, he invited members to elect a Chairperson of the Committee.

12. **Ms. Peer** (Austria) nominated Mr. Michael Schneider (Switzerland) for the office of Chairperson of the Committee of the Whole.

13. *Mr. Schneider (Switzerland) was elected Chairperson of the Committee of the Whole by acclamation.*

Adoption of the agenda (A/CN.9/683)

14. *The agenda was adopted.*

15. *Mr. Schneider (Switzerland) took the Chair.*

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (A/CN.9/703 and Add.1, A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules

Section I. Introductory rules

Draft article 1. Scope of application

16. **The Chairperson** drew attention to documents A/CN.9/703 and Add.1, which contained the draft revised UNCITRAL Arbitration Rules prepared by the Working Group, and A/CN.9/704 and Add.1-10, which contained a compilation of comments by Governments and international organizations. He proposed that the Commission should consider the draft revised Rules article by article, leaving aside until a later stage article 2, paragraph 2, article 6, paragraph 3, article 34, paragraph 2, and article 41, paragraphs 3 and 4, since work had continued on those provisions after the end of the Working Group's last session and they would therefore require more thorough discussion.

17. He invited the Committee to begin its consideration of draft article 1. Once the full text of the Rules had been adopted, the items in square brackets in article 1 would be completed and the recommended model statements of independence would be discussed.

18. *Article 1 was adopted.*

Draft article 3. Notice of arbitration

19. **The Chairperson** invited the Committee to consider draft article 3. He noted that the Government of El Salvador had proposed that the word “relief” in paragraph 3 (f) should be replaced by the word “measure”. A proposal had also been made to add “whether or not there is a response to the notice” to the conclusions in paragraph 5. Since there was no support in the Committee for either proposal, he took it that the Committee wished to adopt article 3 as it stood.

20. *Draft article 3 was adopted.*

Draft article 4. Response to the notice of arbitration

21. **The Chairperson** invited the Committee to begin its consideration of article 4, which constituted a major change to the Rules.

22. **Mr. Vaagt** (Office of Legal Affairs) said that it would be difficult for the United Nations to meet the strict 30-day deadline set out in paragraph 1 (b), owing to the fact that arbitrations were usually handled by outside counsel whose hiring took time under the United Nations rules on procurement. The matter could possibly be dealt with in the United Nations arbitration rules.

23. **Mr. Torterola** (Argentina) said that the 30-day deadline for the submission of documents under paragraph 1 (b) might also be onerous for States or other respondents, in the event of complex arbitration. It might therefore be advisable to provide for a longer time limit.

24. **The Chairperson** pointed out that the observation had been made to the Working Group that the deadline provided for in the article under consideration and in other parts of the Rules were too lengthy and gave rise to complaints in arbitration. Before changing the time limit, the Committee must consider whether that might affect

the acceptability of the Rules. The problem might be dealt with in the arbitration clause. In addition, an observation could be recorded that States might have difficulty in organizing their defence, obtaining counsel and preparing a response. He pointed out, however, that there was a difference between establishing the arbitration tribunal and preparing the defence. Under the current rules, the respondent might have a longer time to develop a defence; the time limit pertained solely to designating an arbitrator.

25. **Mr. Abascal Zamora** (Mexico) said that his Government opposed the inclusion of the article on the grounds that it would give rise to difficulties in arbitration and was not within the Committee’s mandate. He therefore proposed that it should be deleted.

26. **Mr. Seweha** (Egypt) wondered whether a delay would have any consequences and, if so, whether it might be preferable to refer to such consequences in article 4.

27. **The Chairperson** replied that one consequence was set out in paragraph 3, which stated that “constitution of the arbitral tribunal shall not be hindered by any controversy”, in which event the appointment of arbitrators and establishment of the tribunal would proceed under article 8. The claimant could then decide whether to proceed to a substitute appointment under the Rules.

28. **Mr. Torterola** (Argentina) said that an annotation in the Rules stating that some States and other respondents might find it difficult to comply with the 30-day time limit would suffice.

29. **Mr. Jacquet** (France) said that the Working Group, mindful of the difficulties that might arise under article 4, had made provision both for obligatory items, set out in paragraph 1, and for optional items, set out in paragraph 2, to be communicated within the 30-day deadline.

30. **The Chairperson** said that he took it the Committee agreed to the proposal by El Salvador that the words “to be” should be added before “constituted” in paragraph 2 (a). He suggested that the Committee should further consider the questions of the 30-day time limit and the identification of those items whose communication within that limit might be problematic.

31. *It was so decided.*

Draft article 5. Representation and assistance

32. **Mr. Nikolaichik** (Belarus) drew attention to his Government's proposal, contained in document A/CN.9/704/Add.2, that a phrase should be added to the second sentence of article 5 relating to the certification of credentials.

33. **The Chairperson** said that he saw no support for the proposal in the Committee.

34. *Draft article 5 was adopted.*

Draft article 6. Designating and appointing authorities

35. **Ms. Hu** Shengtao (China) said that her Government, in its comments contained in document A/CN.9/704/Add.1, had suggested that the reference to the Permanent Court of Arbitration (PCA) in paragraph 1 should be deleted, as that article had not been thoroughly discussed by the Working Group.

36. **Ms. Peer** (Austria) said that her Government supported China's suggestion that the PCA should be solely a designating authority and not an appointing authority.

37. **The Chairperson** said that the reference to the PCA had been added as a clarification to indicate that it was not necessarily limited to the position of designating authority but could also act as an appointing authority, since at present it did act in the latter capacity. Austria was now proposing that the PCA should act as a designating authority but not as an appointing authority. He asked whether the Committee concurred.

38. **Mr. Petrochilos** (Greece) said that the PCA, in a previous submission to the Working Group, had pointed out that there was a practice of having it act as both designating authority and appointing authority. The purpose of the reference to the PCA in paragraph 1 was to codify existing practice. Any change to the provision might affect the validity of a number of long-standing agreements.

39. **The Chairperson** said that he took it that, in the absence of any support for the proposal by China and Austria, the Committee wished to adopt draft article 6 in its current form.

40. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that draft article 6, paragraph 4, should include a specific reference to refusal by an appointing official to act in the context of a challenge.

41. **The Chairperson** said he thought that refusal to act in the context of a challenge was covered by the first phrase of the first sentence of the paragraph, which referred to the appointing authority's refusal to act.

42. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that that phrase could be said to apply to failure to make a decision with respect to fees and expenses as well. For the sake of completeness, therefore, specific reference should be made to failure to act in respect of challenges.

43. **The Chairperson** said that a specific reference to challenges was not necessary and suggested that paragraph 4 could be considered in the context of draft article 41.

44. **Mr. Vaagt** (Office of Legal Affairs) said that the strict stipulation in draft article 6, paragraph 2, that the parties had to agree on the choice of an appointing authority within 30 days was difficult to implement. That difficulty should be reflected in the final report and maybe in the resolution on the application of the strict time limits imposed by the new UNCITRAL Arbitration Rules.

45. **The Chairperson** said that he found nothing wrong with that difficulty being mentioned in the final report, but its inclusion in the resolution could only be considered during the discussion on the resolution itself.

46. **Mr. Jacquet** (France) said that since the decision had been made to include the time limit in the text, there was no point in indicating that the time limit was impractical or difficult to implement. It was important not to introduce elements into the report that would contradict the Rules themselves. Much like paragraph 3 of draft article 6, paragraph 4 of that article should also be considered at a later stage in connection with draft article 41.

47. **The Chairperson** said that he had already indicated that draft article 6, paragraph 4, would be

deferred and revisited in the context of draft article 41.

48. **Mr. Castello** (United States of America) said that failure to act in the context of a challenge was not covered by draft article 6, paragraph 4, because it referred to an activity that had no time limit, whereas paragraph 4 referred to failure to act under the 30-day deadline or failure to act within any other period provided by the Rules.

49. **The Chairperson** said that the issue could be resolved either by redrafting the text to avoid enumeration of different situations where the appointing authority might be called upon to intervene, or by adding the reference to failure to act in the context of a challenge. He suggested that paragraphs 3 and 4 of draft article 6 should be considered at a later stage.

50. *Draft article 6, save for paragraphs 3 and 4, was adopted.*

Draft article 7. Number of arbitrators

51. **Mr. Abascal Zamora** (Mexico) said that his delegation had already proposed an alternative text to draft article 7 and wished to consult with other delegations to discuss its proposal.

52. **The Chairperson** said that the text was available in Spanish only and could not be discussed in detail until it was available in all the other languages. In the meantime, only the substance of the proposal could be discussed. He sought clarification as to whether the proposal affected the fall-back position of one or three arbitrators for arbitral tribunals.

53. **Mr. Abascal Zamora** (Mexico) observed that when the 1976 Rules were drawn up the number and complexity of international arbitration cases justified the appointment of three arbitrators. However, circumstances had changed considerably, with the increasing speed and number of transactions in the current international business environment. There were now many cases where one arbitrator was preferable to three. For example, in certain instances, the amount of money at stake was so insignificant that it made no sense to appoint three arbitrators. The gist of the Mexican proposal was that a default rule of a sole arbitrator should be established, with the possibility of three arbitrators

being appointed for specific cases. Following that appointment, the sole arbitrator would hear the parties, examine the documents, and then decide whether it was justified to have a three-person panel or to proceed alone.

54. **The Chairperson** noted that the mechanism to be used in the absence of a specific choice by the parties had been discussed at length and that the solution of three arbitrators which had been adopted by the Working Group had been criticized for the same reasons as those raised by the Mexican delegation. It was therefore necessary for the Committee of the Whole to discuss the matter, but that discussion should be deferred until the text was translated and submitted to the Committee.

55. **Mr. Abascal Zamora** (Mexico) said that experience had shown that where the parties did not agree on the number of arbitrators, more and more appointing authorities were adopting the sole arbitrator option.

56. **The Chairperson** said that the idea of having the final decision made by a sole arbitrator who had full knowledge of the case was somewhat attractive, especially if the appointing authority was not well equipped to conduct a thorough analysis before deciding on the number of arbitrators. He suggested that draft article 7 should be considered at a later stage, pending a review of the Mexican proposal.

57. *It was so decided.*

Draft article 8. Appointment of arbitrators

58. *Draft article 8 was adopted.*

Draft article 9

59. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage), referring members to the Comité's written comments (A/CN.9/704/Add.5), said that draft article 9 did not provide for arbitrators to consult with the parties before appointing the president of the arbitral tribunal. The draft article could be amended to read as follows: "If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall, after consultation with the parties should they so decide, choose the third arbitrator who will act as presiding arbitrator of the arbitral tribunal."

60. **The Chairperson** said that he had understood the assumption behind the proposal to be that the current text could preclude consultation between the arbitrators and the parties.

61. **Mr. Petrochilos** (Greece) said that the proposal was not meant to indicate that consultation was mandatory, but that it should be allowed.

62. **The Chairperson** asked whether, with the proposed amendment, it was the parties or the arbitrators who decided.

63. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage) said that Greece's interpretation was correct. The idea was not to impose consultation but to remove any uncertainty as to the possibility of the appointed arbitrators consulting with the parties before choosing the president of the arbitral tribunal.

64. **The Chairperson** said he took it that the Committee wished to defer consideration of the new phrase, "after consultation with the parties should they so decide", as well as the proposal by Slovenia (A/CN.9/704) that the reference in the last sentence of draft article 9, paragraph 3, should be to article 8 as a whole and not only to article 8, paragraph 2.

65. *It was so decided.*

The meeting rose at 1.05 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)

**Summary record of the 902nd meeting, held at Headquarters,
New York, on Monday, 21 June 2010, at 3 p.m.**

[A/CN.9/SR.902]

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

The meeting was called to order at 3.15 p.m.

**Finalization and adoption of a revised version of
the UNCITRAL Arbitration Rules** (*continued*)
(A/CN.9/703 and Add.1; A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules

Section I. Introductory rules

*Draft article 4. Response to the notice of arbitration
(continued)*

1. **Mr. Torterola** (Argentina) said that his delegation wished above all to avoid the risk that paragraph 2 (e) might be interpreted as in any way impeding a respondent's ability to make counterclaims or claims at a later stage, and was therefore proposing that that subparagraph begin with a phrase such as "As far as possible ...".

2. **The Chairperson** said that the components of the response to the notice of arbitration listed in paragraph 2 were in any event optional. The concerns of the representative of Argentina might be better met by making paragraph 1 (b) less prescriptive. That would have the merit of also addressing the concern, expressed at the 901st meeting, that the deadline of 30 days established in paragraph 1 might be too onerous for some parties and yet too lengthy for others. The wording proposed by the representative of Argentina matched that used in draft article 20, paragraph 4, which indicated that "The statement of claim should, as far as possible, be accompanied by all documents ...".

3. **Mr. Jacquet** (France) said that his delegation did not favour reflecting the wording of draft article 20 in draft article 4, paragraph 1 (b), because the two dealt with different situations and were not comparable. In the case of article 20, the situation was one of furnishing documentation, while in draft article 4, paragraph 1 (b), the situation involved a 30-day deadline for action. If the words "as far as

possible" were applied to the deadline, it risked losing all significance.

4. **The Chairperson**, in connection with the requirements of paragraph 1 (b), said that the components of the response to the notice of arbitration fell into two distinct groups: those relating to the claims involved in the case, and those relating to the constitution of the arbitral tribunal. In practice, arbitral institutions tended to apply deadlines more strictly to some requirements associated with the response to a notice of arbitration than to others. He therefore wondered whether the representative of France wished strict deadlines to apply to responses to every component of the notice of arbitration described in draft article 3, paragraphs 3 (c) to (g).

5. **Mr. Jacquet** (France) said that, in his view, some discretion could be used in determining deadlines, depending on the nature of the information concerned.

6. **Mr. Chung Chang-ho** (Republic of Korea) said that he supported leaving the existing wording of paragraph 1 (b) unchanged. The purpose of the article as a whole was to clarify outstanding issues at an early stage in the arbitration process, so 30 days seemed to offer enough time to do so. Moreover, any respondent unable to respond to the notice of arbitration within those 30 days could indicate that fact in the statement of defence described in draft article 21.

7. **Mr. Moollan** (Mauritius), recalling the distinction between the compulsory and optional components of the notice of arbitration itself, covered in draft article 3, paragraphs 3 and 4, said that the very same distinction applied to draft article 4, paragraphs 1 and 2. As a result, making paragraph 1 (b) less prescriptive would have the effect of blurring that distinction. If he had understood it correctly, the concern of the Argentine

delegation was that a respondent, in failing to provide the claimant with the information indicated in paragraph 2 (e) within the required 30 days, might lose any opportunity to do so at a later stage of the arbitration process. Perhaps that eventuality could be addressed by replacing “A response” in paragraph 1 (b) with “An indicative response”.

8. **Mr. Ghikas** (Canada) said that the concerns of the representative of Argentina could probably be dispelled, as draft article 30, paragraph 1 (b), indicated that a failure by the respondent to communicate its response would not be treated by the arbitral tribunal as an admission by the respondent of the claimant’s allegations.

9. **The Chairperson** said that, at the stage of the arbitral process to which draft article 4 applied, no arbitral tribunal would yet have been constituted. Moreover, the components of the response relating to the claims involved in the case were less urgently needed than those relating to the constitution of an arbitral tribunal. A delay in supplying the latter would lead to a delay in starting the arbitral process.

10. **Mr. Castello** (United States of America) said that the representative of Argentina seemed to be focusing on the features of the draft revised UNCITRAL Arbitration Rules that were new relative to the 1976 Arbitration Rules, such as the requirement for a respondent to provide information relating to the merits of the case. He understood that the deadline for receipt of such information might be a problem, for example in the case of a State that was obliged to seek outside counsel via a time-consuming procurement procedure. By contrast, the requirement for a respondent to provide information on the constitution of the arbitral tribunal was not new, and was in fact subject to a more generous deadline than before: 30 days rather than the 15 days stipulated in article 5 of the 1976 version of the Rules.

11. **The Chairperson** said that he inferred from the current discussion that a respondent’s failure to provide a response to the notice of arbitration in connection with the claims involved in the case was not considered as serious as appeared at first sight from reading draft article 4, paragraph 1 (b), alone, as that provision should be read in conjunction with draft article 30, paragraph 1 (b), which suggested

that some considerable time was available to the respondent.

12. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that, in the context of international arbitration rules as a whole, notices of arbitration and the responses thereto were customarily very brief, in contrast to statements of claim and statements of defence, which were more complete. Accordingly, the 30-day deadline seemed appropriate. It was, furthermore, in line with usual international arbitration practice. It should be remembered that the deadline applied in the current case to the information listed in draft article 3, paragraphs 3 (c) to (g), which did not need to be detailed. That seemed to be confirmed by draft article 3, paragraph 3 (e), which referred to “a brief description of the claim”.

13. **The Chairperson** said that, if the solution proposed by the representative of Mauritius was adopted, it could apply only to some of the components of the response listed in paragraph 1 (b), namely those relating to the components of the notice in draft article 3, paragraphs 3 (e) and (f). In view of the discussions that had just taken place, the first option was to leave draft article 4, paragraph 1 (b), unchanged, and the second option was to replace “A response” at the beginning of that subparagraph with “An indicative response”, specifying also that that applied only to article 3, paragraphs 3 (e) and (f).

14. **Ms. Smyth** (Australia), supported by **Mr. Möller** (Observer for Finland), said that it was preferable for draft article 4, paragraph 1 (b), to be left unchanged.

15. **Mr. Boulet** (Observer for Belgium) said that adding the word “indicative” risked creating confusion as to what information was admissible and the degree to which it was binding. Moreover, draft article 4 already made a useful distinction between compulsory and optional information and should not have added to it a further category of information termed “indicative”. He therefore also favoured leaving draft article 4, paragraph 1 (b), unchanged.

16. **Mr. Castello** (United States of America) said that his delegation also preferred draft article 4, paragraph 1 (b), to be left unchanged. However, if the

Working Group and the Committee felt it necessary to communicate the non-binding nature of some of the information required of the respondent, he did not favour adding the word “indicative”, which risked being misinterpreted. Perhaps a reference could be made to draft article 30 (1) (b) instead.

17. **Mr. Lebedev** (Russian Federation) said that he favoured leaving draft article 4, paragraph 1 (b), unchanged, as the concern raised by the representative of Argentina presented itself in only a few cases, and those cases could be resolved by a number of means.

18. **The Chairperson** said that the Committee seemed to agree that information provided by the respondents on claims involved in the case should not be considered binding at that stage of the arbitration process. He took it that the Committee wished to adopt draft article 4 unchanged and to reflect its discussions on the matter in the draft report of the Commission.

19. *Draft article 4 was adopted.*

Draft article 9

20. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage) pointed out that the text of paragraph 1 did not provide for the two arbitrators appointed by the parties to consult with the parties prior to choosing the president of the arbitral tribunal. Since it was the usual practice for the arbitrators to do so, it would be preferable to specify that the choice should be made after consultation with the parties should the arbitrators so decide.

21. **Mr. Petrochilos** (Greece) said that he supported the amendment because it made it clear that consultation was not precluded and that both arbitrators could consult.

22. **Mr. Möller** (Observer for Finland) said that he preferred leaving the text as it stood because it already allowed for such consultation.

23. **Mr. Castello** (United States of America) said that the proposed amendment would have to make it clear whether both arbitrators could consult with both appointing parties or simply each arbitrator with the corresponding party, which was the usual practice. Since most other rules were unspecific on

the matter, he himself doubted that the amendment was needed.

24. **Mr. Chung** Chang-ho (Republic of Korea) said that the established practice of consultation by the arbitrators with the parties might conceivably be seen to conflict with the need for their impartiality and independence under other provisions of the Rules. Perhaps that issue should be clarified by making an addition to draft article 11 confirming the acceptability of that practice.

25. **Mr. Castello** (United States of America) observed that, in many ethics guidelines, consultation with the party regarding the choice of a possible arbitrator was not considered problematic.

26. **Mr. Schöll** (Observer for Switzerland) pointed out that the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes, in Canon III.B.2, made it clear that, as the United States had suggested, each arbitrator could consult with his or her appointing party. He supported retaining article 9, paragraph 1, as drafted.

27. **Mr. Torterola** (Argentina) said that it was not necessary to legislate about exceptions to the rule. He believed the text as it stood left enough latitude for what was the accepted practice.

28. **The Chairperson** said that the consensus seemed to be to retain draft article 9, paragraph 1, as drafted, with the understanding that the report would indicate that the standard practice was uncontested and thus the Commission saw no need to make express provision for it. He drew attention to the comment by Slovenia (in document A/CN.9/704, p. 5) that both paragraphs of draft article 8 were relevant to draft article 9, paragraph 3, and not merely the second paragraph, as indicated in the current text. He therefore took it that the Committee wished to delete the words “, paragraph 2” at the end of article 9, paragraph 3, and thus refer to draft article 8 in its entirety.

29. *It was so decided.*

30. *Draft article 9, as amended, was adopted.*

Draft article 10

31. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage) said that the aim of paragraph 3 of article 10 was to safeguard the equality of the

parties as to the appointment of arbitrators — in line with the 1992 judgement of the French Court of Cassation in the *Dutco v. BKMI and Siemens* case — by allowing the appointing authority, when constituting the arbitral tribunal, to revoke any appointment already made so as to appoint the entire tribunal. He suggested adding the clause “, while respecting the equality of the parties” at the end of paragraph 3, in order to emphasize the principle.

32. **The Chairperson** said that perhaps the requirement to respect the equality of the parties was self-evident.

33. **Mr. Petrochilos** (Greece), recalling the legislative history of paragraph 3, said that it had been intended to accommodate all legal systems in resolving situations such as the one that had given rise to the *Dutco* case. If the proposed wording was added, the provision might diverge from the International Chamber of Commerce (ICC) International Court of Arbitration Rules and the London Court of International Arbitration (LCIA) Rules, and create more problems than it solved.

34. **Mr. Montecino Giralte** (El Salvador) said that he supported the amendment proposed by the Comité Français because the text as it stood might make the parties unequal.

35. **Mr. Jacquet** (France) said that while it might seem tautological to refer explicitly to equality of the parties in a rule aimed at that principle, the proposed amendment would have the advantage of instructing the appointing authority to bear that principle in mind at all times.

36. **The Chairperson** suggested that it might be better to introduce such a reference to equality of the parties in draft article 6 in general terms rather than in draft article 10 in connection with one specific intervention by the appointing authority.

37. **Mr. Jacquet** (France) said he considered that an ingenious solution.

38. **Mr. Castello** (United States of America) said he agreed with Greece that the proposed additional wording would create more difficulties than it solved. It would be best to state in the report that the purpose of the provision was to achieve equality of the parties, and leave it at that.

39. **Mr. Boulet** (Observer for Belgium) said that he believed the text should be made more specific, perhaps simply by stating that the appointing authority might “if need be” revoke any appointment already made.

40. **Mr. Moollan** (Mauritius) said that he agreed with the United States that it would open a Pandora’s box to refer to equality, either in draft article 10 or draft article 6. Article 10, paragraph 3, alleviated the *Dutco* problem by shifting the power of appointment from the parties to an institution, and the text should not in any way tie the hands of the appointing authority. In effect, the problem of the equality of the parties was resolved by removing the power of appointment from the parties.

41. **Mr. Ghikas** (Canada) concurred.

42. **The Chairperson** said that there seemed to be consensus that the appointing authority should be allowed to exercise discretion as to whether or not to revoke an appointment already made and should be given the same freedom that the parties had. The equality of the parties was of course the basic principle for the appointing authority, but it should not be specifically prescribed. The substance of the discussion on paragraph 3 could simply be set out in the report.

43. *Draft article 10 was adopted.*

Draft article 11. Disclosures by and challenge of arbitrators

44. **Mr. Abascal Zamora** (Mexico) said that any circumstances that might give rise to justifiable doubts as to the impartiality or independence of an arbitrator might be known by means other than notification by the arbitrator. His delegation therefore proposed that, in the final part of the draft article, the words “unless they have already been informed by him or her of these circumstances” should be replaced by “unless they have already been informed of these circumstances”.

45. **Mr. Moollan** (Mauritius) wondered whether the point just made was not covered by draft article 12, paragraph 2.

46. **The Chairperson** said that Mexico’s proposal went further in that it would allow an arbitrator to

claim that the parties already had knowledge of the circumstances in question.

47. **Mr. Abascal Zamora** (Mexico) said that draft article 11 set an obligation of disclosure, whereas draft article 12 regulated challenges made to an arbitrator by a party.

48. **The Chairperson** wished to know whether the present wording of draft article 11, which was the same as that of article 9 of the 1976 version of the Rules, had given rise to any problems in practice.

49. **Mr. Moollan** (Mauritius) said that, as an arbitrator could not be expected to know what was known by the parties, that could not qualify his or her obligation of disclosure. As for challenges to an arbitrator, the stipulation in draft article 13, paragraph 1, that such challenges must be notified within 15 days would debar such challenges in the hypothesis of the circumstances being already known to the parties.

50. **The Chairperson** said that the restrictive nature of the present wording of draft article 11 did not appear to have any real consequences, since a party could not rely on what had been known all along in order to make a challenge.

51. **Mr. Torterola** (Argentina) agreed with the delegation of Mauritius that the obligation of disclosure should not be affected by what might already be known to the parties. Turning to the question of justifiable doubts, he said that the present wording was not clear as to whom such doubts might be considered justifiable. His delegation proposed that it should be specified that the doubts must be justifiable in the view of an impartial third party.

52. **The Chairperson** said that there appeared to be a consensus in favour of retaining the present wording.

53. *Draft article 11 was adopted.*

The meeting was suspended at 4.55 p.m. and resumed at 5.15 p.m.

Draft article 12

54. *Draft article 12 was adopted.*

Draft article 13

55. **Mr. Jaeger** (Observer for the Comité Français de l'Arbitrage) said that the present wording of the draft article did not require reasons to be given for the decision taken by the appointing authority on a challenge to an arbitrator. Although some institutions, like the International Chamber of Commerce, did not give reasons for their decisions on such requests, in a context where the parties had not necessarily designated the appointing authority in advance, those parties might not wish to leave such decisions to the complete discretion of that authority. The Comité Français de l'Arbitrage therefore proposed that the wording of the final sentence of draft article 13, paragraph 4, should be changed accordingly, with, in addition, the introduction of a reasonable time limit, so that it would read: "In that case, within 30 days from the date of the notice of the challenge, it shall seek a reasoned decision on the challenge by the appointing authority within a reasonable time".

56. **Mr. Moollan** (Mauritius) said that there had been much debate on the desirability of reasons being given for such decisions by the appointing authority. The present forum was not the most appropriate place to decide the matter. The International Chamber of Commerce had chosen not to give the reasons for its decisions on such requests; some years previously, the London Court of International Arbitration had decided to do so, but in fact it still did not publish such reasons because of the problems that might ensue.

57. **Mr. Seweha** (Egypt) said that doubts as to the impartiality of an arbitrator should not be based on hearsay. It would not be sufficient to be given reasons for a challenge; supporting evidence should also be required, as in draft article 20, paragraph 4. His delegation therefore proposed the addition at the end of the second sentence of paragraph 2 of words to the following effect: "[... reasons for the challenge], and, as far as possible, provide the documents and other evidence relied upon by the challenger."

58. **Mr. Montecino Giralt** (El Salvador) suggested that, for the sake of clarity, it would be useful to include an obligation to give reasons for a challenge in paragraph 1 and not paragraph 2 of the draft article. That would solve the problem of

whether the period of time should be calculated from the time of receipt of the notice of the challenge or of the making of the challenge.

59. **The Chairperson** recalled that Slovenia had pointed to the inconsistency between the method of calculating a period of time prescribed in draft article 2, paragraph 5, where the starting date was the date of receipt of a notice, and the 15-day rule set out in draft article 13, paragraph 4, where the starting date was the date of the notice. Since that difference did not appear to create a problem that needed to be resolved in draft article 13 and as, moreover, there was no support for any of the proposed amendments, he took it that the present wording of that draft article should stand.

60. *Draft article 13 was adopted.*

Draft article 14. Replacement of an arbitrator

61. *Draft article 14 was adopted.*

Draft article 15. Repetition of hearings in the event of the replacement of an arbitrator

62. *Draft article 15 was adopted.*

Draft article 16. Exclusion of liability

63. **The Chairperson** recalled that, in its comments regarding draft article 16 (A/CN.9/704), the Permanent Court of Arbitration (PCA) had indicated that it enjoyed legal immunity under various international instruments. It had further indicated that such immunity provided sufficient protection against liability, and that a specific waiver under the revised Arbitration Rules was therefore unnecessary in respect of the Court. He took it that, unless there were objections, the Committee wished to comply with the Court's request and remove the phrase "the Secretary-General of the PCA" from the draft article.

64. **Ms. Cordero Moss** (Norway) said that the proviso "save for intentional wrongdoing" might create the impression that the Arbitration Rules created a liability for intentional wrongdoing, even if there was no such liability under the applicable law. Since the existence of liability was regulated by the applicable law, the Rules could not regulate the existence of liability; they could only allocate its financial consequences between the parties.

65. To avoid creating such an impression, her delegation proposed that the beginning of draft article 16 should be amended to read: "The parties waive, to the extent permitted under the applicable law, any claim that they may have under that law against the arbitrators ...".

66. **The Chairperson** observed that the language proposed by the representative of Norway would eliminate the words "intentional wrongdoing", thereby addressing the concerns raised in the comments that had been submitted by El Salvador (A/CN.9/704/Add.1) concerning the connotation of those words.

67. **Mr. Abascal Zamora** (Mexico), recalling that the concept of intentional wrongdoing was difficult to define in civil law systems, said his delegation shared the concerns that had been raised by El Salvador and supported the amendment proposed by the representative of Norway.

68. **Mr. Petrochilos** (Greece) said that he supported the proposed amendment. Recalling that arbitral decisions could not be appealed against on grounds of merit, he said that the Working Group had endeavoured to exclude liability to the extent possible in order to avoid the possibility of collateral challenges and attacks against arbitrators.

69. **Mr. Seweha** (Egypt) said that his delegation did not understand the reasoning behind the proposed amendment. He wondered why arbitrators should be granted rights not enjoyed by other professions. For example, judges were not exempt from liability and could be prosecuted for committing errors and forced to pay compensation. Arbitrators did not require such absolute protection, which could be abused. Questions of liability were best addressed under the relevant laws of each country. In fact, the laws of some countries, such as Egypt, did not provide for advance exemption from liability and considered such arrangements to be contrary to public order.

70. **Mr. Boulet** (Observer for Belgium) said that he supported the position of the representative of Egypt in connection with Norway's proposal. However, if the intention of that proposal was simply to emphasize that the Arbitration Rules may not regulate the existence of liability, then it would be preferable to delete the entire article. The key

question was whether the Rules should in any way allow parties to waive claims against the arbitrators, even in cases of intentional wrongdoing, if the applicable law provided for such a waiver. The Working Group had decided that there must be a minimum ethical standard and parties should therefore not be allowed to make such waivers.

71. **Mr. Jacquet** (France) said that the draft article did not contain sufficient qualifications in respect of the waiving of claims against arbitrators: it was too indiscriminate. Under the present wording, the waiver targeted any and all action taken by the arbitrators, as well as individuals other than arbitrators, and yet simultaneously curtailed considerably the opportunity for a waiver by referring to applicable law. It would be preferable to use clearer and more categorical language, such as “no legal claim may be pursued against arbitrators on the basis of any aspect of an arbitral decision”.

72. **Mr. Castello** (United States of America) said that the language of the article should focus on the question of the waiver. It was his understanding that the proposal of the representative of Norway was aimed at dispelling any implication that the article was creating liability. He wondered, however, whether it was desirable to remove the phrase “save for intentional wrongdoing”, which the Working Group had arrived at after much debate. The point on which he sought clarification was whether, in those countries in which arbitrators could be held accountable for intentional wrongdoing, parties would be waiving their right to hold arbitrators accountable for intentional wrongdoing simply by adopting the Arbitration Rules. The wording proposed by the representative of Norway did not address that situation.

73. **Ms. Cordero Moss** (Norway) said that, unfortunately, there was no simple answer to the question raised by the representative of the United States of America because the draft article was not clear as to what constituted intentional wrongdoing. Therefore, in certain jurisdictions, there could be circumstances under which liability would somehow overlap with certain aspects of intentional wrongdoing. The Arbitration Rules would be establishing liability for certain acts, such as intentional wrongdoing, on the assumption that there was a universal understanding of what constituted intentional wrongdoing. However, legal systems had divergent positions as to which forms of liability were mandatory and which forms could be waived, the extent to which they could be waived and in which circumstances. The laws of each State would therefore dictate whether liability could be waived.

74. **Mr. Castello** (United States of America) said that, based on the representative of Norway’s reply, it seemed that the parties could, in certain circumstances, waive the right to make a claim on the basis of intentional wrongdoing. While it was true that the extent to which parties could waive liability varied from one jurisdiction to another, it was his understanding that the representative of Norway was implying that, because intentionality was viewed differently in various jurisdictions, it would make the scope of any waiver uncertain. However, after a long discussion, the Working Group had concluded that intentionality was a legal concept that was recognized under most legal systems. His delegation was therefore reluctant to delete the reference to intentional wrongdoing simply because no better solution was available.

The meeting rose at 6 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*

**Summary record of the 903rd meeting, held at Headquarters,
New York, on 22 June 2010, at 10 a.m.**

[A/CN.9/SR.903]

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

The meeting was called to order at 10.20 a.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*

(A/CN.9/703 and Add.1, A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules

*Section II. Composition of the arbitral tribunal
(continued)*

Draft article 16. Exclusion of liability (continued)

1. **The Chairperson**, recalling the observations made following informal discussions, said that some delegates had noted that the term “intentional wrongdoing” was used in some national laws but not in others, and that it was expressed in different forms in different legal orders. Others, however, had felt that intentional wrongdoing was at the core of all liability claims for wrongful acts and that judges everywhere would understand the concept, regardless of the term used to capture it in their national laws. In response to the view that the draft article could create a liability claim where none existed, some delegates had pointed out that, by saying that “the parties waive ... any claim against the arbitrators”, the draft article was, in fact, saying that there was a claim that could be waived.

2. Lastly, some delegates had noted that, in some legal systems, there were situations where the applicable law went further than “intentional wrongdoing” and where liability could not be waived. Others had said that those situations were covered by the expression “to the fullest extent permitted under the applicable law”.

3. **Mr. Snijders** (Observer for the Netherlands) said that there were only slight differences in the terminology used to express the idea of intentional wrongdoing around the world and that those differences had no impact on the application of the

concept. His delegation therefore supported the draft article as presented.

4. **Ms. Aguirre** (Argentina), speaking in support of the draft article, said that it had been discussed at length in the Working Group and that the text submitted was the result of a consensus reached among the members.

5. **The Chairperson** said that even if the Working Group had reached a consensus, the Committee of the Whole should not be limited in its examination of the draft articles, especially if it felt that something deserved to be reconsidered.

6. **Ms. Matias** (Israel) said that she supported the text as presented, subject to the general agreement that the reference to the Secretary-General of the PCA would be deleted.

7. **Mr. Bellenger** (France) said that the report should show that some delegations, including his own, were somewhat uneasy with the draft article, not only because of its substance, but also because it was not in line with practice. In addition, it was an illusion to think that national judges would be bound by that provision on the settlement of arbitral disputes. The draft article would create a situation where people thought they were protected by the Rules of Arbitration when in fact they were not.

8. **The Chairperson** said that all delegates were aware that protection was not absolute, which was why the text set out the condition of “intentional wrongdoing”.

9. *Draft article 16, as amended, was adopted.*

Draft article 2. Notice and calculation of periods of time (continued)

10. **The Chairperson** drew attention to document A/CN.9/704/Add.8, which contained a revised version of draft article 2.

11. **Ms. Matias** (Israel) said that her delegation supported the proposal made by the delegation of the United States of America in document A/CN.9/704/Add.1 to retain the version of draft article 2 found in A/CN.9/WG.II/WP.157.

12. **The Chairperson** recalled that one of the points which had been raised about the draft article was the requirement, upon the delivery of a communication, of a record of the “information contained therein”, as stated in paragraph 3. It had been argued that, in many forms of transmission of communications, there was no record of the information contained therein. With courier services, for example, a signature of the addressee confirming that a package had been delivered was sufficient. As the expression “information contained therein” had been introduced only in the context of electronic communication, a proposal had been made to delete those words, in order to have a rule that applied to all forms of transmission.

13. **Ms. Cordero Moss** (Norway) and **Ms. Matias** (Israel) supported the proposal.

14. **Mr. Chung** Chang-ho (Republic of Korea), while expressing support for the proposal, said that he would prefer to revert to the language of paragraph 1 of working paper A/CN.9/WG.II/WP.157, which read as follows: “Any notice, including a notification, communication or proposal shall be delivered by any means of communication that provides a record of its transmission”. That paragraph had been chosen originally because it covered every possible means of transmission.

15. **The Chairperson** said that that paragraph had been recast in draft article 2, paragraph 3, but he took it that the Committee had agreed to delete the words “the information contained therein”.

16. *It was so decided.*

17. **The Chairperson**, turning to the rest of the paragraph and the record of “sending and receipt”, wondered whether the concerns raised earlier could be resolved by replacing that expression with “the record of transmission”.

18. **Mr. Chung** Chang-ho (Republic of Korea) said that he agreed with the suggestion, but that the text of paragraph 1 proposed in working paper

A/CN.9/WG.II/WP.157 (para. 8) should become the first paragraph of draft article 2 because, unlike paragraph 3, which referred only to notices under paragraphs 1 (b) and 2, that text would set out the general principle of methods of communication.

19. **The Chairperson** wondered whether, in paragraph 3, changing the wording from “sending and receipt” to “transmission” would cover receipt of a notice or not.

20. **Mr. Chung** Chang-ho (Republic of Korea) said that transmission covered only sending, because receipt must be proven by the receiving party. However, evidence of receipt was not necessary. The only reference should be to methods of transmission, including electronic transmission.

21. **Ms. Matias** (Israel) said that she fully supported the proposal to include a reference to means of communication in paragraph 1.

22. **The Chairperson** said that apart from the specific reference in paragraph 3 to paragraphs 1 (b) and 2 and “information contained therein”, the only difference between the present paragraph 3 and the previous paragraph 1 was the use, in the latter, of the word “transmission” instead of “sending and receipt”. Delegations should therefore decide whether to use the expression “record of sending and receipt”, or “record of sending” only, or “record of transmission”. They should also decide whether the chosen expression should be included in a new paragraph 1 or retained in paragraph 3.

23. **Mr. Castello** (United States of America) said that paragraph 3 should be deleted altogether and replaced with paragraph 1 from the working paper (A/CN.9/WG.II/WP.157). If the Rules required a record of receipt as proposed in draft article 3, they would become more complicated, because there were circumstances where it would be impossible to obtain a record of receipt. The only change his delegation might suggest to the proposed paragraph 1 would be to replace the word “delivered” with “sent”, because that paragraph referred to permissible modes of transmitting documents to the other parties or to the tribunal.

24. **The Chairperson** said that he did not see how replacing the present paragraph 3 with the proposed paragraph 1 would change anything, because what was required was not a record of receipt, but simply

a record of sending. If “delivered” were replaced by “sent”, the problem of physical delivery would not be resolved, because there was no need for a record of sending when something was delivered in person.

25. **Mr. Castello** (United States of America) said that the proposed paragraph 1 should be placed at the top of draft article 2 because it referred generally to all means of communication. With regard to physical delivery, the sending party would usually want to have a record of compliance with the required mode of delivery, whether it was by way of a form or by any other means which would qualify as a record of transmission.

26. **The Chairperson** said that he had thought that if something was delivered physically then it could not be considered to have been sent.

27. **Mr. Ghikas** (Canada) said that “deemed receipt” was contemplated in certain circumstances and that mere sending in those circumstances would constitute evidence of receipt.

28. **Mr. Seweha** (Egypt) said that draft article 2 should be comprehensive and inclusive of all practical cases. It was his understanding that paragraph 1 (a) referred to situations where the addressee was present at the designated place of delivery and received the notification. Paragraph 1 (b), on the other hand, referred to situations where the addressee was not present at the address, such that the communication was delivered at the habitual residence or place of business, or was sent to the last-known address.

29. The stipulation in paragraph 1 (b) that the notice would be deemed to have been received if it was delivered at the habitual address was difficult to understand. It was unclear whether if someone living with the addressee received the notice or if the notice was left at the door, it would be deemed to have been delivered. Consequently, his delegation proposed that a new paragraph should be added to cover cases where the addressee was present and refused to take delivery of the notice.

30. **The Chairperson** said that refusal to take delivery was covered by paragraph 2, which said that if delivery failed, the notice was deemed to have been received if it was sent to the addressee’s last-known place of business or address.

31. **Mr. Seweha** (Egypt) said that as deemed receipt would apply only if the notice was sent to the addressee’s last-known address or place of business, it meant that delivery failed because the addressee’s current address was unknown. If the paragraph had intended to convey refusal of receipt, then there would have been no need to refer to the last-known place of business or address. Therefore, neither paragraph 1 (a) nor paragraph 2 covered the situation where a person or his or her representative was present but refused to take delivery of the notice.

32. **The Chairperson** suggested that if the word “receipt” was replaced by “sent”, then that problem might not arise, and if receipt was no longer required, then the issue of deciding who should take delivery of a notice would be moot.

33. **Mr. Chung** Chang-ho (Republic of Korea) said that the word “delivered” in the previous paragraph 1 should be retained instead of “sent”, because delivery was the principal method of communication, while sending was a concept of communication which applied only when the addressee could not be found.

34. **The Chairperson** said he took it that the proposal was that the word “sending” could be used in the current paragraph 2 when the only option was to send the notice to the last-known address. He wished to know what would happen under the current Rules if the word “delivered” was retained and the addressee refused to take delivery of the notice.

35. **Mr. Chung** Chang-ho (Republic of Korea) said that if the addressee refused to take delivery, the person delivering the notice would leave it at the house and make a record that the notice had been delivered to the address.

36. **The Chairperson** suggested that, for the sake of clarity, draft article 2 might have to be revisited at a later stage.

37. **Mr. Petrochilos** (Greece), speaking on behalf of his own delegation and the Chairperson, introduced a new proposal for a revised version of draft article 2, which read as follows:

“1. For the purposes of these Rules, any notice, including a notification, communication or proposal, may be delivered:

(a) physically to the addressee; or

(b) at the habitual residence or place of business of the addressee, or at any other address previously designated by the addressee for this purpose; or

(c) at the addressee's last-known place of business or address, if after reasonable efforts delivery cannot be effected in accordance with paragraph (a) or (b).

2. Delivery shall be effected by any means of communication that provides a record of sending and receipt.

3. Notice shall be deemed to have been received on the day it is delivered under paragraph 1.

4. For the purpose 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."

38. **Mr. Jacquet** (France), welcoming the proposal introduced by the representative of Greece, said that delivery and receipt were not as important as they appeared. The rules on notifications indicated by what means a communication could validly be made by one party to another, and their purpose was to avoid the need for comprehensive proof of delivery of the notification to the other party and proof of that party's knowledge of the notification. He proposed that the word "delivery" in paragraph 1 (c) of the text proposed by the Greek delegation should be replaced with the word "notification" because the subparagraph in question referred to circumstances in which it had not been possible to effect notification under subparagraphs (a) and (b). It was not logical to introduce a requirement of delivery in subparagraph (c) when no such requirement was mentioned in subparagraphs (a) and (b).

39. With regard to the comments made by the representative of Egypt, there was no need to provide for the possibility of a party's refusal to

receive notification. Once a notification had been sent under paragraph 1, refusal of receipt was irrelevant, and providing for such refusal would negate the impact of the modes of notification set out in paragraph 1.

40. **The Chairperson** said that there seemed to be general agreement that the words "transmission" or "sending" should be used instead of "receipt". He asked whether the term "transmission" was preferred to the word "sending".

41. **Ms. Matias** (Israel) said that her delegation had favoured the concept of a record of receipt, but, in view of the concerns raised by other delegations, would not insist on it. Her delegation preferred the word "transmission" to the word "sending". She agreed with the representative of the Republic of Korea that the word "delivered" should not be replaced with the word "sent" in the version of draft article 2, paragraph 1 (b), contained in document A/CN.9/703, since the provision in general dealt with time frames based on the date of delivery.

42. **Mr. Boulet** (Observer for Belgium) said he agreed that the concept of sending should be regarded as an exception; the general principle behind the draft article was that of delivery. It would be preferable to refer to a record either of sending or of delivery; the use of the word "transmission" would create unnecessary ambiguity.

43. At the same time, his delegation would prefer to retain the reference to a means of communication that provided a record of receipt, since the sender had the burden of proof in the event of a dispute as to whether or not the notice had been received. However, if there was a consensus in favour of referring only to a record of sending, his delegation would go along with it, particularly since, if a dispute arose, draft article 27 in any case provided that each party had the burden of proving the facts relied on to support its claim or defence. Therefore, if the sender wanted to guard against the possibility of a dispute, it could choose a means of communication that provided a record of receipt. Moreover, in most cases no dispute would arise anyway.

44. **Ms. Peer** (Austria) said that, while her delegation understood the concerns that had been raised about requiring a record of receipt, it would

prefer not to remove the requirement completely. Records of receipt were particularly important with regard to notices of arbitration, since only such a record would provide certainty that a party had knowledge of the arbitration proceedings. However, her delegation could accept a text that referred only to a record of transmission.

45. **Mr. Petrochilos** (Greece) said that the 1976 Arbitration Rules treated delivery and receipt as two sides of the same coin; if physical delivery was effected, then the notice was deemed to have been received. Like most laws on the subject, the Rules approached the question of delivery from the perspective of the sender and placed a burden on the sender to effect delivery.

46. The Rules did not deal with situations in which the address was not the correct address or in which a given representative of the recipient was not a proper representative; nor did they need to deal with such situations because, if a party claimed not to have received proper notice of arbitration proceedings, the matter could be resolved by the arbitral tribunal or the courts. Similarly, the matter of refusal by a party to take delivery of a notice was not explicitly addressed in the Rules; however, if the sender, through an intermediary, effected delivery and the person physically making the delivery recorded that it was refused, the delivery was nonetheless considered effected. Disputes as to whether or not proper notice had been received in such circumstances were again a matter for the tribunal or the courts. The scope of the Rules was therefore limited in those respects; they focused on the practical concepts of delivery and transmission by proper means to the right addressee at the right address, which led to a presumption of receipt and of the time of that receipt. The revised version of draft article 2 proposed by his delegation and the Chairperson aimed to reflect those concepts.

47. **Mr. Chan** (Singapore) said that one of the purposes of revising the Arbitration Rules was to bring them into line with the Commission's work in other areas, in particular the area of electronic communications. He therefore proposed that the word "delivery" should be replaced by the word "dispatch", in line with the United Nations Convention on the Use of Electronic Communications in International Contracts.

48. **Mr. Seweha** (Egypt) said he agreed with the representative of Belgium that the sender, as the initiator of delivery, should bear the burden of proof of receipt. Since the Arbitration Rules did not place such a burden on the sender, they should make it clear that, if the sender did not obtain proof of receipt, it incurred the risk of the addressee's denying receipt. The Egyptian courts had operated in line with the approach set out in the 1976 Rules until 2005, when they had introduced a requirement for senders to obtain proof of receipt. That might lead to difficulties in the enforcement of decisions of arbitral tribunals in Egypt.

49. **Mr. Ghikas** (Canada) noted that draft article 3 stated that the parties must "give" notice of arbitration, whereas draft article 4 contained the word "communicate". That terminology should be reviewed in the light of the eventual decision on the wording of draft article 2.

50. **The Chairperson** noted that, in addition, draft article 3, paragraph 2, contained the word "received", which might need to be reviewed, once draft article 2 had been finalized, for cases where no physical delivery was effected.

The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

51. **The Chairperson** said that the consideration of draft article 2 would be resumed at a later stage pending further consultations.

Section IV. The award

Draft article 34. Form and effect of the award

52. **Mr. Castello** (United States of America) said that, bearing in mind the extended debate that had taken place in the Working Group and the Group's difficulties in reaching agreement on an exception to the waiver provided for in draft article 34, paragraph 2, the easiest solution was not to try to craft such an exception but rather to rely on the understanding reflected in many other rules that the waiver referred only to the right under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) to resist enforcement or to apply for the setting aside of an award. His delegation therefore favoured deleting all the words contained in square brackets in the current

text, except for the word “or” that appeared before the word “review”. The word “against” should also be changed to “of”.

53. **Mr. Moollan** (Mauritius) expressed agreement with the United States proposal. The rule would then be consistent with many other institutional rules and would also deal with a number of issues that had arisen under the 1976 Arbitration Rules.

54. **Mr. Ghikas** (Canada) said that his delegation favoured retaining only the first two sentences of the paragraph and deleting the remainder, so that the rule would remain almost identical to the 1976 version. Arbitral awards should be final, and possibilities for “second-guessing” them should be limited, as under the UNCITRAL Model Law on International Commercial Arbitration. The waiving of rights at law that would otherwise exist at the seat of arbitration should be done in a considered way and should not become a matter of course under the Rules. When drafting arbitration agreements, commercial parties usually gave considerable thought to the question of where the arbitration was to be seated, and one factor in their decision was the rights of appeal or review in the jurisdictions in question. The provision as currently drafted might not be interpreted in the same way in different jurisdictions. Moreover, as illustrated by two court decisions in Canada, it could not be assumed that such rights as the right to set aside an arbitration award under the Model Law would be preserved. However, if there was a consensus in favour of retaining the third sentence of the paragraph, then the second half of the sentence, from the word “except” onwards, should be retained in some form.

55. **Ms. Hu Shengtao** (China), expressing support for the comments made by the representative of Canada, said that, whether or not the phrase in the last set of square brackets was kept, wording along the lines of “unless the laws of the country where the arbitration takes place stipulate otherwise” should be added at the beginning of the last sentence of the paragraph.

56. **Mr. Möller** (Observer for Finland) said that he supported the proposal made by the United States representative for the reasons set out by him. The 1976 version of the rule had not caused any difficulties to date. There was no need to add language along the lines of “insofar as such waiver

can validly be made”, because if the applicable law did not allow for a waiver, then the rule itself would not apply anyway.

57. **Mr. Torterola** (Argentina) said that, as pointed out by the representative of Canada, arbitral awards were final and binding on the parties. The rights set out in the New York Convention should not be undermined. The paragraph as currently drafted would be acceptable only if all the text in square brackets was retained. Otherwise the third sentence should be deleted entirely, as proposed by the representative of Canada.

58. **Ms. Smyth** (Australia), expressing support for the United States proposal, said that the concerns raised by the delegation of Canada and others were dealt with to some extent by the words “insofar as they may validly do so by adopting these Rules”, which preserved the fundamental rights of recourse under the New York Convention. The third sentence of the paragraph was a useful addition because it minimized the possibility of other types of challenges to the merits of the award, which was consistent with the fundamental principle that awards were final and binding and should be carried out without delay. However, the text in square brackets in the second half of the sentence, in distinguishing between applications requesting the setting aside of an award and proceedings regarding execution and enforcement, highlighted the difficulties that had been faced in crafting an appropriate wording. For that reason, her delegation supported the United States proposal that the bracketed text should be deleted; however, if it was retained, it should be kept in its entirety. Her delegation saw no contradiction between allowing parties to challenge execution and enforcement and the fundamental principle that awards should be carried out without delay.

59. **Ms. Montejo** (Office of Legal Affairs) said that the Organization conducted its arbitrations outside of the procedural laws of the place of arbitration, in line with the 1946 Convention on the Privileges and Immunities of the United Nations. Therefore the bracketed text at the end of the last sentence of paragraph 2 might be interpreted in some instances as a waiver of the Organization’s privileges and immunities. If that text was

eventually adopted, a note would need to be added indicating that it did not signify such a waiver.

60. **The Chairperson** said that, as the Organization was not subject to the arbitration law at the seat of arbitration, it had no right of appeal under that law. There was therefore no need to provide for a waiver of that right.

61. **Ms. Montejo** (Office of Legal Affairs) said that the opposing parties might have different rights.

62. **Mr. Viswanathan** (India) concurred with the representative of Canada that if the words in square brackets were retained, then the entirety of the text should be retained. Under Indian law, once an award was granted by the arbitrators, the right of parties to challenge the award in court on any grounds permitted by the arbitration law could not be waived. Any agreement between the parties waiving recourse to a court was null and void under the Indian Contract Act.

63. **Mr. Montecino Giralt** (El Salvador) expressed his support for the position taken by the representative of Argentina. As set out in document A/CN.9/704/Add.1, his Government's proposal was to include the words "In so far as permitted under the law applicable to the arbitration", in order to ensure that the provision in draft paragraph 2 applied both to countries in which a waiver of the right of appeal was permitted and to those in which it was not.

64. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that he felt uneasy about the provision under discussion. It was misleading to state that "the parties shall carry out all awards without delay", since a motion to set aside or any resistance to enforcement could cause considerable delay. An observation to that effect should be made in the report.

65. Moreover, the report should make it clear that parties had a right to resist enforcement under article 5 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and had a right to move to set aside or annul an award under article 34 of the UNCITRAL Model Law on International Commercial Arbitration. The reference to a waiver of the right of appeal was therefore misleading, since parties had a right of appeal under the applicable law; the report should state that the

right in question was limited to the grounds of the Model Law. In the text of the Rules, it would be preferable to retain, at most, the first two sentences of draft paragraph 2.

66. **Mr. Boulet** (Observer for Belgium) said that his Government was in favour of retaining the words in square brackets. Since the Committee was formulating a waiver clause, it must specify what was being waived. That was the purpose of the bracketed words, which also set out the limitations to the waiver.

67. **Mr. Moollan** (Mauritius) said that, in the absence of consensus, it was preferable to let the previous wording of article 34 stand. The words in brackets were based on the false assumption that the Model Law was applicable everywhere. Even where the Model Law had been enacted, derogations were often made from the model text. In the United Kingdom, for example, the provision under discussion would conflict with section 69 of the English Arbitration Act, under which setting aside was itself the remedy.

68. **Mr. Castello** (United States of America), with support from the representative of Mauritius, said that, if the first two sentences of draft paragraph 2 were to stand, then the wording contained in the draft should be retained rather than the wording of the 1976 Arbitration Rules, as an important amendment had been made to one of those sentences.

69. **The Chairperson** said that there was strong support for retaining the first two sentences of draft paragraph 2 and that there was no objection to the drafting changes in the third sentence proposed by the United States. The differences arose with respect to the bracketed phrase at the end of the paragraph. He was concerned that, unlike for article 16, the Committee could not assume that a judge would understand the meaning of the provision, since it dealt with procedural remedies for which the diverse terminology used in different countries might create confusion. He invited the Committee to consider whether there was any justification for specifying what types of recourse were reserved, given the difficulty of doing so. In the alternative, it might be best to highlight, as proposed by China, that only those remedies were excluded which the applicable law allowed to be excluded.

70. **Ms. Cordero Moss** (Norway) proposed the following wording, which in her view was sufficiently clear on what was being waived: “the parties waive their right to any form of appeal ... that may be waived under the applicable law and the waiver of which does not require a specific agreement”.

The meeting rose at 1.05

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*

**Summary record of the 904th meeting, held at Headquarters,
New York, on Tuesday, 22 June 2010, at 3 p.m.**

[A/CN.9/SR.904]

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

The meeting was called to order at 3.20 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*
(A/CN.9/703 and Add.1, A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules

Section IV. The award (continued)

Draft article 41. Fees and expenses of arbitrators

1. **The Chairperson** invited the Committee to resume its consideration of draft article 41.

2. **Mr. Bellenger** (France) said that, although his delegation had no problem with the substance of draft article 41, it was too long and repetitious and its style ponderous. For example, the first sentence of draft article 41, paragraph 2, could be shortened by deleting the words “has been agreed upon by the parties or designated by the Secretary-General of the PCA, and if that authority”. The manner in which the appointing party was designated was set out clearly in another part of the Arbitration Rules.

3. Draft article 13, paragraph 4, should be deleted because it was, in essence, a repetition of draft article 41, paragraph 4. Alternatively, the Committee could choose to retain draft article 41, paragraph 4, and shorten draft article 13, paragraph 4.

4. **The Chairperson** recalled that in its comments on the revised Arbitration Rules (A/CN.9/704/Add.5), the Comité Français de l'Arbitrage had also proposed simplifying draft article 41, paragraph 4.

5. With regard to draft article 41, paragraph 2, he said the representative of France had proposed that the beginning of the paragraph should be amended to read: “If the appointing authority applies or has stated that it will apply ...”. He took it that the Committee wished to approve the proposed wording.

6. *It was so decided.*

7. **The Chairperson** said he understood that the delegation of France wished to propose an amendment to draft article 41, paragraph 4.

8. **Mr. Bellenger** (France) said that, instead of amending draft article 41, paragraph 4, his delegation would prefer to delete the last sentence of draft article 6, paragraph 4, which provided that the parties might request the Secretary-General of the Permanent Court of Arbitration (PCA) to make a decision on the fees and expenses of arbitrators under draft article 41, paragraph 4. That course of action was preferable because draft article 6 set out the general terms for designating and appointing authorities while draft article 41 was specifically concerned with arbitrators’ fees and expenses.

9. **Mr. Boulet** (Observer for Belgium) said that his delegation supported the proposal that had been made by the representative of France. All issues related to arbitrators’ fees and expenses should be addressed in draft article 41. He therefore proposed that the bracketed words in article 41, paragraph 4, should be deleted and that the paragraph’s second sentence should read: “Within 15 days of receiving the arbitral tribunal’s determination of fees and expenses, any party may refer for review such determination to the appointing authority, or if no appointing authority has been agreed upon or designated or if the appointing authority refuses or fails to make any decision, to the Secretary-General of the PCA”.

10. **Mr. Chung** Chang-ho (Republic of Korea) said that his delegation was reluctant to delete draft article 6, paragraph 4, because it offered the parties two possible courses of action should the appointing authority fail to act. The paragraph’s first sentence provided for the designation of a substitute appointing authority, thereby addressing situations that might arise in relation to draft articles 8 to 14

and draft article 41, paragraph 3, while the paragraph's second sentence was concerned solely with situations that might arise in relation to draft article 41, paragraph 4.

11. Removing the second sentence of draft article 6, paragraph 4, would create confusion as to which option could be applied in situations where the appointing authority refused or failed to act in accordance with the Arbitration Rules. It would therefore be preferable to retain draft article 6, paragraph 4, in its present form.

12. **The Chairperson** said that the Working Group had decided to group all provisions concerning the appointing authority under draft article 6. In discussing draft article 41, it had further decided that an additional provision in that regard could be introduced into the second sentence of draft article 41, paragraph 4. Since the circumstances addressed by the additional provision could occur only under draft article 41, paragraph 4, the observer for Belgium had proposed that those circumstances should be regulated in draft article 41.

13. **Mr. Chung Chang-ho** (Republic of Korea) said deleting the second sentence of draft article 6, paragraph 4, might create the impression that the parties could request the PCA to designate a substitute appointing authority. Should the Committee choose to delete the second sentence, it might wish to include a proviso that addressed situations that could arise under draft article 41, paragraph 4.

14. **Mr. Castello** (United States of America) said that he supported the position of the representative of the Republic of Korea. In fact, removing the second sentence of article 6, paragraph 4, would be misleading because it created a general rule whereby the parties could request the designation of a substitute appointing authority if the appointing authority refused to act within any time period specified in the Arbitration Rules. It would be best to leave draft article 6, paragraph 4, intact and introduce cross-references into both paragraphs to guide the reader.

15. **Mr. Petrochilos** (Greece) said that the most logical place for the entire provision was draft article 41, paragraph 4, as had been proposed by the observer for Belgium. The United States proposal

would effectively split the provision across draft article 6, paragraph 4, and draft article 41, paragraph 4. The treatment of the same exception in two different articles was not sound legislative technique and would confuse any reader who had not participated in the drafting of the Arbitration Rules. The best approach would be to introduce language into draft article 6, paragraph 4, notifying the reader that draft article 41, paragraph 4, contained an exception.

16. **The Chairperson** said it was his understanding that the choice before the Committee was either to introduce the exception in draft article 41, paragraph 4, and clarify that it was an exception to draft article 6, paragraph 4, or vice versa.

17. **Mr. Petrochilos** (Greece) pointed out that draft article 6, paragraph 4, was intended to address a situation in which the appointing authority failed or refused to act, whereas draft article 41, paragraph 4, was intended to address a situation in which the appointing authority had not been designated or agreed or had failed or refused to act. Since draft article 6, paragraph 4, did not address all of the circumstances in which parties might wish to turn to the Secretary-General of the PCA, it was more logical to group all of the exceptions under draft article 41, paragraph 4.

18. **Mr. Bellenger** (France) said it was his understanding that disputes concerning fees and expenses that arose at such a late stage in the arbitral process could be addressed through only two specific remedies: the designation of a substitute appointing authority or direct referral of the dispute to the Secretary-General of the PCA. That was why his delegation had proposed that the entire issue should be addressed under draft article 41. However, if the Committee agreed with the observations of the representative of the Republic of Korea, then his delegation's proposal was no longer valid.

19. **The Chairperson** said that, in situations where an appointing authority had not been designated or had refused to act, the key question was whether the Committee wished to preserve the right of the parties to request the designation of a substitute appointing authority or whether the

parties should be given the sole option of turning to the Secretary-General of the PCA.

20. **Mr. Boulet** (Observer for Belgium) said that, even if the second sentence of draft article 6, paragraph 4, was deleted, it was unwise to completely remove from article 6 all references to draft article 41. The reason was that all steps connected with designating an appointing authority were more logically taken at an early stage in the arbitration process, and were thus dealt with at an early point in the Rules. The representatives of the Republic of Korea and Greece had rightly pointed out the difficulty in readability and comprehension that would arise if article 6, paragraph 4, and article 41, paragraph 4, were not clearly connected. One way to achieve that linkage would be to add to the first sentence of article 6, paragraph 4, the phrase "Subject to the provisions of article 14, paragraph 4", or other words to the same effect.

21. **The Chairperson** said that a consensus appeared to have formed around the proposal of the representative of Belgium to delete both the second sentence of draft article 6 and the reference to article 6 contained in square brackets in draft article 41, paragraph 4. Appropriate drafting changes would be necessary.

22. **Mr. Friedman** (Observer for the International Bar Association) said that the Rules should ideally be simple to follow, but that was not the case with paragraph 4 of draft article 41 in its current form. He suggested that the reference in the first sentence to article 40, paragraphs 2 (a) and (b), should be deleted. In addition, the third sentence of the paragraph should be amended to begin as follows: "If, and to the extent that, the appointing authority finds that the arbitral tribunal's determination of fees and expenses is inconsistent with the fee proposal, or is otherwise manifestly excessive, the appointing authority or the Secretary-General of the PCA shall, within 45 days of receiving such a referral, make any necessary adjustments ...". In order to take account of the discussion just concluded, it could be specified that, if no appointing authority had been designated or if the appointing authority refused to act, the determination should be made by the Secretary-General of the PCA.

23. **Ms. Smyth** (Australia) said that she supported the suggested changes.

24. **Mr. Castello** (United States of America) said that, while he agreed with the basis for the suggestions of the observer for the International Bar Association, paragraph 4 of draft article 41 was the product of long discussion. The Committee should take the time needed to examine carefully any proposed amendments, which should be presented in writing rather than orally.

25. Since the last meeting of Working Group II in February 2010, his delegation had continued to ponder the usefulness of draft article 41, paragraph 4, not on the basis of opposition to regulating levels of fees and expenses, but because the mechanism proposed was trying to apply a remedy of uncertain effectiveness and risk to a problem of unknown extent. So far, only anecdotal evidence of excessive or unreasonable fees existed. He wondered how often an appointing authority would detect and correct improper levels of fees, whether it might not seek to revise fees for an unrelated reason and whether there was a risk that disgruntled losing parties in an arbitration might challenge the fees charged because such action guaranteed a delay in the enforcement of the arbitral award of a total of up to 60 days, as detailed in draft article 41, paragraph 3.

26. Moreover, an appointing authority requested to review fees and expenses was likely to charge for that service, for which it would also require evidence, including arbitrators' invoices. It should be remembered that, as the review would be taking place at the beginning of the arbitral process, the appointing authority was also likely to demand a deposit representing part of the cost of its review from the party requesting the review. However, such a deposit might in fact help to deter frivolous review requests.

27. **Mr. Snijders** (Observer for the Netherlands) said, as a related consideration, that draft article 41, paragraph 3, appeared not to address the possibility of there being no appointing authority, or of the appointing authority refusing to act. Perhaps language providing for a request to the PCA Secretary-General to designate a substitute appointing authority should be added.

28. **The Chairperson** said he recalled that the omission from draft article 41, paragraph 3, of the possibility of requesting the PCA Secretary-General to designate a substitute appointing authority had been deliberate. Draft article 6 established the general principle that, if a problem arose with the appointing authority, the parties must turn to the PCA. However, it had been decided not to prescribe the launching of such a time-consuming process at the late stage of the arbitration procedure described in draft article 41, paragraph 2. That paragraph therefore provided that the power of designation should be given directly to the PCA Secretary-General. In contrast, paragraph 3 of that same article described an early stage in the arbitration process, just after the constitution of the arbitral tribunal, during which the general principle could still apply.

29. **Mr. Daly** (Observer for the Permanent Court of Arbitration) expressed concern that the amendments to article 41, paragraph 2, proposed by the representatives of Greece and France might cause confusion by implying that there must always be an appointing authority. In fact, many arbitration cases proceeded without such an authority. The involvement of an appointing authority in determining a schedule or method of determining arbitrators' fees, as described in paragraph 2, occurred only if such an authority had been agreed upon or had been designated by the PCA Secretary-General.

30. **The Chairperson** said that the wording of paragraph 2 should be examined from the standpoint of clarity for arbitration users and practitioners. In the current case, the test was whether those individuals could easily infer from that paragraph that if no appointing authority had been agreed upon or designated, the arbitral tribunal would simply have no schedule or method of determining fees to use as a point of reference.

31. **Mr. Castello** (United States of America) said that confusion might be avoided by amending the beginning of paragraph 2 to read: "If there is an appointing authority, and it applies or has stated that it will apply a schedule ...".

32. **Mr. Möller** (Observer for Finland) said that he shared the concerns of the representative of the United States regarding the mechanism for regulating arbitrators' fees and expenses.

33. **Mr. Petrochilos** (Greece) said that he agreed in principle with the view of the United States representative regarding a deposit against the cost of a review. As draft article 4 currently made no such provision, he would like to see the specific language proposed. On the general issue addressed in paragraph 4, while the scope of the problem was unclear, nevertheless something had to be done about the kind of very grave instances of rogue decisions by arbitral tribunals that were known to have taken place — even though they had been described as "anecdotal" — and that could only lead the parties to lose confidence in the arbitration process. There were two options for redress in such cases: to apply to the courts — and the difficulty of finding both the appropriate jurisdiction and the legal basis for doing so was well known; or to resolve the matter in an ad hoc manner in the pro-arbitration fashion set out in paragraph 4.

34. Regarding the risk of abuse, paragraph 6 had been inserted to make it clear that the challenge did not affect any determination by the tribunal other than the costs at issue. The cost deterrent referred to by the United States would also help prevent abuse. Paragraph 4 should be seen as part of a mechanism that started in paragraphs 2 and 3, which allowed the parties to know in advance what the tribunal was proposing with regard to fees and expenses. Paragraph 4 served as a last check-and-balance. After four years of discussion, the Working Group had decided that unless the Commission was ready either to give the arbitrators free rein or to subject them to problematic court proceedings, paragraph 4 was the best compromise.

35. **The Chairperson** asked the United States to draft wording for his proposal regarding a deposit, for subsequent consideration.

36. He drew attention to a written proposal by the Netherlands (in document A/CN.9/704/Add.2, p. 5) that at the end of paragraph 4, the words "pursuant to article 38" should be deleted and replaced by a new final sentence, "Article 38, paragraph 3, shall apply."; the reasoning was that not all provisions of article 38 applied, and that those that did applied only by analogy.

37. **Mr. Castello** (United States of America) recalled that after much discussion, the Working Group had been unsure of the effect of the

application of article 38 on an action that was going to be taken by the arbitral tribunal. Perhaps paragraph 4 could be amended to read, “The procedure of article 38, paragraph 3, shall apply.”

38. *It was so decided.*

39. *Draft article 41, as amended, was adopted, subject to agreed redrafting.*

The meeting was suspended at 4.40 p.m. and resumed at 5.10 p.m.

Section 1. Introductory rules (continued)

Draft article 6. Designating and appointing authorities (continued)

40. **Mr. Castello** (United States of America) recalled that he had been asked to draft wording for a point raised by the Observer for the Association of the Bar of the City of New York, which was not covered in draft article 6, paragraph 4, namely, the failure of an appointing authority to act in response to a challenge. In the first sentence of paragraph 4, he proposed deleting the word “or” before the words “fails to act”, and inserting the following clause after the phrase “by these Rules,”: “or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party’s request to do so,”.

41. Nowhere in the Rules or draft articles was there a time limit for an appointing authority to resolve a challenge, and he had not proposed that one should be established in paragraph 4 — even though that had been done earlier in the paragraph in the case of the appointment of arbitrators — because it was hard to predict how long the process would take. The solution had seemed to be to set a “reasonable” time. Although he had originally intended to formulate a general clause encompassing the three possibilities described in paragraph 4, it had been too hard to craft one and he had settled on an enumeration. The paragraph covered an activity for which there was no time limit elsewhere in the Rules but which was made subject to one now — the appointment of an arbitrator, together with other activities by the appointing authority which were subject to time limits elsewhere in the Rules and the question of the challenge, which for good reason was nowhere subject to time limits.

42. **Mr. Moollan** (Mauritius) said that there was another possible approach. The various time periods now specified in article 6, paragraph 4, could be specified instead in the articles where they applied: for example, in the case of the appointment of arbitrators, articles 8 and 10, and in the case of the challenge, article 13, paragraph 4. That would have the advantage of alerting the appointing authority to the deadline in the relevant Rule itself. The language of article 6, paragraph 4, could then be simplified to read: “If the appointing authority refuses to act or fails to act within a period provided by the Rules, etc.”.

43. **The Chairperson** asked Mauritius to devise wording for the articles affected by his proposal, for subsequent consideration. The other point left pending in draft article 6 was the wording for the exception that it had been decided would replace the second sentence of paragraph 4.

Section III. Arbitral proceedings (continued)

Draft article 17. General provisions (continued)

44. **Mr. Moure** (Observer for the International Bar Association) said that, in the first sentence of draft article 17, paragraph 1, the decision to replace the words “full opportunity” by the words “an opportunity” gave perhaps too much latitude to the arbitral tribunal in allowing a party to present its case. He suggested instead the words “a reasonable opportunity”.

45. **Mr. Möller** (Observer for Finland) said that another possibility was an “adequate” opportunity.

46. **Mr. Chung Chang-ho** (Republic of Korea) said that if qualifying the word “opportunity” in draft article 17 entailed qualifying its every appearance throughout the Rules, he would favour keeping the text as it stood.

47. **Mr. Boulet** (Observer for Belgium) suggested that, in the French text, rather than “une possibilité” (an opportunity), it would be preferable to say “la possibilité” (the opportunity).

48. **Mr. Moollan** (Mauritius) cited the 1996 English Arbitration Act, which allowed the parties “a reasonable opportunity”. He said that the addition of the qualifier “reasonable” in draft article 17, paragraph 1, would not need to be repeated for each

occurrence of the word “opportunity” throughout the draft text.

49. **The Chairperson** said that the replacement of “an opportunity” by “the opportunity” did not appear to resolve the matter.

50. **Ms. Matias** (Israel) expressed agreement with the point made by the delegation of the Republic of Korea. Each and every opportunity provided for by the draft Rules should be reasonable.

51. **Mr. Snijders** (Observer for the Netherlands) said that article 15 of the Rules of Arbitration of the International Chamber of Commerce allowed each party a reasonable opportunity to present its case. It would not be strange to specify that the opportunity should be reasonable in the present case since that was a fundamental principle for equality of the parties.

52. **Mr. Bellenger** (France) said that, in the French text, the qualification of “une possibilité” (an opportunity) by the word “raisonnable” (reasonable) amounted to a reduction of the opportunity thus provided for. He recalled that the 1976 Rules had given the parties “toute possibilité” (a full opportunity) of presenting their case; that opportunity must be guaranteed.

53. **The Chairperson** noted that none of the other opportunities provided for in the draft text was for the purpose of presenting a party’s case. The addition of the word “reasonable” could therefore be justified in draft article 17 without its having to be repeated elsewhere.

54. **Mr. Schöll** (Observer for Switzerland) said that the main concern should be to ensure that the parties had an equal opportunity to exercise their right to be heard.

55. **Mr. Anaya** (El Salvador) expressed support for the addition of the word “reasonable” in paragraph 1 on the ground that it was a general provision.

56. **Mr. Chung** Chang-ho (Republic of Korea) concurred with the delegation of France that the opportunity for a party to present its case should be fully protected.

57. **Mr. Moollan** (Mauritius) suggested the reinstatement of the 1976 wording “a full

opportunity” or, alternatively, the introduction of the qualification “adequate” before the word “opportunity”.

58. **The Chairperson** said the intention of the Working Group in removing the word “full” had been to avoid excessive pleadings. Responding to the point made by the delegation of France, he acknowledged that a reasonable opportunity was one that was not unlimited.

59. **Ms. Matias** (Israel) said that, if the concern was indeed to limit the opportunity offered, the insertion of the word “reasonable” appeared justified.

60. **Mr. Castello** (United States of America) said that, by changing “full” to “reasonable”, the Working Group would have reduced the opportunity for challenge excessively. It was indeed preferable not to qualify the opportunity so as to ensure adequate but not unlimited opportunity for challenge.

61. **The Chairperson** noted that, in the Arbitration Rules of the International Chamber of Commerce, where the English text allowed each party “a reasonable opportunity to present its case”, the French version provided that each party should have “la possibilité d’être suffisamment entendu” (the opportunity of a sufficient hearing).

62. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that the Committee should be guided by the practice of others. A persuasive argument in favour of the formula “a reasonable opportunity” was that other bodies had found it to be the most workable.

63. **Mr. Bellenger** (France) proposed the word “adéquat” rather than “raisonnable” in the French version. The draft text set out a principle, not a rule of procedure; its object was to give full latitude to the arbitral tribunal to decide on procedure within limits imposed by equality of the parties and respect for their rights.

64. **The Chairperson** said that there appeared to be a consensus in support of the insertion of “reasonable” before the word “opportunity” in paragraph 1 of draft article 17.

65. Turning to paragraph 5 of the draft article, he said that, in the event of a request being made to

join a third party in the arbitration, that party would be protected through the refusal of such a joinder where it would be considered prejudicial to the interests of any party.

66. **Ms. Hu** Shengtao (China) said that prejudice to any of the parties to an arbitration agreement should not be a ground for not allowing the joinder of a third person, as the arbitral tribunal had no right to prohibit such joinder: as a party to the arbitration agreement, a third party could be a claimant, just as that party could not be refused the right to act as a respondent. Moreover, in accordance with draft article 10, a third party joined should be able to appoint or reappoint an arbitrator in the same way as other parties to the arbitration agreement.

The meeting rose at 6.10 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*

**Summary record of the 905th meeting, held at Headquarters,
New York, on Wednesday, 23 June 2010, at 10 a.m.**

[A/CN.9/SR.905]

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

The meeting was called to order at 10.20 a.m.

**Finalization and adoption of a revised version of
the UNCITRAL Arbitration Rules** *(continued)*
(A/CN.9/703 and Add.1, A/CN.9/704 and Add.1-10)

*Draft revised UNCITRAL Arbitration Rules
(continued)*

Section III. Arbitral proceedings (continued)

Draft article 17. General provisions (continued)

1. **The Chairperson** invited the Committee to resume its consideration of draft article 17.

2. **Ms. Cordero Moss** (Norway) proposed that a comment should be included in the report to clarify that prejudice to any of the parties was not the sole criterion a tribunal should bear in mind when deciding whether to join a third party: it should also consider the impact of joinder on the enforceability of the arbitral award.

3. **Mr. Castello** (United States of America) said he concurred that the potential impact on enforceability should be taken into account. While the proposal by the representative of Norway described such impact as an additional consideration, however, his Government was of the view that it would be encompassed by the word “prejudice”. Any comment that was added should not change the understanding that prejudice to a party included prejudice to the enforceability of the award.

4. **The Chairperson** said that he took it that the Committee agreed to the inclusion of a comment in the report as proposed by the representative of Norway.

5. **Mr. Anaya** (El Salvador) drew the Committee’s attention to the proposal made by his Government, as contained in document A/CN.9/704/Add.1, to amend paragraph 2 in order

to specify that no extension of the time limit for the issuance of the award would be permitted.

6. **The Chairperson** noted that the Rules contained a proviso stating that any provision that was contrary to the applicable law would not override that law. The Rules themselves did not provide for a time limit; such a limit would arise only under an agreement by the parties. If there was a prohibition against such a limit in the applicable law, that prohibition would prevail under article 1 of the Rules. He noted that no Committee member, apart from the representative of Mexico, had expressed support for the proposal by the Government of El Salvador.

7. **Mr. Holguín González** (Mexico) drew attention to his Government’s proposal, contained in document A/CN.9/704/Add.6, that the rule set out in paragraph 4 should govern all communications relating to arbitration proceedings and should be set out in a new paragraph under article 2.

8. **The Chairperson**, noting that there was no support for the proposal just made, said that he took it that the Committee wished to adopt draft article 17 as amended thus far.

9. *It was so decided.*

Draft article 18. Place of arbitration

10. **Mr. Anaya** (El Salvador) drew the Committee’s attention to his Government’s proposal, set out in A/CN.9/704/Add.1, that the word “place” should be changed to “seat”.

11. **The Chairperson** said that a lengthy discussion had taken place in the working group on that very subject. While many arbitration specialists preferred the word “seat” as the correct term, the working group had ultimately concluded that there should be no change and that the word “place”

should stand. He saw no support in the room for the proposed change.

12. **Ms. Montejo** (Office of Legal Affairs) said that the phrase “deemed to” in article 18 might make it appear that the United Nations had voluntarily made itself subject to local law. The Organization was not subject to local laws, including in arbitration proceedings. The report should reflect that the reference to “the place of arbitration” in the revised text could not be interpreted as a waiver of the Organization’s privileges and immunities.

13. *Draft article 18 was adopted.*

Draft article 19. Language

14. **Ms. Perales Viscasillas** (Spain) said that the plural “languages” had been amended to the singular in the UNCITRAL Model Law on International Commercial Arbitration and wondered whether the singular should also be used in the Rules.

15. **The Chairperson** explained that the plural had been removed from the model clause in order to avoid inciting parties to include several languages, as that could cause difficulties in proceedings. In some cases, however, it might be helpful to use more than one language in an arbitration proceeding. In the provision under discussion, that decision was for the tribunal to make. Retaining “languages” in the plural would give the tribunal that option, whereas deleting the plural would preclude such an option.

16. *Draft article 19 was adopted.*

Draft article 20. Statement of claim

17. **Mr. Seweha** (Egypt) said that the purpose of the provision set out in paragraph 4 was to ensure that all documents were available so that decisions could be taken at the outset of the arbitration proceeding. That being the aim, a provision should be added stating that, if not all of the documents could be submitted, the statement of claim should be accompanied by a justification or explanation. It should also explain how such documents could be obtained or give the reasons why it was impossible to obtain them.

18. **The Chairperson** said that claimants did not need the Rules to know that they had to provide

documentary evidence to back up their claims. If he did not hear any objections he took it that the Committee had rejected the proposal.

19. *It was so decided.*

20. **Mr. Anaya** (El Salvador) said that the word “recurso” used in the Spanish text for “relief” or “remedy” in article 20, paragraph 2 (d), should be replaced by “prestación” [measure], which would be the more accurate term to use.

21. **The Chairperson** said that that was a linguistic issue that should be resolved among the Spanish-speaking delegations.

22. **Ms. Perales Viscasillas** (Spain) said that the words “materia” or “objeto” should be used instead, as they were in the original text of the Rule.

23. **The Chairperson** suggested that as there was no problem with “relief” or “remedy” in English, the issue was purely one for the Spanish-speaking delegates to resolve.

24. *Draft article 20 was adopted.*

Draft article 21. Statement of defence

25. **Mr. Abdel Raouf** (Observer for the Cairo Regional Centre for International Commercial Arbitration) said that words “referred to” should be inserted between the words “arbitration” and “in” on the fourth line of draft article 21, paragraph 1, to make it easier for the cross reference to be understood.

26. **The Chairperson** said if he heard no objection he took it that the proposed addition was accepted.

27. *It was so decided.*

28. **Mr. Moollan** (Mauritius) said that in the absence of the representative of Slovenia, he wished to point out a suggestion from the Slovenian delegation contained in document A/CN.9/704, page 5, which read as follows: “It is suggested to consider whether draft article 21 (4) should also include a reference to draft article 20 (3), to cater for the situation where the counterclaim or claim for the purpose of a set-off would be based on a contract or legal instrument different from the one submitted by the claimant in the statement of claim.”

29. **The Chairperson** said that if there was no objection, he took it that the words “paragraphs 2 and 4” on the first line of draft article 21, paragraph 4, would be replaced by “paragraphs 2 to 4”.

30. *It was so decided.*

31. **Mr. Petrochilos** (Greece) said that as paragraph 4 set forth the requirements for a respondent asserting a counterclaim or claim for the purposes of set-off, it should include a cross-reference to draft article 4, paragraph 2 (f), which dealt with a stand-alone claim by the respondent against a party to the arbitration agreement other than the claimant. He suggested adding a comma and the words “a claim under article 4, paragraph 2 (f)” after the word “counterclaim” in draft article 21, paragraph 4.

32. **The Chairperson** recalled that one delegate had pointed out a similar situation where there was no requirement for the claimant to respond to a counterclaim. He wished to put that comment on the record because the Committee might return to it if a problem arose. He said if he heard no objection he took it that the suggested change had been approved.

33. *It was so decided.*

34. *Draft article 21, as amended, was adopted.*

Draft article 22. Amendments to the claim or defence

35. *Draft article 22 was adopted.*

Draft article 23. Pleas as to the jurisdiction of the arbitral tribunal

36. **Mr. Friedman** (Observer for the International Bar Association) said that the words “may rule” on the first line of draft article 23, paragraph 1, should be replaced by “shall have the power to rule”. There were instances where the arbitral tribunal had a duty to rule on its own jurisdiction and as “may” was a permissive word, it might be interpreted as allowing the arbitral tribunal not to rule on its jurisdiction even though it had such authority and the law applicable to the arbitration mandated it to do so.

37. **The Chairperson** said that the delegation of El Salvador had made a similar suggestion in its written comments (A/CN.9/704/Add.1), which was to replace the word “may” by the words “has the

power to” in describing the arbitral tribunal’s functions. The words “shall have the power to” had been inserted to reflect the change made to the UNCITRAL Model Law on International Commercial Arbitration.

38. **Mr. Moollan** (Mauritius) said that even though the change had arisen from the change to the Model Law, States had the prerogative to use wording of their choice in its application. The Rules, on the other hand, were conferring a power and should use the language of the Model Law.

39. **The Chairperson** said that while there was a general policy to look to the Model Law for guidance, there was no requirement for the Rules to use identical wording.

40. **Mr. Jacquet** (France) said that he failed to see why there was a problem, as both the Rules and article 16, paragraph 1, of the Model Law — at least in the French version — used the word “*peut*” (may). In any event, if the tribunal was compelled to rule on its jurisdiction, it would have to do so even if that jurisdiction was not challenged, which would be unacceptable. His delegation would simply retain the language of the old Rules, which seemed to be consistent with practice.

41. **The Chairperson** said that there was a language problem once again, because the French text of the Rules said that “*le tribunal peut*” (the tribunal may), whereas the proposed English text said that “the tribunal shall have the power”.

42. **Mr. Sorieul** (Secretary of the Commission) said that there was no translation problem, because both “shall have the power” and “may” could well be translated in French as “*peut*”. Nonetheless, as he understood it, the proposal was not to revert to “shall have the power”, but to use “shall rule”, which would change the substance of the draft Rule.

43. **Mr. Friedman** (Observer for the International Bar Association) said that his proposal was not to use “shall rule”, but “shall have the power to rule”.

44. **Ms. Smyth** (Australia) said that, under draft article 23, paragraph 2, an objection as to jurisdiction in the context of a counterclaim must be raised no later than in the reply to the counterclaim. Yet there was no obligation in the Rules for claimants to respond to a counterclaim. Article 5,

paragraph 6, of the International Chamber of Commerce (ICC) Rules of Arbitration, for example, required claimants to file a reply to any counterclaim. She wished to discuss the issue further with other delegations to see whether the UNCITRAL Arbitration Rules should include an express obligation to respond to a counterclaim.

45. **The Chairperson** said that members should feel free to point out anything that required changing, even if it was in draft articles that had already been adopted.

46. **Mr. Petrochilos** (Greece) said that the only reference to a reply to a counterclaim was in article 21, paragraph 3, of the old Rules, which had been envisaged as a substantive pleading, unlike the paragraph in the ICC Rules. Nonetheless, the issue was covered by draft article 24, which allowed the tribunal to decide which further statements, in addition to the statement of claim and the statement of defence, were required from the parties.

47. **The Chairperson** said that the Committee should consider that the issue of a reply to a counterclaim was covered by draft article 24 and that if at a later stage it was determined that there was a need for an addition, a proposal could be made to that effect.

48. *Draft article 23, as amended, was adopted.*

Draft article 24. Further written statements

49. *Draft article 24 was adopted.*

Draft article 25. Periods of time

50. **Mr. Seweha** (Egypt) said that draft article 25 established the general principle that written statements should be submitted within 45 days, but then added the exception that the tribunal might extend that time limit if it concluded that the extension was justified. His delegation felt that if the general principle called for a 45-day time limit, the exception could not be without a time limit. He proposed adding the words “for a further period of” or “for a period not exceeding a certain number of days”, or perhaps simply saying that the original statement and the exception should be submitted within 45 days.

51. **The Chairperson** said that a time limit had not been envisaged for the exception because arbitration cases were all different and a time limit was not always appropriate in the case of an exception.

52. **Mr. Seweha** (Egypt) said that 45 days should not necessarily be the requirement, but that since the original statement had a 45-day time limit, the exception could not be open-ended.

53. **The Chairperson** said that if he heard no support for the establishment of a time limit for the exception, he took it that the draft article would be left unchanged.

54. *It was so decided.*

55. *Draft article 25 was adopted.*

Draft article 26. Interim measures

56. **Mr. Torterola** (Argentina) proposed that draft article 26, paragraph 2 (c), should be deleted; if it was retained, wording should be added stating explicitly either that the provision did not apply to the assets of States, or that it applied taking into account rules on immunity of States, or that it did not waive such rules.

57. **Mr. Petrochilos** (Greece) proposed that the last part of the chapeau of paragraph 2 should be reworded along the following lines: “the arbitral tribunal orders a party to take, without limitation, any of the following measures”.

58. Paragraph 9 as currently drafted was extremely difficult to understand, particularly for readers who were not aware of the discussions that had led up to it. The intent behind it was to avoid offending against domestic law, which might have specific provisions allocating jurisdiction on preliminary orders, *ex parte* measures and so on to domestic courts. The paragraph could be deleted, especially since draft article 1, paragraph 2, safeguarded the primacy of the law of arbitration.

59. **Ms. Montejo** (Office of Legal Affairs) proposed that a note should be added to the Commission’s report reflecting the ability of the tribunal to dictate that the types of measures referred to were contrary to the privileges and immunities of the United Nations pursuant to article II, section 3,

of the Convention on the Privileges and Immunities of the United Nations.

60. **The Chairperson** suggested that, since the representative of the Office of Legal Affairs had raised a point similar to that raised by the representative of Argentina, the two representatives should consult on a possible solution.

The meeting was suspended at 11.35 a.m. and resumed at 12.10 p.m.

61. **Mr. Moollan** (Mauritius) said that many Governments and organizations — future users of the Rules — had commented that draft article 26, paragraph 9, was incomprehensible. The text had been drafted during a heated debate in the Working Group, in which delegations had disagreed as to whether paragraph 1 of draft article 17 (article 15 of the 1976 Rules) created the power to order preliminary measures *ex parte*. Those who had taken the view that the power already existed under that rule had wanted to ensure that the power was not taken away, while those who had believed that no such power existed had opposed creating it. The text was an attempt to explain why the Rules did not deal with preliminary orders and had been intended for inclusion in the explanatory notes rather than in the Rules themselves. He proposed that it should be moved back to the explanatory notes.

62. **Ms. Smyth** (Australia) expressed agreement with that proposal.

63. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that his delegation also supported the proposal, but that changes would still be needed in order to ensure that the text made sense. For example, if an interim measure had merely been “requested”, then the party towards which the measure was directed would not know about it; it would therefore be difficult for that party not to frustrate the purpose of the measure.

64. **Mr. Castello** (United States of America), supported by **Ms. Perales Viscasillas** (Spain) and **Mr. Chung** Chang-ho (Republic of Korea), said it was his delegation’s recollection that paragraph 9 had been intended for inclusion in the Rules rather than in the notes. The paragraph had been debated at length and represented an important point which should not be discarded, namely that there was

nothing in the Rules that authorized the institution of preliminary orders, but at the same time there was nothing that precluded a tribunal from issuing a preliminary order if it was otherwise authorized to do so.

65. Although the language was somewhat ungainly, it represented a carefully considered attempt to accommodate a strong division of opinion; those who criticized it should propose better language. Moreover, criticisms of the wording of a given provision should not be used to deflect attention from that provision’s merits. Lastly, it should be borne in mind that draft article 26, paragraph 9, was substantively linked to draft article 17, paragraph 4; the deletion of the former would therefore have the effect of disassembling a carefully crafted position.

66. **Mr. Ghikas** (Canada) said it was also his delegation’s understanding that paragraph 9 had been intended for inclusion in the Rules themselves rather than in the notes. However, he agreed with the proposal to delete it, since it neither added to nor subtracted from the Rules.

67. **Ms. Aguirre** (Argentina), expressing support for the remarks made by the United States representative, said that the paragraph should be retained as it stood.

68. **Mr. Möller** (Observer for Finland) said that, while the wording could be improved, the paragraph should not be deleted; moreover, it should be placed in the Rules rather than in the notes. The inclusion of provisions on preliminary orders in the UNCITRAL Model Law on International Commercial Arbitration had also been highly controversial, and yet a compromise had been reached. Since the compromise on paragraph 9 had been preceded by an extensive debate, he hoped that the debate would not now be reopened.

69. **The Chairperson** pointed out that the debate was not being “reopened”; the Commission or its Committee of the Whole was free to disagree with the conclusions of the Working Group. The problem with paragraph 9 was precisely that it did not contain the compromise found in the Model Law, where preliminary orders had been the compromise solution. That solution had not been accepted by the Working Group in respect of paragraph 9; the latter

was in fact a rule that said nothing. As pointed out by the representative of Mauritius, the concern was that some delegations had taken the view that an arbitrator sitting under the Rules had the power to order preliminary measures, while others had held that the Rules did not give the arbitrator that power. Paragraph 9, in stating that the Rules did not give the arbitrator that power, excluded the compromise solution in the Model Law.

70. **Mr. Möller** (Observer for Finland) agreed that paragraph 9 represented a different type of compromise from that found in the Model Law, but it was a compromise nonetheless. Although the Rules did not create the power to order preliminary measures, they did not limit it either, and it should still be pointed out that agreeing to the Rules did not preclude a party from applying for a preliminary order if it was entitled to do so under the law applicable to the arbitration. The provision should therefore be retained.

71. **Mr. Jacquet** (France) said that a practical point regarding the usefulness of the text was that arbitral tribunals always had difficulties with requests for ordinary interim measures; applications for preliminary orders put them in an even more difficult position. He agreed with the proposal to move paragraph 9 to the notes.

72. **Mr. Lebedev** (Russian Federation) said that, in order to understand paragraph 9, future users of the Rules might refer to the documents regarding the discussions in the Working Group that were mentioned in the footnote to draft article 26. He requested the secretariat to outline the discussions contained in those documents so as to shed more light on the intent behind the paragraph.

73. **The Chairperson** said that his understanding was that the footnotes would not be published with the official Rules and were just for the purposes of the Committee's discussion.

74. **Mr. Sorieul** (Secretary of the Commission) said that the unprecedented five full pages of notes on draft article 26, paragraph 9, combined with the comments of the delegations, had covered the issue fully, and there was no need to reopen the discussion.

75. **Mr. Moollan** (Mauritius) said that his intention had not been to reopen the discussion. But

the problem remained that draft article 26, paragraph 9, had been drafted as a footnote but had somehow ended up as part of the text. Unlike the Model Law, from which countries could pick and choose provisions to include in their national legislation, the Rules would have to be adopted in their entirety. Draft article 26, paragraph 9, was a "non-rule" and should be deleted.

76. **The Chairperson** said that it would be a bad precedent to have a rule that could only be understood with reference to footnotes. In the absence of any proposals for redrafting the Rule in a more comprehensible fashion, he would take it that the Committee agreed that draft article 26, paragraph 9, should be deleted.

77. **Mr. Castello** (United States of America) said that deleting draft article 26, paragraph 9, would raise the question of what would happen to the reference to that paragraph contained in article 17, paragraph 4.

78. **The Chairperson** said that if article 26, paragraph 9, was deleted, then naturally the reference to it in article 17, paragraph 4, would also have to be deleted.

79. **Mr. Castello** (United States of America) said that the reference to article 26, paragraph 9, contained in article 17, paragraph 4, could not simply be deleted, but would have to be replaced with something else, because it addressed the substantive question of when exceptions would be allowed to the rule that communications to the arbitral tribunal should be communicated simultaneously to all parties.

80. **The Chairperson** agreed that if article 26, paragraph 9, was deleted, then the Committee would have to consider whether or not the exception provided for in article 17, paragraph 4, should be preserved in some other formulation. He asked if any consensus had been reached on the wording of draft article 26, paragraph 2 (c).

81. **Mr. Torterola** (Argentina) suggested that the following sentence, using language taken from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, should be added: "Nothing regarding or relating to article 26, paragraph 2 (c), should be

construed as derogating from the law on immunity from execution”.

82. **Mr. Petrochilos** (Greece) said that adding language to one particular provision stating explicitly that it did not imply a waiver of immunity suggested that all other provisions not containing such language did imply such a waiver. He noted that there had never been any concern before that authorizing the arbitral tribunal to grant interim measures implied a waiver of immunity.

83. **Mr. Jacquet** (France) said that it was inadvisable to add language to either the text or the notes. First of all, the Working Group had deferred all questions touching on arbitration involving a State to a later stage. Secondly, from the point of view of States, the issue was moot. States always had the option of forgoing arbitration under the UNCITRAL Rules in favour of arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which took into account the special concerns of States, including immunity. It had become generally understood that agreement by a State to arbitration did not imply automatic waiver of immunity, and States no longer appealed to immunity as a pretext for refusing arbitration. Immunity might come into play where a tribunal ordered interim measures against State assets, but that was an issue to be handled by the relevant national enforcement agencies and did not need to be addressed in the Rules.

84. **Mr. Loken** (United States of America) said that the phrase “derogating from the law on immunity from execution” sounded like it was referring to a particular law, but there was no single accepted general rule involved. He suggested that the concerns expressed by Argentina were already adequately addressed by the general principle expressed in article 1.

85. **The Chairperson** said that he understood the reference to “the law” to indicate whatever law was applicable, and that therefore concerns about waiver of immunity were covered by the general provision in article 1. In addition, a note to the effect that the Rules had no effect on immunity would be included in the report.

86. **Mr. Torterola** (Argentina) said that it was not the case that the language of the Rules had no impact on immunity of jurisdiction of States. There had been a case in which language in existing article 32 describing Tribunal awards as “final and binding” had been cited by French courts as implying a waiver of immunity. If the issue was deferred, then the Rules as they stood would be in force in the interim, which could be years. Until the issue was resolved by a general rule, the language he proposed should be included in article 26. As the Chairperson had noted, the phrase “the law” was intended to refer to the law in force where the interim measure was being executed.

87. **Mr. Sorieul** (Secretary of the Commission) said that he wished to clarify that there were in fact no plans for the Working Group to address arbitration involving States. The delegates had deliberately restricted the Working Group’s mandate to discussing transparency in investment disputes based on treaties. If the Commission wanted to broaden the Working Group’s mandate it was free to do so.

88. **The Chairperson** said that the issue immediately at hand was whether the wording of article 26, paragraph 2 (c), could be construed as implying a waiver of immunity, and if so, whether some clarification should be inserted into the text of the Rules themselves.

The meeting rose at 1.05 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*

Summary record of the 906th meeting, held at Headquarters,
New York, on Wednesday, 23 June 2010, at 3 p.m.

[A/CN.9/SR.906]

Temporary Chairperson: Mr. Sorieul (Secretary of the Commission)

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

The meeting was called to order at 3.15 p.m.

Election of officers *(continued)*

1. **The Temporary Chairperson** invited the Group of African States to submit a nomination for the office of Vice-Chairperson of the Commission.
2. **Ms. Kiragu** (Kenya), speaking on behalf of the Group of African States, nominated Mr. Moollan (Mauritius) for the office of Vice-Chairperson of the Commission.
3. *Mr. Moollan (Mauritius) was elected Vice-Chairperson by acclamation.*
4. *Mr. Schneider (Switzerland), Chairperson of the Committee of the Whole, took the Chair.*

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)* (A/CN.9/703 and Add.1; A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules

Section III. Arbitral proceedings (continued)

Draft article 26. Interim measures (continued)

5. **The Chairperson** invited further comments on the draft article, noting that that discussion of paragraph 2 (c) had been suspended and that the question of the effect on draft article 17 of the deletion of paragraph 9 remained open. The delegation of Greece had proposed a drafting change to the last part of the chapeau of the draft article, which would read: "... the arbitral tribunal orders a party to take without limitation any of the following measures:".
6. **Mr. Loken** (United States of America) proposed that the word "temporary" should be transferred to the last clause of the chapeau, which would then read: "... the arbitral tribunal orders a

party to take temporary action, including, without limitation, any of the following:".

7. **Mr. Bellenger** (France) said that the present wording of the French text of the chapeau was

satisfactory, the main point being that the list was not an exhaustive one.

8. *Draft article 26, as amended, was adopted, subject to finalization of the drafting of the chapeau and further consideration of paragraph 2 (c).*

Draft article 27. Evidence

9. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that, guided by practice, he thought that it would be useful for the draft article to provide for an explicit right to cross-examine witnesses.

10. **The Chairperson** said that, in the present wording, there were no restrictions on the questioning of witnesses, except as stipulated in draft article 28.

11. *Draft article 27 was adopted.*

Draft article 28. Hearings

12. **Ms. Aguirre** (Argentina) proposed the addition at the end of paragraph 4 of the following words: "..., provided that this is duly justified by some circumstance".

13. **Ms. Matias** (Israel), supported by **Mr. Viswanathan** (India), said that, in view of the increasingly frequent use of videoconferencing, it would be preferable not to require particular justification for such use.

14. **Mr. Chung Chang-ho** (Republic of Korea) concurred, noting the applicability of draft article 17, paragraph 1.

15. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) also concurred. He wondered whether it might be useful to replace the word “examined” in paragraph 4 by “heard”.

16. **The Chairperson** took it that, in the absence of support for either of the proposed amendments, the draft article could be adopted.

17. *Draft article 28 was adopted.*

Draft article 29. Experts appointed by the arbitral tribunal

18. *Draft article 29 was adopted.*

Draft article 30. Default

19. **Mr. Sewaha** (Egypt) said that, in the Arabic version of the draft article, the words “without showing sufficient cause” contained in the chapeau of the English text, had been transposed to subparagraphs (a) and (b). He wondered whether there was not a contradiction between subparagraph (b) of the draft article and draft article 32.

20. **The Chairperson** said that subparagraph (b) concerned the substance or merits of a case, whereas draft article 32 was a procedural provision regulating non-compliance with the Rules. There was no contradiction between them.

21. *Draft article 30 was adopted.*

Draft article 31. Closure of hearings

22. **The Chairperson** noted that “witnesses” would normally be included in “further proofs” and not seen as a separate category, as in paragraph 1.

23. **Ms. Smyth** (Australia) proposed that paragraph 1 be reworded to read: “... further proofs to offer, including witnesses to be heard ...”.

24. **Mr. Moollan** (Mauritius) said that the wording was the same as in the 1976 text and had not created any problem.

25. *Draft article 31 was adopted.*

Draft article 32. Waiver of right to object

26. *Draft article 32 was adopted.*

Section IV. The award

Draft article 33. Decisions

27. **Mr. Friedman** (Observer for the International Bar Association) said it was regrettable that, according to the present draft wording, a presiding arbitrator alone could decide only on questions of procedure and would not be able to make an award. The Rules of Arbitration of the International Chamber of Commerce provided for such a possibility in the absence of a majority. He proposed the addition of a third paragraph to that effect.

28. **Mr. Torterola** (Argentina) said that his delegation wished to retain the wording developed by the Working Group.

29. **Mr. Schöll** (Observer for Switzerland), supported by **Mr. Möller** (Observer for Finland), said that he supported the proposal of the International Bar Association but would accept whatever consensus emerged regarding the wording of draft article 33.

30. **Mr. Moollan** (Mauritius) said that the proposal of the International Bar Association had merit because, as presently worded, the Arbitration Rules left open the possibility of an arbitration that ended in deadlock.

31. **Mr. Castello** (United States of America) said that his delegation favoured leaving the current wording of the draft article unchanged. It had been adopted by many parties because it offered them the security that any decision taken by an arbitral tribunal would have the backing of at least two of its members. Those who supported giving a presiding arbitrator a deciding vote in the case of deadlock were making the assumption that the presiding arbitrator was the most reasonable member the tribunal. That assumption was not necessarily true.

32. **The Chairperson** suggested that, in view of the opinions expressed, the Committee should retain the wording agreed upon by the Working Group.

33. **Mr. Sewaha** (Egypt) said that, with regard to the decisions on questions of procedure referred to in draft article 33, paragraph 2, he wondered whether the presiding arbitrator would also participate in the review of a decision that he or she had made alone, given that the last words of paragraph 2 referred to the entire arbitral tribunal.

On the one hand, it was not appropriate for the presiding arbitrator to review his or her own decision. On the other hand, the review could not take place without the presiding arbitrator because the arbitral tribunal would otherwise be improperly constituted. If, as his delegation believed, the participation of the presiding arbitrator in a review of a decision that he had made alone would be contrary to the Rules, the last clause of the paragraph 2 should be deleted.

34. **The Chairperson** said it was his understanding that, with regard to questions of procedure that had been decided by the presiding arbitrator alone, the entire arbitral tribunal or any combination of two arbitrators could review the presiding arbitrator's decision.

35. *Draft article 33 was adopted.*

Draft article 34. Form and effect of the award

36. **Ms. Montejo** (Office of Legal Affairs) said that the Commission should make clear in its report that a party's legal duty to publicly disclose an award, referred to in draft article 34, paragraph 5, must not be interpreted as limiting the ability of the United Nations to impose certain restrictions on the disclosure of information in connection with its privileges and immunities, including in respect of arbitral awards.

Draft article 35. Applicable law, amiable compositeur

37. **Mr. Friedman** (Observer for the International Bar Association) said that, with regard draft article 35, paragraph 1, concerning the designation of the law applicable to the substance of the dispute, he saw no reason to restrict the scope of choice of an arbitral tribunal to determining which specific national law was to be used in situations where the parties had failed to decide that question. He therefore proposed that the last clause of paragraph 1 should be amended to read: "... the arbitral tribunal shall apply the rules of law which it determines to be appropriate". Doing so would dispel any doubt as to whether an arbitral tribunal had the authority to resolve a dispute by applying a set of rules other than a national law, including, for example, the rules of the International Institute for the Unification of Private Law (UNIDROIT).

38. **Mr. Jacquet** (France) said that the proposed amendment would not prevent a tribunal from applying national law; it would simply open the possibility of applying rules other than national laws.

39. **Mr. Moollan** (Mauritius) recalled that the Working Group, after lengthy and considered debate, had decided that an arbitral tribunal should be restricted to choosing a national law. It was therefore not necessary for the Committee to address the question once again.

40. **Ms. Cordero Moss** (Norway) said that draft article 35 gave both the parties to the dispute and the arbitral tribunal considerable flexibility with regard to designating which laws or rules were applicable to the dispute. However, the Commission's report should reflect that neither the parties nor the arbitral tribunal were completely free to decide which law or rules were applicable because disregard of certain laws could lead to the invalidity or unenforceability of the arbitral award. That was made clear under articles 34 and 36 of the Model Law on International Commercial Arbitration, as well as article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

41. **Mr. Petrochilos** (Greece) said that, while he agreed with the representative of Norway, the report should go even further and specify that draft article 35, paragraph 1, did not constitute a complete guide with regard to which laws or rules applied in an arbitration. There were matters of applicable law that were not dependent on the parties' choice, including the parties' capacity to enter into a transaction.

42. *Draft article 35 was adopted.*

Draft article 36. Settlement or other grounds for termination

43. *Draft article 36 was adopted.*

Draft article 37. Interpretation of the award

44. *Draft article 37 was adopted.*

Draft article 38. Correction of the award

45. *Draft article 38 was adopted.*

Draft article 39. Additional award

46. *Draft article 39 was adopted.*

Draft article 40. Definition of costs

47. *Draft article 40 was adopted.*

Draft article 42. Allocation of costs

48. **Mr. Chung** Chang-ho (Republic of Korea) said that there was a discrepancy between the wording of draft article 42, paragraph 2, and the wording of draft article 40, paragraph 1. Specifically, the former spoke of an “award” while the latter spoke of a “decision”. His delegation therefore proposed that draft article 42, paragraph 2, should be amended to conform with draft article 40, paragraph 1.

49. **The Chairperson** said that draft article 40, paragraph 1, made reference to a decision because a correction was not necessarily an award but rather a decision. On the other hand, draft article 42, paragraph 2, specifically concerned awards. It was his understanding that the reference in the latter must be to an award because of enforcement requirements. If, however, the decision concerned a sum that one party must pay to another, then “award” would be the appropriate word. He suggested that the Committee might wish to postpone consideration of draft article 42 until a later time.

50. *It was so decided.*

51. **Mr. Castello** (United States of America) said that, in his observations regarding draft article 40, paragraph 2 (f) (A/CN.9/704), the Observer of the Permanent Court of Arbitration (PCA) had noted that, although the definition of costs included both “the fees and expenses” of the appointing authority, that same definition only included the “expenses” of the Secretary-General of PCA. He had further noted that PCA currently used the term “administrative fee” for the amount charged to cover administrative and other expenses involved in processing an application for designation of an appointing authority. In order to remove the potential ambiguity arising from the difference in wording, the Secretary-General of PCA had therefore proposed that draft article 40, paragraph 2 (f), should be amended as follows: “Any fees and expenses of the

appointing authority and of the Secretary-General of the PCA”.

52. **The Chairperson** said that he took it that the Committee wished to adopt the proposed amendment to draft article 40, paragraph 2 (f).

53. *It was so decided.*

Draft article 43. Deposit of costs

54. *Draft article 43 was adopted.*

The meeting was suspended at 4.30 p.m. and resumed at 5.10 p.m.

Annex to the Rules

Draft model arbitration clause for contracts

55. **The Chairperson** invited the Committee to express any further views on the placement and layout of the draft model arbitration clause for contracts. He recalled that, as the Committee was still considering a possible waiver statement in connection with draft article 34, additional changes to the wording of the draft model arbitration clause might be required.

56. *The draft model arbitration clause for contracts was adopted, subject to any amendments made necessary by the Committee’s decisions regarding draft article 34.*

Draft model statements of independence pursuant to article 11 of the Rules

57. **Mr. Petrochilos** (Greece), referring to the draft model statements of independence, said that the word “hereby” should be deleted from the first and second paragraphs, having been made redundant by an earlier deletion. Referring to the note below the draft model statements, he proposed that the word “parties” should be replaced by the words “prospective arbitrators”, as the model statements were intended to be used by arbitrators if they so wished. Alternatively, the introductory sentence could be made impersonal, and mention neither the parties nor the arbitrators.

58. **Mr. Loken** (United States of America) said that his delegation had understood the model statements to be texts that the parties could propose

to the arbitrators, who could elect to sign them or not.

59. **The Chairperson** said that the draft model statements raised two questions. The first concerned implementation. While arbitral institutions would usually call on arbitrators to make a statement of impartiality upon appointment, it was unclear what the course of action would be when a similar request was being made by the parties. The second concerned obligation. Draft article 11 of the Rules specified, in connection with arbitrators, that “he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence”, suggesting that some form of obligation existed. The same draft article then referred the reader to the model statements in the present annex.

60. Concluding that the two paragraphs containing the draft model statements were addressed to arbitrators, but that the accompanying note was addressed to the parties, he suggested that the introductory sentence to the note could read “The parties may consider requesting from the arbitrator the following addition to the statement of independence”.

61. **Mr. Moollan** (Mauritius) said that he concurred with the view of the United States representative, and advocated a minor change to the wording suggested by the Chairperson, to read “The parties may consider requesting the following statement from the arbitrator in addition to the statement of independence”, in order to clarify the status of the text attached to the note.

62. **Mr. Ghikas** (Canada) said that he wondered whether Working Group II had intended that a request to an arbitrator to provide the additional statement in the note could be made by only one party, or whether the request must be made by all the parties.

63. **Mr. Mourre** (Observer for the International Bar Association) said that he wondered whether the paragraph under discussion could be included in the draft statement itself rather than in the note. Doing so would make it clear to arbitration practitioners that availability, the matter dealt with in the note, was a prerequisite in UNCITRAL arbitration. A consolidated International Chamber of Commerce

statement of acceptance, availability and independence had been in use successfully for some time.

64. **The Chairperson** said that the separation of the statement of independence from the statement of availability was explained by the reference in draft article 11 of the Rules to a statement of independence. The Rules did not mention the need for a statement of availability.

65. **Mr. Petrochilos** (Greece) said that, having read the reports of Working Group II and draft article 11 of the Rules, he remained unconvinced that the draft statements of independence should be available only to the parties to propose, as opposed to being available also to arbitrators to use if they wished. The Committee’s report should clarify that matter.

66. **Mr. Torterola** (Argentina) proposed the addition to the draft statements of wording confirming that the arbitrator making the statement was impartial and independent not only of the parties, but also of the parties’ lawyers.

67. **Mr. Boulet** (Observer for Belgium) said that he supported the proposal.

68. **Mr. Moollan** (Mauritius) said that, as the aspect of arbitration that the Committee was considering was developing rapidly, he would caution against moving faster than current practice. The Committee should in particular examine the wording of the International Chamber of Commerce statement of acceptance, availability and independence to see whether it referred to the parties’ lawyers.

69. **The Chairperson** said that, in his view, the Committee must determine not just what was accepted practice, but also what its own wishes were. He wondered whether draft article 5 of the Rules, on representation and assistance, was relevant in that regard.

70. **Mr. Möller** (Observer for Finland) said that he supported the view of the representative of Mauritius. Adding a reference to the parties’ lawyers could prove to be too broad. He assumed that references to the “parties to the arbitration” automatically included counsel representing them in the arbitration. Unbeknownst to the arbitrators, the

parties might also have used the services of a wide range of other lawyers.

71. **Mr. Raouf** (Observer for the Cairo Regional Centre for International Commercial Arbitration) said that the Centre made no reference to the parties' lawyers in its own arbitration practice. However, the International Chamber of Commerce statement of acceptance, availability and independence referred to disclosing relationships between an arbitrator and "any of the parties, their related entities or their lawyers or other representatives".

72. **Mr. Torterola** (Argentina) said that the Committee should take account of the need for transparency in arbitration, particularly given the direction that the International Chamber of Commerce was taking. He urged that the Committee should not restrict transparency and lead users to question the impartiality of decision-making.

73. **The Chairperson**, noting that the practice of institutions was in any event inconsistent, said that the Committee should be careful to draw a distinction between the rules and practices of institutions and the rules and practices of UNCITRAL. While institutions could rapidly change their practices and model statements in response to problems that arose, the Commission could not react with the same speed and therefore had traditionally been more cautious, particularly in rapidly evolving situations.

74. **Mr. Moollan** (Mauritius), emphasizing that his earlier statement had not been intended to restrict the Committee's margin for discretion, said that the statement of independence used by the London Court of International Arbitration (LCIA) indicated simply "I am impartial, and independent of each of the parties", with no reference to the parties' lawyers.

75. **Ms. Matias** (Israel) said that the first of the draft model statements in the annex to the Rules, by indicating "To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence", would perhaps provide sufficient safeguards, even if it did not specifically mention the lawyers or counsel of the parties.

76. **Ms. Perales Viscasillas** (Spain) said that her delegation, like others, took references to the parties

in the current context to include their representatives and lawyers. However, if more clarity was deemed necessary, perhaps the first draft model statement could be rephrased to read: "I am impartial and independent of the parties and their representatives in this dispute, and intend to remain so".

77. **Mr. Ghikas** (Canada) said that it was important to remember that the aim of the draft model statements was to give effect to article 11 of the Rules. They should be read in conjunction with it and had no need to indicate more than was required, namely the disclosure of anything that might give rise to justifiable doubts regarding the arbitrator's impartiality or independence. If it was thought necessary to provide more detail, that detail should logically be placed in draft article 11 of the Rules as well as, or instead of, in the annex to the Rules. However, a simpler solution was to delete the first sentence of each of the draft model statements.

78. **The Chairperson** said that draft article 11 referred to "impartiality and independence", as did the first sentence of each of the draft model statements. Deleting those sentences would eliminate that parallel wording. Perhaps the first sentence in each case could be shortened to "I am impartial and independent and intend to remain so".

79. **Mr. Loken** (United States of America), supported by **Mr. Moollan** (Mauritius), said that the shortened formulation was awkward because it did not specify vis-à-vis whom the arbitrator must be impartial and independent.

80. **Mr. Torterola** (Argentina) said that, in his delegation's view, the current approach was neglecting a valuable opportunity to increase transparency in the arbitration process. However, he would not oppose the consensus of the Committee.

81. **Ms. Cordero Moss** (Norway) said that, in her view, adding detail to existing provisions tended to create problems rather than solving them. Independence and impartiality were important even in situations in which arbitrators had no link with the parties. They might, for example, have a personal economic interest in the outcome of the dispute. Perhaps the formulation "impartial and independent in the context of the dispute" could be used.

82. **The Chairperson** said that he deduced from the discussion that the Committee's primary concern was to have arbitrators furnish a statement of impartiality and independence from an arbitrator, and to make clear that the impartiality and independence was vis-à-vis the parties. That was covered by the first sentence of each of the model statements. By contrast, links with the parties' counsel, lawyers, witnesses or experts were considered of secondary importance, and they could be covered by the broad formulation of the second sentence of each of the statements.

83. **Mr. Moollan** (Mauritius) said that he agreed with the Chairperson's assessment of the priorities surrounding the issue. Arbitral institutions using statements of independence which mentioned independence from the parties to the dispute but went into no further detail did not appear to have problems.

84. **The Chairperson** said that he took it that the Committee saw no need to amend the wording of the draft model statements of independence pursuant to article 11 of the Rules.

85. *It was so decided.*

The meeting rose at 6 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)

**Summary record of the 907th meeting, held at Headquarters,
New York, on Thursday, 24 June 2010, at 10 a.m.**

[A/CN.9/SR.907]

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

The meeting was called to order at 10.20 a.m.

**Finalization and adoption of a revised version of
the UNCITRAL Arbitration Rules** (*continued*)
(A/CN.9/703 and Add.1, A/CN.9/704 and Add.1-10)

*Draft revised UNCITRAL Arbitration Rules
(continued)*

Section III. Arbitral proceedings (continued)

Draft article 17. General provisions (continued)

1. **The Chairperson** invited the Committee to resume its consideration of draft article 17.

2. **Mr. Castello** (United States of America) said that the original reference to article 26, paragraph 9, contained in draft article 17, paragraph 4, had been intended to allow for an exception to the requirement that all communications to the arbitral tribunal by one party must at the same time be communicated by that party to all other parties. Such an exception was necessary where the communication involved was a request for a preliminary order, because informing the other party of such a request might give that other party time to move or hide assets in order to frustrate that order. Now that draft article 26, paragraph 9, had been deleted, he suggested that the reference to it at the end of draft article 17, paragraph 4, should be replaced by the following wording: “except if delayed communication to the other party is necessary so that the arbitral tribunal can consider, when it is otherwise authorized to do so, a party’s request that it issue a preliminary order directing the other party not to frustrate the purpose of a requested interim measure while the tribunal considers that request”. The words “not to frustrate the purpose of a requested interim measure” were taken directly from article 17, paragraph (b), of the Model Law.

3. **The Chairperson** said that it might be better to define the exception in a more general way, because there were other procedures in use to prevent a party from frustrating a preliminary order, including waiting for submissions from both parties before communicating them, or communicating a request for a preliminary order directly to the relevant institution.

4. **Mr. Castello** (United States of America) said that his delegation was open to other wording as long as the exception originally provided for by the reference to the now deleted draft article 26, paragraph 9, was preserved.

5. **Mr. Moollan** (Mauritius) said that the exception could be provided for more simply by adding the words “save where otherwise authorized by the tribunal”. Additional language might need to be inserted to cover cases where such authorization was retrospective rather than prospective.

6. **The Chairperson** said that the phrase “otherwise permitted” would cover all contingencies, including retrospective authorization.

7. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that the problem could also be solved by adding the words “except if permitted under applicable law for the purpose of obtaining preliminary relief”.

8. **Mr. Jacquet** (France) said that there was no need to replace the reference to the now deleted provision with anything. There were other more suitable places to address alternative methods of requesting preliminary orders.

9. **The Chairperson** said that the replacement language proposed was intended to bring the Rules into line with provisions of the Model Law, which allowed for exceptions to the simultaneous communication requirement in certain cases.

10. **Mr. Jacquet** (France) said that the simplest solution would be to delete the words “at the same time” from draft article 17, paragraph 4.

11. **Mr. Lebedev** (Russian Federation) said that it would be helpful to have all the various proposals in writing.

12. **The Chairperson** said that the three proposals under consideration included the wording offered by the United States delegation; the proposal by the Observer for the Association of the Bar of the City of New York to add the words “except if permitted under applicable law for the purpose of obtaining preliminary relief”; and the proposal by the French delegation to delete the words “at the same time”. He suggested that all three should be distributed in writing.

Section III. Arbitral proceedings

Draft article 26. Interim measures (continued)

13. **Mr. Castello** (United States of America) said that at the end of the chapeau to draft article 26, paragraph 2, the words “to, including, without limitation” should be replaced by the words “to, for example and without limitation”. He had ascertained from Arabic, French and Spanish-speaking delegates that that wording could be satisfactorily translated into their languages, and he hoped that the same would be the case for Chinese and Russian. The words “for example and without limitation” could equally well be inserted between commas before the word “to”. While the phrase “for example and without limitation” sounded redundant, both elements were necessary in order to emphasize the conscious departure from the existing formulation in the Model Law.

14. **Ms. Hu Shengtao** (China) said that the proposed English version was acceptable as a basis for discussion.

15. **The Chairperson** asked whether the Committee members had reconsidered their views on the proposal made by the representative of Argentina to include an observation in the report that “nothing regarding paragraph 2 (c) should be construed as derogating from the law on immunity from execution”.

16. **Mr. Jacquet** (France) said that such an observation would be acceptable. For the sake of consistency, however, it might be advisable to formulate it using a general reference to interim measures, rather than restrict it to paragraph 2 (c) of article 26.

17. **The Chairperson** noted that the proposed wording was intended as a protection against a misinterpretation of that specific clause. If there was a wish to protect against the misinterpretation of other clauses, then those clauses must be identified.

18. **Ms. Smyth** (Australia) said that the wording did not go precisely to the issue under discussion and could be seen as pertaining to an issue that was already addressed by article 1, paragraph 3. To address the concerns of the representative of Argentina and the Office of Legal Affairs, it might be preferable to use language that precluded any implicit waiver, such as a statement to the effect that nothing in relation to interim measures should be construed as a waiver of any immunities under national law.

19. **Mr. Petrochilos** (Greece) said that it was not within the province of the Rules to deal with immunity from execution, which was a matter that arose after the arbitral tribunal had discharged its functions. If that matter was now to be dealt with in the Rules — and particularly if delegations were about to make a blanket observation that the intention was to preserve immunity from execution — he would be obliged to seek instructions from his Government. He had no objection, however, if some delegations wished to go on the record as stating that they saw nothing in the Rules that dealt with sovereign immunity. The observation proposed by the representative of Argentina amounted to a non-rule, however, and would therefore be acceptable.

20. **Mr. Jacquet** (France) said that, since the Argentine proposal had not been accepted for inclusion in the text of the Rules, it would suffice to indicate in the report that a proposal had been made and had been duly noted by the Committee, but that the Committee had also noted that it should refrain from considering the question of immunity.

21. **The Chairperson** said that there must be consistency between the report and the Rules. The

wording proposed by the representative of Argentina should appear in the report as well as the information that the Committee of the Whole felt that it should appear in the report but not in the Rules. The observation made by the Office of Legal Affairs would also appear.

22. **Ms. Montejo** (Office of Legal Affairs) said that, while she appreciated the attempts by certain delegations to address the issue of immunity, it had not been the intention of the Office to create difficulties. Furthermore, the Office wished to distinguish the immunity of the United Nations from the immunity of States.

23. *Draft article 26 was adopted.*

Section I. Introductory rules

Draft article 3. Notice of arbitration (continued)

24. **Mr. Ghikas** (Canada) said that, for the sake of consistency, it would be appropriate to change the word “give” in paragraph 1 to the word “communicate”, which was used throughout the Rules.

25. **The Chairperson** said that he saw no objection among the Committee members to that proposal.

26. *Draft article 3, paragraph 1, as amended, was adopted.*

Section IV. The award

Draft article 40. Definition of costs (continued)

Draft article 42. Allocation of costs (continued)

27. **The Chairperson** noted that a question had been raised as to why the word “decision” was used in draft article 40, paragraph 1, whereas the word “award” was used in draft article 42, paragraph 2.

28. **Mr. Castello** (United States of America) said that, as was reflected in paragraph 16 of document A/CN.9/688, the working group had felt that the word “award” would be too restrictive in draft article 40, paragraph 1, because the arbitral tribunal could fix the costs in a decision at any stage of the proceedings. It had therefore agreed to use the word “decision” rather than “award” at the end of paragraph 1.

29. **Mr. Chung** (Republic of Korea) further explained that, in contrast, the allocation of costs referred to in draft article 42, paragraph 2, could only be made in an award, which would be enforceable; in that clause, therefore, the word “award” had been used instead of “decision”.

30. **The Chairperson** said that he took it that the current text of both draft paragraphs should stand.

31. *Draft articles 40 and 42 was adopted.*

The meeting was suspended at 11.25 a.m. and resumed at 12.15 p.m.

Section I. Introductory rules

Draft article 6. Designating and appointing authorities

Paragraph 4

32. **The Chairperson** drew attention to a text which had been distributed in the room containing a revised version of draft article 6, paragraph 4, which read as follows: “Without prejudice to article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party’s request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party’s request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority”.

33. The substantial change in the paragraph was the addition of the words “without prejudice to draft article 41, paragraph 4”, in order to introduce the separate solution found in draft article 41 on the final review of fees.

34. **Mr. Castello** (United States of America) said that the added phrase was unclear and should be replaced by the expression “except for as stated in article 41, paragraph 4”, which would be clearer.

35. **The Chairperson** said that the wording was not yet finalized for adoption and that the solution could be found during the break.

36. **Mr. Lebedev** (Russian Federation) wished to know whether the new text was replacing or adding

to draft article 6, paragraph 4, as contained in document A/CN.9/703.

37. **The Chairperson** said that during the discussion of that version of paragraph 4, it had been proposed that the last sentence should be deleted and replaced by a reference to the separate solution in draft article 41, paragraph 4. The idea was not to make substantive changes, but simply to ensure that the separate solution of draft article 41, paragraph 4, was not misconstrued. He said he took it that as the proposed text — which would replace the text in document A/CN.9/703 — was not yet fully satisfactory, it would be discussed again at a later stage.

38. *It was so decided.*

Section III. Arbitral proceedings

Draft article 17. General provisions

Paragraph 4

39. **The Chairperson**, inviting the Committee to resume its consideration of article 17, paragraph 4, drew attention to a text which had been distributed in the room containing three new versions of the paragraph, as proposed by the United States of America, Mauritius and France, along with a complementary proposal from the Association of the Bar of the City of New York to the Mauritius proposal.

40. **Mr. Moollan** (Mauritius) said that the Mauritius proposal was as follows: “All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties, except as otherwise permitted by the arbitral tribunal”. The Association of the Bar of the City of New York had made a suggestion to add the words “or the applicable law” after the words “except as otherwise permitted by the arbitral tribunal”, to cover situations where a jurisdiction had adopted draft article 17, paragraph (b), of the Model Law.

41. One concern that had arisen was that the proposed amendment might dilute the requirements of the Rules in jurisdictions that were too lax on those matters, because their applicable laws would then come into play. The French delegation had also said that, as currently drafted, the Mauritius

proposal did not make it clear whether the proviso applied only to “at the same time” — which was what Mauritius had intended — or to the whole of the first segment of the sentence. To set things straight, he proposed to either move the words “at the same time” to just before the comma, or to even delete them from the first segment altogether and end the sentence after that. A second sentence would then be drafted to the effect that such communication should be done simultaneously, except as otherwise permitted by the arbitral tribunal.

42. **The Chairperson** said that if the permission of the arbitral tribunal or the applicable law was added in a separate sentence, then deleting the words “at the same time” would make no difference.

43. **Mr. Moollan** (Mauritius) said that the French comment was on the Mauritius proposal and not on its own proposal, and that his delegation wished to make it clear that the qualifying words “except as otherwise permitted by the arbitral tribunal” should only apply to timing. The solution was either to say: “All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties at the same time, except if otherwise permitted by the arbitral tribunal”, or to say: “All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties at the same time. Such communication shall take place simultaneously, except if otherwise permitted by the arbitral tribunal”.

44. The French delegation had suggested to delete the words “at the same time”, but the Mauritius delegation had rejected that suggestion, on the concern that deleting those words would make it unclear as to whether the discretion given to an arbitral tribunal would apply to the whole Rule or only to timing.

45. **The Chairperson** said that he had understood that the Mauritius proposal was simply to move the words “at the same time” to a different location.

46. **Mr. Moollan** (Mauritius) said that it made no difference where the phrase was located, provided it was clear that the tribunal’s discretion was only in respect of the simultaneous nature of the communication, and that the only solution was to have two separate sentences.

47. **Ms. Hu** Shengtao (China) said that her delegation favoured the option of adding a new sentence, because the exception was only with regard to timing.

48. **Mr. Jacquet** (France) said that the Mauritius proposal was similar in spirit to the French proposal, but that it was even better because it was more precise. Hence, the French delegation offered to withdraw its proposal and to align itself with the Mauritius proposal. It supported the solution of two sentences, one without the phrase “at the same time”, and another relating solely to timing, which could say something to the effect that the communications should be made at the same time.

49. **Mr. Castello** (United States of America) said that he endorsed the proposal to have two sentences, in order to show clearly that the tribunal’s discretion was only with respect to timing. However, it would be preferable for the second sentence to end with the phrase “except as otherwise permitted by the arbitral tribunal or the applicable law”.

50. **Mr. Kee** (Observer for the Asia Pacific Regional Arbitration Group) said that the first part of the United States proposal could be combined with the second part of the Mauritius proposal to come up with the following: “All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties, except if delayed communication from one party to the other party is permitted by the arbitral tribunal”.

51. **Mr. Friedman** (Observer for the International Bar Association) said that the Mauritius proposal was preferable, especially as it made reference only to the power of the arbitral tribunal and not to the applicable law.

52. **Mr. Möller** (Observer for Finland) said that he agreed with the Mauritius proposal to make two sentences, but that the second sentence should end with “or the applicable law”.

53. **The Chairperson** said that it was his understanding that the second sentence would say the following: “Except as otherwise permitted by the arbitral tribunal or the applicable law, such communication shall be simultaneous”.

54. **Mr. Castello** (United States of America) introduced his delegation’s proposal for a revised text of draft article 17, paragraph 4, which read as follows:

“All communications to the arbitral tribunal by one party shall at the same time be communicated by that party to all other parties except if delayed communication to the other party is necessary so that the arbitral tribunal can consider, when it is otherwise authorized to do so, a party’s request that it issue a preliminary order directing the other party not to frustrate the purpose of a requested interim measure while the tribunal considers that request.”

55. **Mr. Ghikas** (Canada), supported by **Mr. Petrochilos** (Greece), **Mr. Jacquet** (France) and **Mr. Schöll** (Observer for Switzerland), said that his delegation favoured the proposal to split the text proposed by Mauritius into two sentences but did not support the addition of a reference to the applicable law. The purpose of the latter proposal was to ensure that, if the applicable law prohibited anything other than simultaneous communication, the tribunal would not be able to override that prohibition; however, it would actually have the opposite effect. In addition, his delegation would prefer a formulation using the expression “at the same time” rather than the word “simultaneous”.

56. **The Chairperson** said it was his understanding that the purpose of the Finnish proposal was to say that, if the applicable law authorized delayed communication in certain circumstances, the arbitrator should not have the right to prohibit it.

57. **Mr. Ghikas** (Canada) said that he did not support the proposal even on that basis.

58. **Mr. Boulet** (Observer for Belgium) said that, if wording along the lines of “except as otherwise permitted by the arbitral tribunal” were added to the provision, that would amount to a presumption that the tribunal had the power to authorize *ex parte* measures. Previously, the Commission had been trying not to take a position on that question. The addition of the new language would therefore represent a complete change of direction and an abandonment of the neutrality which had been aimed for in draft article 26, paragraph 9.

59. **The Chairperson** said it was his understanding that non-simultaneous communication in cases other than those involving *ex parte* measures presented no difficulties. Communications were made first to the tribunal and then passed on to the parties. That power of the tribunal was not in question. He had thought that placing the exception in the hands of the tribunal could resolve the problem.

60. **Mr. Boulet** (Observer for Belgium) said there was no question that the tribunal had the power to delay the communication of a statement. However, the proposed new language would have the effect of giving *ex parte* measures the same status as a simple order issued by an arbitral tribunal; in other words, it would mean giving the tribunal the power to authorize *ex parte* measures. Previously, the Commission had taken no position on whether or not the tribunal had that power, leaving the question to be determined by the applicable law.

61. **Ms. Smyth** (Australia) said that her delegation had some sympathy with the views expressed by the observer for Belgium, but was inclined to support the proposal made by the representative of Mauritius on the basis that it could cover circumstances in which communications were made to the tribunal and then passed on to the parties. On the question of *ex parte* preliminary orders, perhaps the provision was cast in sufficiently general terms to preserve the balance that had been struck in the Working Group. No reference should be made to the applicable law. She favoured the formulation of the provision proposed by the Asia Pacific Regional Arbitration Group (APRAG), in that it provided an elegant one-sentence solution, but would go along with a two-sentence formulation if the majority of delegations so preferred. Lastly, her delegation preferred the phrase “at the same time” to the word “simultaneous”.

62. **Ms. Thomas** (Observer for the Association of the Bar of the City of New York) said that, in order to address the concerns expressed about adding the words “under the applicable law”, wording along the following lines could be used: “except as permitted by the arbitral tribunal and if and to the extent authorized under applicable law”. Such wording would make it clear that no authority was being conferred on the tribunal to allow an *ex parte* communication, and that the tribunal had such authority only if it existed under the applicable law.

63. **Mr. Boulet** (Observer for Belgium) said that his delegation supported that proposed modification because it would bring the text closer to the United States version, in that it would refer to the tribunal’s being authorized to take measures under the law rather than to the tribunal’s authorizing certain measures itself. That distinction was crucial. His delegation had favoured the version of the provision proposed by the United States but could accept the version proposed by Mauritius with the proposed modification.

64. **Mr. Moollan** (Mauritius) said that the phrase “when it is otherwise authorized to do so” in the United States proposal referred to the authority of the tribunal to issue preliminary orders. The Mauritian proposal merely referred to the tribunal’s discretion to decide that exchanges did not need to be simultaneous; it said nothing at all about the power to issue *ex parte* orders.

65. **Mr. Boulet** (Observer for Belgium) said that that explanation did not entirely allay his concerns. The two versions of the provision under discussion were fundamentally different. In the text proposed by the United States, the application of the provision was subject to the tribunal’s being authorized to act; in other words, the tribunal could act only if it had been given the power to do so either by the parties or under the applicable law. The question of whether or not the tribunal had the power to act was therefore left open. In the text proposed by Mauritius, it was assumed that the tribunal had the power to act, and the only question was whether or not it used that power.

66. **The Chairperson** said that there seemed to be a broad consensus, albeit with one reservation, that the tribunal could allow non-simultaneous communications, and that the provision should be split into two sentences. In addition, there seemed to be no clear majority in favour of making reference to the applicable law. He therefore took it that draft article 17, paragraph 4, would be amended to read as follows: “All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties. Except as otherwise permitted by the arbitral tribunal, such communications shall be made at the same time.”

67. *It was so decided.*

*Section IV. The award**Draft article 41. Fees and expenses of arbitrators**Paragraph 4*

68. **The Chairperson** drew attention to a revised version of draft article 41, paragraph 4, proposed by the International Bar Association, which had been circulated in the meeting room. In substance, the proposed new text was the same as the version of the paragraph set out in document A/CN.9/703/Add.1; the main change was that the paragraph had been divided into a number of subparagraphs in order to make it more readable. The revised text read as follows:

“4. (a) When informing the parties of the arbitrators’ fees and expenses that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;

(b) Within 15 days of receiving the arbitral tribunal’s determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA;

(c) If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal’s determination is inconsistent with the arbitral tribunal’s proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any necessary adjustments to the arbitral tribunal’s determination, so that it satisfies the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;

(d) Any such adjustments shall either be included by the tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of article 38, paragraph 3, shall apply.”

69. **Mr. Petrochilos** (Greece) proposed that the last part of the first sentence of subparagraph (c) should be amended to read “make any adjustments to the arbitral tribunal’s determination that are necessary to satisfy the criteria in paragraph 1”.

The meeting rose at 1 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*

**Summary record of the 908th meeting, held at Headquarters,
New York, on Thursday, 24 June 2010, at 3 p.m.**

[A/CN.9/SR.908]

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

The meeting was called to order at 3.25 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*
(A/CN.9/703 and Add.1; A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules
(continued)

Section III. Arbitral proceedings (continued)

Draft article 17. General provisions (continued)

1. **The Chairperson** said, in response to Australia's request to be allowed to make a comment on paragraph 4, that once a draft article had been adopted, the discussion could not be reopened.

2. **Ms. Smyth** (Australia), noting that she did not believe that paragraph 4 as adopted reflected the position of the Working Group, said that in that case she wished it recorded in the report that it was Australia's understanding that the words "except as otherwise permitted by the arbitral tribunal" did no more than allow the tribunal to receive a communication subsequently to be communicated to the other parties. She further understood, in view of the provisions of paragraph 1 on equality and fairness, that paragraph 4 was not intended to affect the different question of whether a tribunal might issue orders or take any other steps without hearing the parties.

3. **Mr. Torterola** (Argentina) asked that the report reflect Argentina's concurrence with Australia's remarks.

Section IV. The award (continued)

Article 41. Fees and expenses of arbitrators
(continued)

4. **The Chairperson** said he took it that the Committee wished to adopt paragraph 4 of draft article 41, as amended at the previous meeting.

5. *It was so decided.*

6. **Mr. Castello** (United States of America), recalling that he had been asked to draft new wording under article 41, said that his first proposal would be to insert a new paragraph 5, regarding the deposit of money with the reviewing authority, which would read: "A party referring for review, under paragraph 4, the arbitral tribunal's determination of fees and expenses shall, at the time of such referral, deposit with the reviewing authority a sum, to be determined by the reviewing authority, to cover the estimated cost of such review. Any excess amount shall be returned by the reviewing authority at the completion of the review".

7. **Ms. Matias** (Israel) said that she had difficulty with the length of article 41 as a whole, but that proposed text could be useful as a deterrent for frivolous requests. However, no provision was made for a case in which not enough money had been deposited initially.

8. **Mr. Castello** (United States of America) proposed, accordingly, that the final sentence of his proposed text should be replaced by the following: "Any adjustments to the amount of such deposit shall be made, as needed, no later than the completion of the review".

9. **The Chairperson** clarified, in response to queries by India and Argentina, that the new paragraph 5 would institute a complaint procedure involving the deposit of a fee for the cost of the requested review of the arbitral tribunal's determination of costs for the earlier arbitration.

10. **Mr. Petrochilos** (Greece) said he agreed in principle with the point at issue and welcomed the language proposed. If a party had a bona fide interest in initiating a review, the money involved would not be a problem.

11. **Mr. Moollan** (Mauritius) said that he wondered if it was desirable to add a new paragraph to an already very heavy article. The fee that the reviewing authority was entitled to charge would be a small amount and would thus not serve as a deterrent for frivolous complaints.

12. **Mr. Torterola** (Argentina) said that if the deposit in question was intended as payment for the reviewing authority, it was unnecessary to specify such a routine matter in the Rules. If the deposit was intended as a deterrent, it should be specified that it constituted a security.

13. **Mr. Castello** (United States of America) explained that the deposit in fact covered only the cost of the review, but that it was intended in part as a deterrent. It might not deter all invocations of the review function, but it might deter some.

14. **Mr. Ghikas** (Canada) said that he agreed with the sentiment behind the United States proposal but, like Mauritius and Argentina, felt that it was too detailed and would result in a more complicated Rule. He was not in favour of adding the new paragraph 5.

15. **The Chairperson** said that, in view of the objections, the report could simply indicate that the Commission expected the reviewing authority to charge a fee, which might serve to discourage frivolous requests for review.

16. *It was so decided.*

17. **Mr. Torterola** (Argentina) said that he would like it recorded in the report that Argentina agreed that the reviewing authority had the right to charge a fee, but not as a deterrent.

18. **Mr. Castello** (United States of America) said that a proposed second sentence, to be added to the end of paragraph 6, would address the concern that every losing party might seek to delay compliance with the tribunal's award by requesting a review of the fees determined in the award; the sentence would read: "If a final award containing the tribunal's determination of its fees and expenses is referred for review pursuant to paragraph 4, all provisions in the award other than those that relate to the determination of fees and expenses shall, to the maximum extent authorized by applicable law, be subject to immediate recognition and

enforcement". The reference to applicable law was intended to accommodate all variations in the different legal regimes.

19. **The Chairperson** observed that the proposed provision would actually be a greater deterrent to abuse and reflected the thinking of the Committee on avoiding any delay in enforcing the substantive award.

20. **Mr. Castello** (United States of America) said that his understanding was that paragraph 6 did not speak to the enforcement of the award but rather to the substantive scope of the review process, which should not reach the merits of the case.

21. **Mr. Boulet** (Observer for Belgium) said that he would prefer a more neutral formulation. The almost menacing tone of the proposed language seemed to aim not at deterring abuse but at discouraging any request for review. He would simply emphasize in paragraph 6 that a review of the fees did not affect the enforceability of the substantive award.

22. **Mr. Ghikas** (Canada), supported by **Mr. Torterola** (Argentina), and concurring with Belgium, said that it would be better to say simply that a pending review process did not delay enforcement of the award.

23. **Mr. Möller** (Observer for Finland) said that he found the United States proposal acceptable, although it could be shortened. With regard to the Belgian proposal, it was not enough to refer to enforcement but also to recognition of an award.

24. **Mr. Castello** (United States of America) said that any unintended punitive tone in his proposal could be avoided by deleting the words "maximum" and "immediate"; but he would then add the words "without delay" after the words "recognition and enforcement", in line with draft article 34, paragraph 2.

25. **Ms. Smyth** (Australia) said that the United States proposal and the shorter wording proposed by Belgium, Canada and Argentina said essentially the same thing and she would prefer the latter.

26. **Mr. Ghikas** (Canada), supported by **Mr. Boulet** (Observer for Belgium), proposed adding, at the end of the current text of paragraph 6, the clause

“or delay the recognition or enforcement of those other determinations”.

27. **Mr. Castello** (United States of America) observed that a determination was not subject to recognition or enforcement, but rather to the provisions in the award other than those related to fees and expenses.

28. **The Chairperson** suggested adding the following clause to the end of current paragraph 6: “; nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the tribunal’s expenses and fees”.

29. *It was so decided.*

30. *Draft article 41, as amended, was adopted.*

Section I. Introductory rules (continued)

Draft article 6. Designating and appointing authorities (continued)

31. **Mr. Petrochilos** (Greece) proposed the following rewording of paragraph 4 of draft article 6 to take account of the change to draft article 41: “Except as provided in article 41, paragraph 4, if the appointing authority refuses to act, or if it fails to appoint an arbitrator within 30 days after it receives a party’s request to do so, fails to act within any other period provided by these Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party’s request to do so, any party may request the Secretary-General of the PCA to designate a substitute appointing authority”. That made it clear that the process under draft article 41, paragraph 4, operated in an exclusive, independent manner.

32. **The Chairperson** said that he took it that the Committee wished to adopt the proposed adjustment to the wording of draft article 6, paragraph 4.

33. *It was so decided.*

Section IV. The award (continued)

Draft article 34. Form and effect of the award (continued)

34. **The Chairperson** said that a proposal had been made to remove the third sentence of paragraph 2 and to move the question of a waiver to

the draft model arbitration clause. Rather than having a waiver imposed on them by the Rules, the parties would then be able to adapt the waiver to their own arbitration agreement; the possibility of a waiver would be included as the fifth element that could be added to that agreement, in the same way as the four elements listed in the draft annex to the Rules (A/CN.9/703/Add.1, para. 28).

35. **Mr. Castello** (United States of America) wondered what the consequences would be for the jurisdiction of Switzerland, which was the seat of many arbitrations. The waiver provided for in the Rules of Arbitration of the International Chamber of Commerce, for instance, was not directly recognized under Swiss law, which required a specific agreement to that effect. If the waiver provision was transferred to the model clause, so that the parties would adopt it directly, would that be regarded as an express agreement to waive more comprehensive rights?

36. **Mr. Schöll** (Observer for Switzerland) acknowledged that, under the Swiss private international law statute, waivers must be very specific: a general waiver of the right to request the setting aside of an award was not considered valid. Conditions of validity would, however, need to be checked for each jurisdiction.

37. **The Chairperson** said that the question was whether the Supreme Court of Switzerland would interpret that clause as a specific waiver if it were included in a contract.

38. **Ms. Cordero Moss** (Norway) said the listing of the waiver as just one of five elements that the parties should consider adding might convey the wrong message, as the other four elements were essential, while the waiver clause was not. She suggested that the proposed text should remain unchanged and that the following separate note should be added: “If the parties wish to exclude recourse against the arbitral award that may be available under the applicable law, they may consider adding language to that effect, as suggested below, considering however that the effectiveness and conditions of such an exclusion depend on the applicable law”. That would be followed by the text of the waiver.

39. **Mr. Moollan** (Mauritius), **Ms. Dostie** (Canada), **Ms. Hu Shengtao** (China), **Mr. Boulet** (Observer for Belgium) and **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) expressed support for Norway's proposal.

40. **Mr. Möller** (Observer for Finland) said that his delegation could accept that proposal, but purely in a spirit of compromise.

41. **Mr. Bellenger** (France) said that the Norwegian proposal offered a good solution to the concerns expressed. He noted that the Committee's approach to the waiver of recourse against an award, by displacing the problem to the model arbitration clause, actually provided a recipe for such a waiver; as, however, it would affect only a limited number of countries, it was of little consequence.

42. **Mr. Castello** (United States of America) said that the proposal did not fit into a draft model arbitration clause for contracts but required a separate note, which could be entitled "Note concerning possible waiver of recourse against the arbitral award". That would call for an amendment to the wording proposed by the Norwegian delegation whereby "to that effect" would be replaced by "to their arbitration agreement".

43. **Mr. Moollan** (Mauritius) said that the waiver of the right of recourse was a basic feature of modern international commercial arbitration and, for that reason, the decision had been taken to include it in the draft model arbitration clause. It was not acceptable to downgrade it to a note to a note in an annex, let alone to an annex to an annex.

44. **Mr. Torterola** (Argentina), supported by **Ms. Kiragu** (Kenya), concurred. The original wording and format of the waiver clause had been decided by consensus; it would be preferable to leave it as paragraph (e) in the annex to the Rules.

45. **Mr. Snijders** (Observer for the Netherlands) suggested that, rather than a note to a note, the proposal of the delegation of Norway should appear as "Note 2", following the previous note, which should be entitled "Note 1".

46. **Mr. Castello** (United States of America) said that there was no wish to downgrade the waiver clause; the objective was to be specific so that when a party looked at the annex to the Rules, it would

see a manageable checklist and not have to grapple with the complex interaction between a waiver clause and applicable law. A separate heading was required, on what was a separate issue, so as to make the model arbitration clause more user-friendly.

47. **Mr. Möller** (Observer for Finland) and **Mr. Bellenger** (France) supported the view expressed by the United States delegation.

48. **Mr. Moollan** (Mauritius) said that it needed indeed to be made clear to the parties that there was no waiver of recourse in the UNCITRAL Arbitration Rules, in contrast with other modern arbitration rules. That was why the relevant provision had been transposed to the model arbitration clause; that position must not be undermined.

49. **The Chairperson** took it that the Norwegian wording of the waiver clause could be included in the same annex to the Rules, on the same page, under a different heading, which would be that proposed by the United States delegation.

50. **Mr. Moollan** (Mauritius) said that he would like to know definitively whether or not the proposed waiver clause would be part of the annex to the Rules, entitled "Draft model arbitration clause for contracts".

51. **Mr. Castello** (United States of America) said that there was only one annex to the Rules, containing two items, the draft model arbitration clause for contracts and the draft model statements of independence pursuant to article 11 of the rules. Each of those items had attached to it one or more notes. The United States proposed that the heading "Draft model arbitration clause for contracts" and subsequent text should be followed by an additional and separate heading, referring to a possible or optional waiver of recourse against the arbitral award.

52. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that, as the draft model arbitration clause for contracts, as a block, with its attached note, was by its very nature not compulsory, it was inappropriate to add a waiver clause itself described as "possible" or "optional" under the heading "Draft model arbitration clause for contracts".

53. **Mr. Torterola** (Argentina) said that the waiver should be described as “optional” rather than “possible”.

54. **Ms. Cordero Moss** (Norway) said that the word “optional” might misleadingly suggest that the waiver was being officially promoted as widely available. In actual fact, it was a possibility only in a small number of jurisdictions.

55. **Ms. Hu Shengtao** (China) said that her delegation had listened to the views of the representatives of Norway and the United States of America and had no firm preference as to whether the waiver clause should fall within or outside the heading “Draft model arbitration clause for contracts”.

56. **Ms. Smyth** (Australia) said that, by analogy with the draft model arbitration clause and the draft model statement of independence already proposed for insertion in the annex to the Rules, perhaps the new heading should read “Draft model waiver clause”.

57. **Mr. Torterola** (Argentina) said that, to spare the Committee from having to decide whether to describe the waiver clause as “possible” or “optional”, the wording proposed by Norway could be added without inserting an additional heading and therefore without altering the existing layout of the annex to the Rules. The wording would simply be considered part of the draft model arbitration clause for contracts.

58. **The Chairperson** said that there appeared to be a consensus in favour of a clearer separation between the waiver clause and the other two sections of the annex to the Rules. He therefore took it that, in the absence of any other proposal, the Committee wished to add to the annex to the Rules a separate heading, “Possible waiver statement”, followed by the text proposed by the representative of Norway.

59. *It was so decided.*

Section I. Introductory rules (continued)

Draft article 2. Notice and calculation of periods of time (continued)

60. **The Chairperson** drew attention to a text containing revised wording, dated 23 June 2010,

proposed by the representatives of Armenia, Australia, Austria, Canada, Egypt, Greece, Israel, Mauritius, Norway, the Republic of Korea, and the United States of America and the observers for Belgium and Switzerland.

61. **Mr. Petrochilos** (Greece) said that the joint proposal, based on the wording in document A/CN.9/703, had undergone further slight revisions. The aim was to clarify the details of permitted modes of communication of notices, permitted delivery destinations, actual and deemed receipt, and delivery by electronic means.

62. If, after reasonable effort, it had proven impossible to deliver a notice successfully because the delivery address did not exist, the intended recipient was not at that location, or the recipient’s place of business or habitual residence could not be identified, the last known mailing address, place of business or habitual residence could be used. Delivery by electronic means, an issue discussed at great length in Working Group II, would be authorized only if an electronic mail address or facsimile number for delivery had been designated in advance by a party, or was authorized subsequently by the arbitral tribunal. The intention was to prevent the use of a general mailbox or facsimile number that was not likely to be regularly checked for incoming messages. With regard to time periods, it should be remembered that the central condition in draft articles 2, 3 and 4 was receipt of a notice. That condition would be satisfied by transmission by electronic means or by actual or deemed delivery to a physical address.

63. **Mr. Castello** (United States of America) said that his delegation favoured reversing the proposed word order of draft article 2, paragraph 2, to avoid suggesting that delivery was required to take place even if no address had been designated by a party to the arbitration or by the arbitral tribunal. In addition, the introductory wording added to that paragraph would require a change in the subsequent wording in order to make it clear what alternative action should be taken if delivery proved impossible.

64. **Mr. Ghikas** (Canada) said that his delegation wished to ensure that, with regard to deemed delivery, there was no incompatibility or lack of clarity between that concept as expressed in the unchanged wording of draft article 2, paragraph 5,

and that expressed in the proposed new draft article 2, paragraph 2.

65. **Mr. Moollan** (Mauritius) said that his delegation concurred with the United States representative that the course of action to be taken in the event of a failed attempt to deliver a notice must be clearly expressed.

66. **Mr. Chan** (Singapore), recalling that the main purpose of draft article 2 was to determine the time of receipt of a notice, said that the proposed wording could create confusion by emphasizing delivery rather than receipt. Similarly, while paragraph 1 referred to transmission, the remainder of the draft article referred to delivery. The use of consistent language would prevent misinterpretation of the intention of the draft article. Consistency was also important in the broader context of UNCITRAL documents. While the current wording should be praised for providing specifically for the possibility of delivery of a notice by electronic means, it should match that of other UNCITRAL instruments relating to electronic communication. He therefore suggested replacing the word “transmitted” with the word “dispatched”, which was used in those UNCITRAL instruments.

67. **The Chairperson** said that he wondered if such harmonization would clarify the intended meaning of the draft article, as the use of “transmitted” in paragraph 3, implying that a notice had reached the addressee, was in any event succeeded by “sent” in paragraph 5, describing a failure of a notice to reach the addressee.

68. **Mr. Chan** (Singapore) said that, in the case of electronic methods, the concept of “dispatch” included the act of “transmission”. He agreed, however, that the use of the word “sent”, a more generic term than “dispatched”, was appropriate in paragraph 5.

69. **The Chairperson** said he took it that the delegations with concerns regarding the wording of draft article 2, including the harmonization of, and interaction between, the terms used, wished to work further on the text.

70. *It was so decided.*

The meeting rose at 6.05 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*

**Summary record of the 909th meeting, held at Headquarters,
New York, on 25 June 2010, at 10 a.m.**

[A/CN.9/SR.909]

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

The meeting was called to order at 10.30 a.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*
(A/CN.9/703 and Add.1, A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules
(continued)

Section I. Introductory rules (continued)

Draft article 2. Notice and calculation of periods of time (continued)

1. **The Chairperson** drew attention to the proposal for a revised text of draft article 2, as contained in conference room paper A/CN.9/XLIII/CRP.2/Add.3, which had been prepared by a number of delegations.

2. Drawing attention to the changes that had been introduced, he said that the first sentence of paragraph 2 expressed the important idea that the address designated by a party should be the one used for communication purposes. Under draft article 3, the parties were required to provide contact details, but so far there had been no requirement in the Rules that those specific contact details should be used. The second sentence of paragraph 2 stated that electronic communication was permitted only to specifically designated electronic addresses, in order to ensure that notices were not sent, for example, to defunct e-mail accounts. Paragraph 3 (a) dealt with the key concept “received”, which was relied on in other provisions, while the concept “deemed received” was set out in paragraph 3 (b). Paragraph 4 set out the fall-back position if efforts at delivery under paragraph 2 or 3 had not been successful.

3. **Mr. Seweha** (Egypt) said that the phrase “deemed to have been received” in paragraph 5 was inconsistent with paragraph 3 in that it was used to refer not only to notices deemed received under

paragraph 3 (b) but also to notices actually received under paragraph 3 (a).

4. **The Chairperson** pointed out that the purpose of paragraph 5 was to determine the date of delivery. It was his understanding from English-speaking delegations that the phrase “deemed received” could include the meaning “actually received”.

5. He wondered why, in paragraph 4, the word “effected” had been used in relation to delivery and whether the word “made” would be better.

6. **Ms. Smyth** (Australia) said that “effected” was the more appropriate word in the context.

7. **Mr. Castello** (United States of America) said that, pursuant to paragraph 5 of the proposed new text, the date of deemed receipt was the date of delivery or attempted delivery. In the case of electronic transmission, however, the sender often did not know whether or not delivery had been effected. It therefore seemed appropriate to create a separate rule for electronic communications. He proposed that the following sentence should be added to paragraph 5: “A notice transmitted by electronic means is deemed received on the day it is transmitted.”

8. **Mr. Chan** (Singapore) proposed that the word “dispatched” should be used instead of the word “transmitted” in order to bring the Rules into line with the United Nations Convention on the Use of Electronic Communications in International Contracts.

9. **The Chairperson** said that, while it was desirable for UNCITRAL texts on different topics to be consistent with each other, it was also important, in the Arbitration Rules, to use terminology that was widely understood by the commercial and arbitration community. He asked whether others agreed that the Arbitration Rules should be aligned with the aforementioned Convention and whether

the word “dispatched” would be clear to users of the Arbitration Rules. He also wondered whether the electronic community would have any difficulty with the word “transmitted”.

10. **Mr. Chan** (Singapore) said that the word “transmitted” was a generic term, whereas the term “dispatched” was widely used and understood, in particular by countries that had based their national laws on the UNCITRAL Model Law on Electronic Commerce or the Convention.

11. **Mr. Sorieul** (Secretary of the Commission) said that “communication” was a key concept in the Commission’s instruments on electronic commerce and communications and was understood as a process that began with dispatch and ended with receipt. However, in the electronic environment, dispatch and receipt might actually take place at the same time. Thus far the Commission had generally chosen to regard the time of dispatch as the time at which communication took place. It might therefore be appropriate to use the word “dispatch” in the current context.

12. **The Chairperson** asked whether the word “sent” would be a suitable non-technical alternative to the word “dispatched”.

13. **Mr. Castello** (United States of America) said that, if the word “dispatched” were used in the sentence which he had proposed, it would be the only place in the Rules where it occurred. Since the concepts of transmission and sending were already used in the version of draft article 2 currently under discussion, the introduction of a third concept could create confusion. His delegation therefore favoured the term “sent” over the term “dispatched”.

14. **Mr. Boulet** (Observer for Belgium) said that article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts defined the time of dispatch of an electronic communication as the time when it left the sender’s information system and the time of receipt as the time when the communication became capable of being retrieved at a designated electronic address. In order to be consistent with the Convention, the Arbitration Rules should refer to the time when a communication became capable of being retrieved rather than the time of dispatch.

15. **The Chairperson** recalled that the concept “capable of being retrieved” had been used in the version of draft article 2, paragraph 1 (b), contained in document A/CN.9/703, but had been removed on the basis of strong opposition from Committee members. However, in that instance it had qualified communications in general, whereas in the current context it would qualify electronic communications specifically. He asked whether members wished to reintroduce the concept in the current context.

16. **Mr. Chan** (Singapore) said that the observer for Belgium had raised an important point. One of the purposes of revising the Arbitration Rules was to align them with developments in the electronic communications environment, and the concepts “sent” or “dispatched” might not be appropriate in that context.

17. **The Chairperson** said that the Secretary had confirmed that “sent” would be an appropriate alternative to “dispatched”. However, the representatives of Belgium and Singapore had now raised a different point, namely at what time an electronic message should be deemed to be received. He asked the Secretary to elaborate on that issue.

18. **Mr. Sorieul** (Secretary of the Commission) said that his main concern was to ensure that the additional sentence proposed by the representative of the United States of America was understandable. Since in the case of electronic communications it was not clear whether a notice was transmitted on the day when it was “sent” or “dispatched” or on the day when it was “capable of being retrieved”, the Commission simply needed to establish a rule that determined which of those two approaches should be taken.

19. **The Chairperson** said that, while the simplest solution would be to use the word “sent”, the observer for Belgium had raised the question of whether the nature of electronic communication made it desirable, from the perspective of arbitration procedure, to introduce the additional requirement of “capable of being retrieved”, bearing in mind that the revised text of the Rules took account of the specific characteristics of electronic communications.

20. **Mr. Sorieul** (Secretary of the Commission) said that the specific nature of electronic communications

was not the Commission's main concern; instead, it needed to determine what basic rule it wished to set in place. If the notice was deemed received on the day it was sent, it would be much easier for the sender to prove receipt by the addressee. If, on the other hand, the Commission decided that the notice should be deemed received on the day it was capable of being retrieved, an approach that was more in line with generally recommended practice in electronic commerce, it would be more difficult for the sender to prove receipt, as the address might or might not be used by the addressee, and the sender might not know at what point the notice became accessible on the addressee's information system. The simplest solution would be to use the word "sent", although it should be acknowledged that in that situation the addressee could claim that the notice had never been capable of being retrieved.

21. **The Chairperson** said that, unless any delegations had fundamental objections, he suggested that the word "sent" should be used, since that provided sufficient clarity as to when the notice would be deemed received. The difficulty with the other approach was that the sender would be unable to determine whether the notice was capable of being retrieved.

22. **Mr. Boulet** (Observer for Belgium) said that the Working Group on Electronic Commerce, in which he had participated, had drafted article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts after very careful consideration and long deliberations. He was therefore reluctant to depart from what had been established in that article, paragraph 2 of which stated that the time of receipt of an electronic communication was the time when it became capable of being retrieved by the addressee at an electronic address designated by the addressee. It also specified that an electronic communication was presumed to be capable of being retrieved by the addressee when it reached the addressee's electronic address. If a contrary rule was established, according to which the notice was deemed received when sent, it would not address the risk that a notice might leave the sender's information system but not reach the addressee.

23. It was important to understand that, just as in the case of traditional communications, there was

always an intermediary between the sender and the addressee of an electronic communication; that intermediary would be able to certify the date on which the notice was received. If a notice transmitted by electronic means was deemed received on the day it was sent, the Commission would be saying the exact opposite of what had been established for traditional means of communication, where a notice was deemed received on the day it was delivered or attempted to be delivered. He saw no convincing reason to depart from the principle established by the Convention.

24. **The Chairperson** asked how the sender would prove in such a case that a notice was capable of being retrieved by the addressee.

25. **Mr. Boulet** (Observer for Belgium) said it was highly likely that the technical means to determine when electronic communications had been sent or received would be available when it became legally important to do so; in fact, he believed that such means already existed. In any case, the problem was not insurmountable; for example, the addressee could simply be asked to send an acknowledgement of receipt. With the other approach, there was a presumption that the addressee had received the notice, when that might not in fact be the case.

26. **The Chairperson** asked whether other delegations shared the concern expressed by the observer for Belgium or whether they felt that the wording "deemed received on the day it is sent" was acceptable. If an addressee was concerned that a notice sent to an electronic address might not be received, the addressee could always specify that the notice should be delivered by mail or courier instead. The difficulties that might arise with electronic communications could be recorded in the report.

27. **Mr. Chan** (Singapore) said that, since the rules being formulated would be used in the real world, it was important to understand how those rules would be applied. He cautioned against using language that might later create problems on the ground.

28. **The Chairperson** said that, according to the Secretary of the Commission, there was no difference in meaning between "sent" and "dispatched". Unless there were any other

objections, he suggested that the word “sent” should be used.

29. **Mr. Chan** (Singapore) reiterated that there was a case for harmonization with the terminology used in international conventions and national law. With regard to the more important point raised by the observer for Belgium, the experts of the Working Group on Electronic Commerce had highlighted that an electronic communication sent to an addressee’s electronic address was transmitted via an intermediary; consequently, it might fail to reach the addressee even after it had been received by the intermediary. It was for that reason that the Working Group had finally agreed on the phrase “capable of being retrieved”. The Working Group had also been advised that, unlike any other means of communication, electronic communications were logged at each stage in the process and forensic examination could therefore be performed to determine whether a communication had been capable of being retrieved.

30. **The Chairperson** said that the observation made by the representative of Singapore was important. However, since it was his understanding that no other delegations had objected to the text as proposed, he suggested that the Committee should adopt the second revised text of draft article 2, including the additional sentence proposed by the United States delegation, with the word “sent”, before engaging in further discussions during the suspension to seek a possible consensus on whether to make an addition for the specific case of electronic communications or leave the proposed text unchanged, in which case, the concerns expressed about the use of the word “sent” could be included in the report.

31. **Ms. Hu Shengtao** (China) proposed that the two sentences of the second paragraph of the revised draft of article 2 should be split to form two subparagraphs, (a) and (b), which would relate to traditional and electronic means of communication respectively. The wording at the start of paragraph 3 should in that case be amended to read: “Pursuant to paragraph 2 (a), in the absence of such designation or authorization ...”, and each reference to paragraph 2 in paragraphs 4 and 5 should be amended to refer to paragraph 2 (a).

32. **The Chairperson** asked what would be the advantage of singling out electronic communications in that way.

33. **Ms. Hu Shengtao** (China) clarified that her aim was not to single out electronic communications. It was her understanding that the current text of paragraphs 3 and 4 mainly applied to traditional means of communication; if that was the case, she believed it necessary to make a distinction between electronic and traditional means of communication in those paragraphs. In order to do so, it was also necessary to make the same distinction in paragraph 2.

34. **The Chairperson** said that the issue of electronic communications was very complex. The Commission must balance the need to produce a text that stood up to scrutiny with the need to complete its work. He asked whether any further changes were needed before the draft text of article 2 was adopted.

35. **Mr. Moollan** (Mauritius) said that the Chairperson had given all delegations a good opportunity to express their views. The Commission had in fact benefited from substantial input from the Singaporean delegation during its drafting of the second revised text of draft article 2. His delegation did not see any purpose in leaving the issue open since broad consensus had been achieved on the text as it stood, with the additional sentence proposed by the United States delegation and the use of the word “sent”; that text should therefore be adopted without further debate. All the issues had already been discussed many times and the question was essentially whether to use “sent” or “dispatched”.

36. **The Chairperson** said it was his understanding that the representative of Singapore had not merely raised a question of terminology but had indicated that the issues of evidence and responsibility arising in the case of electronic communications differed from those arising with traditional communications and suggested that the Committee would be making a grave mistake to stipulate that a notice transmitted by electronic means should be deemed received on the day it was sent or dispatched.

37. **Mr. Raouf** (Observer for the Cairo Regional Centre for International Commercial Arbitration)

asked why the phrase “attempted to be delivered in accordance to paragraph 4” was used in paragraph 5 of the second revised draft of article 2.

38. **The Chairperson** clarified that under paragraph 4, delivery might take place at the addressee’s last known place of business, habitual residence or mailing address, in which case the notice would have been delivered in accordance with paragraph 4, or delivery might not take place, in which case there would have been an attempt at delivery in accordance with the same paragraph. It was for that reason that paragraph 5 made two references to paragraph 4.

39. **Mr. Seweha** (Egypt) said that while paragraph 5 of the second revised text of draft article 2 referred to the day when a communication was deemed to have been received, paragraph 6 referred to the day when it was received. If the same expression was not used in both cases, it would be difficult to determine whether the time period should begin to run on the day the communication was received or on the day it was deemed to have been received. His delegation preferred to make a distinction, by saying “deemed to have been received” according to paragraphs 2 and 3 (b), or “received” according to paragraph 3 (a).

40. **Mr. Moollan** (Mauritius) said that one way of dealing with the issue was to change the introductory words to paragraph 5 to “the date on which a notice shall be treated as received”.

41. **The Chairperson** said that that would introduce a new word — “treated” — into the equation, whereas the decision to be made was between “deemed to have been received” and “received”.

42. **Mr. Moollan** (Mauritius) said that he was withdrawing his suggestion as it did not seem to find any support.

43. **The Chairperson** said that the whole issue should be clarified, because some delegates had explained that “deemed to have been received” included “received”, yet paragraph 6 used the word “received”, instead of keeping the expression “deemed to have been received”. He suggested that, for the sake of consistency, the expression “deemed to have been received” should be used at the end of paragraph 6 as well as in paragraph 5.

44. **Mr. Chung** Chang-ho (Republic of Korea) said that his delegation felt that “received” in paragraph 6 comprised both “physically received” and “deemed to have been received”, hence there was no need for the addition.

45. **The Chairperson** said that if there was no support for the addition, he took it that the report would show that the word “received” in paragraph 6 included “deemed to have been received”.

46. *It was so decided.*

47. **Ms. Smyth** (Australia), referring to paragraph 2, said that her delegation would like the report to show that the informal drafting group had come to the understanding that the reference to an address designated “specifically for this purpose” would include contracts whereby parties had given each other designated addresses for the purpose of receiving notices, including arbitration notices. The words “specifically for this purpose” were not meant to exclude general contractual designations, which would include other notices in addition to arbitration notices.

48. **The Chairperson** said that if he did not hear any objection he took it that that point would be included in the report as requested.

49. *It was so decided.*

Draft article 7. Number of arbitrators

50. **The Chairperson** said that draft article 7 had been discussed at length and that the Working Group had agreed to preserve the fall-back position of three arbitrators, subject to the slight addition in paragraph 2 for cases where the respondent could not be found. The Committee had to decide whether to preserve that option or to adopt the proposal from the Mexican delegation in document A/CN.9/704/Add.6. That proposal provided that only one arbitrator, rather than three, should be appointed if the parties had not agreed on the number of arbitrators, and that the sole arbitrator might, at the request of the parties, designate three arbitrators.

51. **Mr. Castello** (United States of America) said that introducing that proposal into the Rules would result in delays, because a party might decide at any point of the proceeding to request a three-person

panel. That would require the submission of new briefs and the holding of a new hearing on that point, thereby lengthening the proceedings. It was also unclear what would happen to decisions that had already been made in the course of the proceedings. Given the many possibilities of complication and delay, his delegation supported the default rule of three arbitrators.

52. **Mr. Jacquet** (France) said that the Mexican proposal would reverse the position which had been adopted by the Working Group after thorough reflection, and should therefore not be considered.

53. **Ms. Aguirre** (Argentina) said that her delegation agreed that the solution of three arbitrators should be kept.

54. **The Chairperson** said if he heard no support for the Mexican proposal, he took it that draft article 7 was adopted as drafted.

55. *Draft article 7 was adopted.*

Section III. Arbitral proceedings (continued)

Draft article 17. General provisions (continued)

Paragraph 4 (continued)

56. **The Chairperson** said that a number of delegations had requested that the discussion of draft article 17, paragraph 4, which had been adopted at the 907th meeting, should be reopened.

57. **Ms. Smyth** (Australia) said that, following consultations with other delegations, she wished to propose that the second sentence of paragraph 4, as adopted by the Committee of the Whole at the 907th meeting, should be replaced by the following wording: "Such communications shall be made at the same time, except as otherwise authorized by the arbitral tribunal, if it may do so under applicable law." Such a formulation would better reflect the conclusions reached by the Working Group.

58. **Mr. Castello** (United States of America) said that his delegation was prepared to accept that proposal, but with the proviso that the word "authorized" should be replaced by the word "permitted". The word "permitted" had been discussed at length and, as had been indicated by the representative of Mauritius, it was the appropriate word to use, because the aim of the draft article was

to capture both prospective and retrospective permission. Using the word "authorized" would mean that there had already been a formal authorization, whereas that was not necessarily the case.

59. **Mr. Moollan** (Mauritius), **Ms. Aguirre** (Argentina) and **Mr. Lebedev** (Russian Federation) endorsed the proposal.

60. **The Chairperson** said if he heard no objection, he took it that the word "authorized" would be replaced by the word "permitted".

61. *It was so decided.*

The meeting was suspended at 12.05 p.m. and resumed at 12.55 p.m.

Draft article 2 (continued)

62. **The Chairperson** drew attention to a third revised text of draft article 2 proposed by the United States of America, which had been distributed in the room.

63. **Mr. Castello** (United States of America) said that the tentative view of the consultation group had been to avoid requiring a complicated proof of electronic receipt for ordinary exchanges of pleadings during arbitration proceedings, but to require such proof of receipt for a notice of arbitration. On that basis, his delegation had revised its proposed text to read as follows: "A notice transmitted by electronic means is deemed received on the day it is sent, except that a notice of arbitration so transmitted will only be deemed received on the day when it reaches the addressee's electronic address". The phrase "reaches the addressee's electronic address" had been taken from article 10, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts.

64. **Mr. Chan** (Singapore) said that he had initially endorsed the language of the revised draft, but that having seen the whole proposal in writing, it seemed that the natural conclusion of any reader would be that a notice transmitted by electronic means other than a notice of arbitration would be deemed to have been received even if it did not reach the addressee's electronic address. He

requested that the proposal should be reformulated to avoid creating such an unfortunate impression.

65. **Mr. Moollan** (Mauritius) said that he was surprised at the reaction of the representative of Singapore, who had been a member of the drafting group that had reached a consensus on the proposal. It should be recalled that the decision of principle had been to severely limit the instances where notices by electronic means would be allowed under the Rules. It had been decided that a party must have designated an electronic address in order for that address to be used. The proposal merely added another layer of protection for notices of arbitration, which constituted the very foundation of the jurisdiction of the arbitral tribunal.

66. His delegation felt that the proposal struck the right balance in that it allowed the tribunal and a party facing a non-participating respondent to proceed normally with proceedings, but also made sure that the fundamental document — the notice of arbitration — reached the addressee.

67. **The Chairperson** said that he had thought that the observation concerned only situations where, in the normal course of arbitration, a notice was sent to the opposite party and it bounced back, but that for the purposes of ordinary communication, the notice would be considered received. He said if he heard no further objections he took it that the United States proposal was accepted.

68. *It was so decided.*

69. *Draft article 2, as orally amended, was adopted.*

70. **The Chairperson** said if he heard no objection he took it that the Committee wished to adopt the draft revised Rules as a whole.

71. *The draft revised UNCITRAL Arbitration Rules as a whole were adopted.*

The meeting rose at 1.10 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*
Monitoring implementation of the 1958 New York Convention

**Summary record of the 910th meeting, held at Headquarters,
 New York, on 25 June 2010, at 3 p.m.**

[A/CN.9/SR.910]

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

later: Mr. Moollan (Vice-Chairperson) Mauritius

The meeting was called to order at 3.15 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules *(continued)*
 (A/CN.9/703 and Add.1; A/CN.9/704 and Add.1-10; A/CN.9/705)

Report of the Committee of the Whole to the Commission on its consideration of a revised version of the UNCITRAL Arbitration Rules (A/CN.9/XLIII/CRP.1/Add.1-5; A/CN.9/XLIII/CRP.2 and Add.1-3 and A/CN.9/XLIII/CRP.4)

1. **The Chairperson** invited the Committee to consider its draft report to the Commission on its consideration of a revised version of the UNCITRAL Arbitration Rules, contained in documents A/CN.9/XLIII/CRP.1/Add.1-6; A/CN.9/XLIII/CRP.2 and Add.1-3 and A/CN.9/XLIII/CRP.4.

A/CN.9/XLIII/CRP.1/Add.1

2. *Paragraphs 1 to 6 were adopted.*

3. **Mr. Castello** (United States of America), referring to paragraph 7, said that, while States could be described as “sovereign”, intergovernmental organizations could not. He proposed that that word should simply be deleted.

4. **Ms. Montejo** (Office of Legal Affairs) said that she did not oppose the deletion of “sovereign”, but emphasized that such a step should not be construed as affecting the practices and procedures of the United Nations referred to in paragraph 8.

5. *Paragraph 7, as orally amended, and paragraph 8 were adopted.*

6. **Mr. Castello** (United States of America), referring to paragraph 9, said that, by analogy with

his proposal to amend paragraph 7, the phrase “sovereign entities” should be replaced with the phrase “States or intergovernmental organizations”.

7. *Paragraph 9, as orally amended, and paragraphs 10 to 18 were adopted.*

8. **Ms. Smyth** (Australia), supported by **Mr. Moollan** (Mauritius), said that the phrase “precluding such consultation, which was said to be usual practice” in paragraph 19 and the phrase “while such consultations were usual in practice” in paragraph 20 were unclear and perhaps did not reflect accurately the Committee’s discussion. She proposed instead using the phrase “precluding such consultation, which was said to occur in practice” in paragraph 19 and the phrase “while such consultations occurred in practice” in paragraph 20.

9. **Mr. Castello** (United States of America) said that paragraph 20, despite its length, seemed not to reflect completely the Committee’s discussions. He proposed the addition, following the second sentence, of a new sentence reading “It was also suggested that, before adding such language, more precision was required as to how the arbitrators would carry out such consultations.”

10. *Paragraphs 19 and 20, as orally amended, and paragraphs 21 to 24 were adopted.*

11. **Mr. Castello** (United States of America) said that the existing wording of paragraph 25 failed to portray completely the Committee’s discussion of party equality. He proposed that the first sentence should be shortened, ending after “appointing authority”. The following new sentence should be inserted at that point: “However, it was noted that the shifting of all appointing power to the appointing authority safeguarded the principle of equality of the parties”. The remainder of the

original first sentence should then be amended to read: “The Committee concluded that there was no need to add such language to the Rules”.

12. *Paragraph 25, as orally amended, was adopted.*

13. **Ms. Smyth** (Australia), referring to paragraph 26, said that, in the first sentence, the phrase “dispense an arbitrator of its obligation” should be replaced by “dispense an arbitrator of his or her obligation”.

14. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that, in the same sentence, the word “dispense” should be replaced by the word “relieve”, which was more appropriate in the context.

15. *Paragraph 26, as orally amended, and paragraphs 27 to 34 were adopted.*

A/CN.9/XLIII/CRP.1/Add.2

16. *Paragraphs 1 to 5 were adopted.*

17. **Mr. Castello** (United States of America), referring to paragraph 6, said that to avoid the risk of inferring that the Committee had independently reached a conclusion as to the immunity against legal process of the President of the Permanent Court of Arbitration (PCA), he suggested rewording the first two sentences along the following lines. The first sentence would be shortened to read: “The Committee noted that the Secretary-General of the PCA was mentioned as being among those against whom parties would waive liability under the revised Rules.” The following wording would then be added to the remainder of the original first sentence in order to clarify that the conclusion had come from the Permanent Court itself: “However, according to the comments of the PCA, it already enjoyed immunity ...”.

18. *Paragraph 6, as orally amended, and paragraph 7 were adopted.*

A/CN.9/XLIII/CRP.1/Add.3

19. **Mr. Castello** (United States of America), referring to paragraph 1, proposed that, in order to reflect more accurately the Committee’s discussion of the matter, the words “the phrase ‘a full opportunity’ could be contentious” should be

replaced by “the phrase ‘a full opportunity’ could be invoked to delay proceedings or otherwise misused”.

20. *Paragraph 1, as orally amended, and paragraphs 2 to 23 were adopted.*

21. **Ms. Smyth** (Australia), referring to paragraph 24, recalled that, during the Committee’s discussion of draft article 23, her delegation had asked whether the Arbitration Rules obliged a respondent to reply to a counterclaim, and that the representative of Greece had pointed out that draft article 24 contained a relevant general provision in that regard. As the Committee’s discussion of draft article 24 was covered in paragraph 26, perhaps the latter should be added to paragraph 24.

22. **Ms. Montineri** (International Trade Law Division) said that future readers of the report of the Commission’s session would be more likely to look for the background to the Committee’s decision in the comments relating to draft article 23 than in those relating to draft article 24.

23. *Paragraphs 24 to 39 were adopted.*

24. **Mr. Castello** (United States of America), referring to paragraph 40, proposed that, in order to reflect more accurately the Committee’s discussion of the matter, the final sentence, “That suggestion did not find support” should be replaced by “Since the proposed change continued to provoke a division of opinion, it was not agreed to”.

25. *Paragraph 40, as orally amended, and paragraph 41 were adopted.*

26. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York), referring to paragraph 42, said that he wondered why the section of the draft report under discussion omitted any reference to draft article 34 of the revised Rules.

27. **Ms. Montineri** (International Trade Law Division) said that draft article 34 was covered in document A/CN.9/XLIII/CRP.1/Add.4, along with a series of other draft articles which the Committee had originally deferred for finalization.

28. *Paragraphs 42 and 43 were adopted.*

29. **Mr. Castello** (United States of America) said that the references to “the court’s public policy” and

“the law of the court” in paragraph 44 should more accurately refer to the forum rather than the court.

30. **The Chairperson** said that the word “court” in fact appeared three times in the paragraph, but not with identical meaning. In the first and third instances, “court” meant the court in which enforcement was sought. In the remaining instance, “forum” could be substituted.

31. **Ms. Smyth** (Australia) said that it might be better to refer to the law of the forum of enforcement.

32. **Mr. Loken** (United States of America) said that he wondered if it might be sufficient to refer in each case to the “applicable law”.

33. **The Chairperson** said that he was concerned that simply referring to the “applicable law” would not make clear the fact that the applicable law in each situation varied. The current context was not that of the applicable law for the arbitration, but the applicable law regarding legal capacity, arbitrability and public policy.

34. **Mr. Jacquet** (France) said it was important to remember that, as its first sentence indicated, the paragraph in question was attempting to reflect the point raised by the delegation of Norway that the choice of a law to govern an arbitration proceeding was not entirely free. For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) at times itself indicated which law should be applied. The central issue was therefore one of establishing the applicable law rather than the court or forum.

35. **The Chairperson** said that, in the light of the views expressed, he wished to suggest that the last sentence of the paragraph should be amended to read: “It was highlighted that the law applicable to each of the parties and the law applied by the forum should be taken into consideration regarding legal capacity, arbitrability and public policy”. That sentence should be taken in conjunction with the directly previous sentence, on which it expanded.

36. **Mr. Loken** (United States of America) said that the reference in the last sentence of the paragraph to “the law applicable to each of the parties” might also cause confusion. He therefore proposed that the last sentence of the paragraph

should read: “It was highlighted that relevant laws regarding legal capacity, arbitrability and public policy should be taken into consideration”.

37. **The Chairperson** said that he took it that the Committee wished to amend the last sentence of paragraph 44 in line with the proposal of the United States representative.

38. *It was so decided.*

39. *Paragraph 44, as orally amended, and paragraphs 45 to 52 were adopted.*

The meeting was suspended at 4.05 p.m. and resumed at 4.30 p.m.

A/CN.9/XLIII/CRP.1/Add.4

40. *Paragraphs 1 to 4 were adopted.*

41. **Ms. Thomas** (Observer for the Association of the Bar of the City of New York) suggested that the word “complemented” in paragraph 5 should be replaced by the word “augmented”.

42. *Paragraph 5, as orally amended, was adopted.*

43. *Paragraph 6 was adopted.*

44. **Ms. Montineri** (International Trade Law Division) said that the first part of the first sentence of paragraph 7, before the colon, should be replaced by the following: “The Committee considered the following proposal for draft article 2”. In paragraph 3 of the proposed text, the word “or” should be inserted before subparagraph “(b)”. In paragraph 4, the word “made” should be replaced by the word “effected”.

45. *Paragraph 7, as orally amended, was adopted.*

46. **Ms. Montineri** (International Trade Law Division) read out four new paragraphs, to be inserted after paragraph 7, relating in particular to draft article 2, paragraph 5. The new paragraphs reflected the discussion regarding, inter alia, the need for consistency between the revised Rules and other UNCITRAL standards on electronic communication; the drafting of a specific Rule on notice of arbitration; the need to reflect a practice where reliance on electronic communication was still limited; and more generally the pros and cons, in daily arbitration practice, of a Rule relying on

deemed receipt of a notification based on dispatch rather than on electronic receipt.

47. The new wording adopted by the Committee, to be inserted at the end of paragraph 5 of draft article 2, would read: "A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address."

48. **Mr. Castello** (United States of America) observed that the deeming rule for time of receipt of electronic transmissions was keyed to sending rather than receipt in order to permit the sender to know with certainty how the time period was calculated, but it was not intended to displace receipt. That should be made clear in the additional text just read out by the secretariat. Also, the reference to general contract terms should indicate that the contract at issue was the one out of which the arbitration had arisen.

49. **Mr. Seweha** (Egypt) said that the report should also reflect the concern expressed at the previous meeting that the term "deemed receipt" included the actual receipt.

50. **The Chairperson** said that the secretariat would draft appropriate wording to cover both those three points.

51. *The new paragraphs relating to draft article 2, as orally proposed by the UNCITRAL secretariat, were adopted pending agreed redrafting.*

52. *Paragraphs 8 and 9 were adopted.*

53. *Paragraph 10 was adopted with a minor drafting change.*

54. *Paragraphs 11 to 14 were adopted.*

55. **Mr. Castello** (United States of America) proposed deleting the words "refusal or" before the words "failure to act" in the first sentence of paragraph 15.

56. *Paragraph 15, as orally amended, was adopted.*

57. *Paragraphs 16 to 22 were adopted.*

58. **Ms. Smyth** (Australia) proposed that the phrase "at the same time" before the words "be communicated" in paragraph 23 should be deleted.

59. *Paragraph 23, as orally amended, was adopted.*

60. **Ms. Smyth** (Australia) proposed deleting the text starting with the words "to empower" to the end of paragraph 24, and replacing it with the following words: "to affect the question of whether an arbitral tribunal may issue orders without hearing the parties. In this respect, one delegation recalled that draft article 17, paragraph 1, requires the arbitral tribunal to treat the parties with equality and provide a fair and efficient process for resolving their dispute."

61. **Ms. Montineri** (International Trade Law Division) read out an addition to the end of paragraph 24 indicating that the Committee had adopted a proposal clarifying that the Rules remained neutral by reference to applicable law as to whether the arbitral tribunal had the power to permit delayed communications.

62. She also proposed that paragraph 25 should be amended to read: "The Committee adopted the substance of draft article 17, paragraph 4, as it appeared under paragraphs 23 and 24."

63. *Paragraphs 24 and 25, as orally amended, were adopted.*

64. *Paragraphs 26 and 27 were adopted.*

65. *Paragraph 28 was adopted with a minor drafting change.*

66. *Paragraph 29 was adopted with a minor drafting change.*

67. **Ms. Aguirre** (Argentina) proposed that the word "State" should be inserted before the word "immunity" in the first sentence of paragraph 30.

68. **Ms. Smyth** (Australia) proposed the insertion of a new second sentence reading: "A proposal was also made to include a general provision to the effect that nothing in the Rules should be implied as a waiver of any State immunities." In the original second sentence, she proposed replacing the word "needed" by the word "appropriate" and in the last sentence she proposed replacing the word "that",

before the word “nothing”, by the words “to be unnecessary as”.

69. *Paragraph 30, as orally amended, was adopted.*

70. *Paragraph 31 was adopted.*

71. **The Chairperson** suggested inserting the word “prior” before the word “notice” in the first sentence of paragraph 32.

72. **Mr. Castello** (United States of America) said that the diverging views in the Working Group had not focused on the 1976 version of the Rules as the central issue. He therefore proposed deleting the text of the last sentence beginning with the words “on whether” and replacing it with the words “with regard to the question of preliminary orders”.

73. *Paragraph 32, as orally amended, was adopted.*

74. **Mr. Castello** (United States of America) proposed replacing the words “derived from legislation” at the end of the first sentence of paragraph 33 with the words “found outside these Rules”.

75. In paragraph 34, he proposed replacing the words “only referred to applicable law” with the words “did not provide a Rule”.

76. *Paragraphs 33 and 34, as orally amended, were adopted.*

77. *Paragraphs 35 to 42 were adopted.*

78. **Mr. Castello** (United States of America) proposed inserting the words “certain types of” before the word “recourse” in the second sentence of paragraph 43.

79. *Paragraph 43, as orally amended, was adopted.*

80. *Paragraph 44 was adopted with a minor drafting change.*

81. *Paragraphs 45 to 55 were adopted.*

82. **Mr. Castello** (United States of America) proposed replacing the word “parties” at the end of the first sentence of paragraph 56 by the phrase “losing parties who might seek review of fees to delay enforcement of an award”. The word “restore”

before the word “confidence” in the third sentence should be replaced by the word “promote”.

83. *Paragraph 56, as orally amended, was adopted.*

84. *Paragraphs 57 to 59 were adopted.*

85. **Mr. Castello** (United States of America) proposed deleting, in paragraph 60, the redundant clause after the first colon in the first sentence, reading “With respect to the drafting of draft article 41, paragraph (4), the following proposal was made:”.

86. *Paragraph 60, as orally amended, was adopted.*

87. *Paragraph 61 was adopted.*

88. **Mr. Castello** (United States of America) proposed inserting in paragraph 62, following the words “After discussion,” the phrase “and particularly in view of the agreed addition to paragraph 6,”.

89. *Paragraph 62, as orally amended, was adopted.*

90. *Paragraphs 63 and 64 were adopted.*

91. **Mr. Mekjian** (Armenia), noting an omission in paragraph 65, said that the words “those relating to” should be reinserted after the words “all parts of the award other than” in the first sentence.

92. *Paragraph 65, as orally amended, was adopted.*

93. *Paragraphs 66 to 72 were adopted.*

A/CN.9/XLIII/CRP.2 and Add.1-3

94. **Mr. Sorieul** (Secretary of the Commission), drawing attention to the annex to the draft report, containing the text of the draft revised UNCITRAL Arbitration Rules (A/CN.9/XLIII/CRP.2 and Add.1-3), said that, in paragraph 2 of article 1, the date of adoption of the revised Rules remained to be indicated. As the texts of the Arabic and Spanish versions still required some editorial changes in order to be brought fully into line with the other language versions, he proposed the insertion of the date of 15 August 2010, by which time all the versions would be posted on the UNICTRAL

website; that date would accordingly be the effective date of adoption.

95. **The Chairperson** took it that the Committee wished to adopt the annex as amended.

96. *The annex to the draft report, containing the text of the draft revised UNCITRAL Arbitration Rules, as orally amended, was adopted.*

97. *The Committee of the Whole adopted its report.*

98. **The Chairperson** said that the Committee of the Whole had concluded its work.

99. *Mr. Moollan (Mauritius), Vice-Chairperson of the Commission, took the Chair.*

100. *The Commission adopted the report of the Committee of the Whole.*

A/CN.9/XLIII/CRP.4

101. **The Chairperson** said he took it that the Commission wished to adopt the draft decision adopting the revised UNCITRAL Arbitration Rules (A/CN.9/XLIII/CRP.4).

102. *The draft decision was adopted, subject to editorial changes.*

Settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules (A/CN.9/705)

103. **Ms. Montineri** (International Trade Law Division) said that the secretariat needed to know whether the recommendation to be prepared on the revised Rules should follow the model of the 1982 recommendation. The 1982 model was quite useable, including for the purposes of arbitral bodies; however, some of those bodies might wish to have guidance on the use of the new Rules. She suggested that the secretariat prepare a draft recommendation that would include such guidance.

104. **Mr. Lebedev** (Russian Federation), supported by **Mr. Möller** (Observer for Finland) said that the new Rules should be made better known and that a recommendation to that effect would be useful. The question remained whether the new Rules should be referred to as an update of the 1976 Rules or as the new 2010 Rules.

Future work of the Commission in the field of settlement of commercial disputes

105. **The Chairperson** drew the Commission's attention to paragraph 299 of the UNCITRAL 2009 report (A/64/17), which referred to its earlier decision that the question of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority upon completion of the revision of the Arbitration Rules. He took it that there was no need to reaffirm that decision.

106. **Mr. Schneider** (Observer for Switzerland) suggested that the mandate of Working Group II should not be limited to that question but should include other issues arising specifically in investor-State arbitration.

107. **The Chairperson** said that it had been decided to give priority to that question following representations by States and non-governmental organizations. He proposed that the mandate might remain as a starting point for the work of the Working Group and be reviewed as the work proceeded.

108. **Mr. Schneider** (Observer for Switzerland) agreed, on the understanding that the Working Group would indeed be free to consider certain other issues, such as rules governing investor-State arbitration in general.

109. **Mr. Castello** (United States of America) said that there should continue to be a specific focus on transparency, which would not preclude consideration of other issues. The Working Group's mandate should remain unchanged, subject to review by the Commission in 2011 on the basis of the Group's work in 2010.

110. **Mr. Monardes** (Chile) said that the Commission might usefully spell out that the question of priority was just a starting point and that other issues could be addressed.

111. **Ms. Dostie** (Canada) said that there was no need to change the formulation adopted in 2009.

112. **Mr. Jacquet** (France) said that the transparency was indeed a priority concern and might well take up more than two sessions of the Working Group; the question of a possible redefinition of its mandate should remain open for the time being. More pressing questions concerned

the approach to be adopted, the scope of the work and the basis on which it would proceed. He asked whether a questionnaire would be used.

113. **Ms. Montineri** (International Trade Law Division) said that a questionnaire had been circulated and that the 40 replies already received would be published in August 2010. It would be for the Working Group to define transparency and then to take stock of the question as reflected in international texts.

114. **The Chairperson** said he took it that the Commission wished the Working Group to maintain the priority focus on transparency and to go on to consider other issues relating to investor-State security as they arose.

115. *It was so decided.*

Monitoring implementation of the 1958 New York Convention

116. **Ms. Montineri** (International Trade Law Division) recalled that, in 2008, the secretariat had published a report on the implementation of the New York Convention by States (A/CN.9/656 and Add.1) based on replies to a questionnaire addressed to States parties, subsequently transformed into a dedicated database. The secretariat was currently preparing a further report on the subject, which was expected to be completed in 2012.

117. **Mr. Sorieul** (Secretary of the Commission) said that the outcome of that work would be the preparation by the UNCTAD secretariat of a guide to the Convention which would go beyond the compilation of data and require a number of expert meetings. It was likewise expected to be submitted for the consideration of the Commission in 2010 or 2011.

The meeting rose at 6 p.m.

Finalization and adoption of a draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property

**Summary record of the 911th meeting, held at Headquarters,
New York, on Monday, 28 June 2010, at 10 a.m.**

[A/CN.9/SR.911]

Chairperson: Mr. Sorieul (Secretary of the Commission)

later: Ms. Sabo (Vice-Chairperson) (Canada)

The meeting was called to order at 10.10 a.m.

Election of officers (*continued*)

1. **The Temporary Chairperson** recalled that Mr. Ricardo Sandoval (Chile), representing the Group of Latin American States, had been elected Chairperson of the Commission, but that he would not be present until the following week. The Commission had adopted the revised UNCITRAL Arbitration Rules under the chairmanship of the Vice-Chairperson of the Commission representing the Group of African States. As there were still openings on the Bureau and as the Vice-Chairperson representing the Group of African States was absent, he invited other regional groups to submit nominations for the office of Vice-Chairperson of the Commission.

2. **Ms. Smyth** (Australia), on behalf of the Group of Western European and Other States, nominated Ms. Kathryn Sabo (Canada) for the office of Vice-Chairperson of the Commission.

3. **The Temporary Chairperson** said that, upon her election, the Vice-Chairperson would not only chair the proceedings for the next three days, but would remain a member of the Bureau for a full year until the opening of the next session of the Commission.

4. **Mr. Nigam** (India), **Mr. Morán Bovio** (Spain), **Mr. Dennis** (United States of America) and **Mr. Riffard** (France) supported the nomination.

5. *Ms. Sabo (Canada) was elected Vice-Chairperson of the Commission by acclamation.*

6. *Ms. Sabo (Canada) took the Chair.*

Finalization and adoption of a draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (A/CN.9/689; A/CN.9/700 and Add.1-7; A/CN.9/701 and A/CN.9/702)

7. **The Chairperson**, reporting to the Commission on the work of Working Group VI (Security Interests), said that the text submitted to the Commission was generally based on the structure and recommendations of the Legislative Guide on Secured Transactions. The task for the next three days was to review the Working Group's draft and to resolve all outstanding issues, notably the conflict rule, the issue of the applicable law and future work in the area of security interests. There were some other minor drafting issues as well as the title of the document which were still to be finalized.

8. The relevant documents for the purposes of the discussion were A/CN.9/700 and Add.1-7, which contained notes from the secretariat about the draft Supplement; document A/CN.9/701, which contained comments from States and organizations on the draft; document A/CN.9/702 and Add.1, which contained the ideas for future work; document A/CN.9/689, which was a report from the last session of the Working Group; and two conference room papers (A/CN.9/XLIII/CRP.7 and A/CN.9/XLIII/CRP.8).

A/CN.9/700

9. **Mr. Bazinas** (International Trade Law Division) said that, before the final adoption of the draft Supplement, the Commission might wish to consider its title, which was rather long. The Commission might also wish to consider those documents in the light of the comments made by the

World Bank, the World Intellectual Property Organization (WIPO) and the European Community Trade Mark Association, as set out in document A/CN.9/701.

10. With regard to the preface of the draft Supplement, WIPO had made a suggestion to have the role it played in organizing the 2007 colloquium highlighted in the third paragraph to read: "... the secretariat organized, with the cooperation of WIPO, a colloquium ...". It had also requested that reference should be made, in the last paragraph of the preface, to the fact that it had attended the meeting as an observer. The suggestion was therefore to insert, after the words "organizations from the public and the private sector", the phrase "which attended its meetings as observers".

11. In discussing document A/CN.9/700, the Commission might wish to consider whether the notes to the Commission, which had been included to assist the Working Group in identifying the relevant references in the preparatory work for its section of the draft Supplement, should be retained or deleted. If retained, they would be completed with references to documents A/CN.9/700 and Add.1-7 and the relevant paragraphs of the Commission's report.

12. With respect to paragraph 13, reference was made to the fact that an encumbered asset was whatever right the grantor had in an asset and intended to encumber. The Commission might wish to confirm whether that was an accurate statement, or whether there should be a differentiation between tangible and intangible assets.

13. **The Chairperson** said with regard to the title of the document, that the secretariat had suggested that the two segments of the title could be separated by a colon, or that a second line could be created for the second segment of the title. As there were no general statements regarding the Guide, she invited comments on the suggested title.

14. **Ms. Hu Shengtao** (China) said that she agreed with the secretariat's suggestion.

15. **The Chairperson** said she took it that the secretariat's suggestion was accepted.

16. *It was so decided.*

17. **The Chairperson** asked whether the notes to the Commission should be retained in the final version of the text or not.

18. **Mr. Nigam** (India) said that if the notes made cross-references to paragraphs in the main Legislative Guide or in the draft Supplement, then they should be retained in the draft Supplement too.

19. **The Chairperson** said that those notes were not cross-references to the Guide, but to previous versions of the draft Supplement and to reports of different sessions of the Working Group.

20. **Mr. Bazinas** (International Trade Law Division) said that, with regard to cross-references to other parts of the draft Supplement and the Guide, the Commission had to decide whether they should be included or even complemented. For example, in paragraph 4 of document A/CN.9/700, the second sentence referred to document A/CN.9/700/Add.1, paragraphs 8 to 21, which noted that issues relating to the existence, validity and content of a grantor's intellectual property rights were not addressed in the Guide. There might be a need to add another reference to document A/CN.9/700/Add.5, paragraphs 8 to 11, where the same point was raised.

21. At the end of the second line of paragraph 1 (A/CN.9/700), there might also be a need to add the words "as security for credit", because the enhancement of the value of intellectual property was in the context of secured transactions relating to intellectual property. While the next sentence clarified that point, it might well be that the text as currently drafted was too broad and therefore required that specification.

22. He noted that WIPO had suggested that, at the end of paragraph 32, reference should not be made to the exclusive rights of licensors or licensees, because only owners had exclusive rights. Consequently, it had proposed to either delete the word "exclusive" before the word "rights" in the last sentence, or to retain the word "exclusive" and change the word "licensor" to "owner", with "licensor" in parentheses, and then to refer to "an exclusive licensee", who would have exclusive rights.

23. WIPO had also suggested that the words "with the consent of the licensor" should be added at the end of the penultimate sentence of paragraph 41,

because a licensee could only create security rights with the consent of the licensor.

24. With regard to secured transactions relating to intellectual property covered in paragraphs 35 to 45, those transactions could be divided into two broad categories. The first category consisted of transaction in which the intellectual property rights themselves served as security for the credit. The second category consisted of financing transactions that involved intellectual property in combination with other moveable assets, such as equipment, inventory or receivables. The World Bank had said that examples 1 through 5 given in paragraphs 37 to 43 illustrated those two broad categories. Examples 6 and 7, on the other hand, referred to transactions where the incumbent's assets were not intellectual property, but tangible assets that were subject to a security right.

25. To address that point, a heading could be inserted before paragraph 43, to separate that paragraph from the first five examples. The second sentence of paragraph 43, which read "This category of transactions is illustrated by examples 6 and 7 below", could also be modified as follows: "This category of transactions, illustrated by examples 6 and 7 below, involve security rights in tangible assets". The next sentence would clarify the point made in A/CN.9/700/Add.2, paragraphs 32 to 36, that a security right in a tangible asset did not automatically extend to the intellectual property used with respect to that asset, except if otherwise agreed by the parties.

26. At the end of paragraph 44 a sentence could be added as follows: "Bank F does not have a security right in the trademarks, unless the trademarks are described specifically in the security agreement as encumbered assets". A similar sentence could also be added at end of paragraph 45.

27. **The Chairperson** said she took it that the notes to the Commission would be deleted in the final version of the draft Supplement but that cross-references to other parts of the Supplement would be retained with the appropriate editorial adjustments. She also took it that the Commission wished to amend the preface in line with the comments made by WIPO in document A/CN.9/701.

28. *It was so decided.*

29. **Mr. Agthe** (Observer for the International Trademark Association) said that his delegation agreed with the point raised by WIPO with regard to the last sentence of paragraph 32 of document A/CN.9/700 and proposed the following wording: "the expression 'transfer other than an outright transfer' may denote the granting of rights from a licensor to a licensee where the licensor retains some control over the use of the trademark".

30. **The Chairperson** suggested that, since the paragraph referred not only to trademarks but to intellectual property in general, the last part of the sentence should read "retains some control over the use of the intellectual property".

31. *It was so decided.*

32. **The Chairperson** invited comments on the secretariat's suggestion to add the phrase "with the consent of the licensor" to the end of the penultimate sentence of paragraph 41, in response to the comment made by WIPO in document A/CN.9/701.

33. **Mr. Nigam** (India) said that, in the example given in paragraph 41, it was necessary to specify what happened in the event of enforcement of the security interest: would the secured creditor be entitled to sell the entire software as it was? If not, that security interest would not be effective as far as the secured creditor was concerned. When a security interest was created over a licence obtained from a third party, it must be created along with the security interest over the other software developed by the developer, and the whole software must be given as a security. The third-party licence on its own could not be taken as a security because, once incorporated into the main software, it could not be sold without the approval of the licensor of the third-party software.

34. The same point applied to the example in paragraph 44: would the secured creditor be entitled to sell the designer jeans with the labels of the party which had given the licence to use the trademark? The question needed to be clarified because the use of the trademark might be subject to certain conditions, such as that sales should take place at a particular type of outlet for high-fashion goods; any such condition would also apply to the secured

creditor when it wished to sell the jeans as an enforcement of security.

35. **The Chairperson** said that the section of the draft Supplement currently under discussion was intended only to give examples of financing practices; the clarifications suggested by the representative of India were covered in the commentary in the chapter relating to enforcement.

36. **Mr. Nigam** (India) said that, if the product was not sellable and did not give rise to a valid security interest for the secured creditor, it could not be given as a security. If a company had a piece of software that contained a software component licensed from a third party, but that third party had not given the secured creditor permission to sell that component in the event of the company's default, then the software was no longer a valid security for the lender. Similarly, it made no sense for a lender to accept designer jeans as a security if it could not sell them in the event of default because of conditions attached to the use of the trademark.

37. **Mr. Weise** (Observer for the American Bar Association) noted that there was a typing error in the suggestion made by WIPO regarding paragraph 41: "paragraph 57" should read "paragraph 52". He said that his delegation did not object to the substance of the suggestion; however, any additional language in paragraph 41 should correspond to paragraph 52, in that the latter paragraph stated that the licensor's consent was necessary only if the licence agreement provided that the rights of a licensee were non-transferable without the consent of the licensor. Paragraph 41 should not therefore suggest that the consent of the licensor was always required.

38. **Mr. Tosato** (Italy) said he agreed with the previous speaker that the wording of paragraph 41 should be consistent with that of paragraph 52 and that it should make clear that the licensor's consent for the licensee to use the licence as collateral was necessary only if the licence so stated in accordance with the general principle that something was allowed unless it was expressly forbidden.

39. With regard to the remarks of the representative of India, his delegation had always considered it to be implied, in the example set out in paragraph 41, that the company using the software

as collateral actually had the right to retransfer the licence and thus could use it as collateral; the secured creditor could therefore sell the licence in the event of default. However, if others felt that it would be clearer to restate that principle in the example, his delegation would not object.

40. **Mr. Bazinas** (International Trade Law Division) said that the examples of financing practices set out in the draft Supplement were not intended as complete examples of how a security interest was created and made effective against third parties, gained priority and was enforced. Rather, they were descriptions of practices that already existed and that were to be kept in mind when the issues of creation, third-party effectiveness, priority and enforcement were discussed in the draft Supplement. If a reference to enforcement were added, it might be argued that a reference to priority should also be added.

41. **Mr. Tosato** (Italy) said that the concerns expressed by the representative of India with regard to paragraph 41 might be addressed by adding wording to the second sentence indicating that company D had the right not only to sub-license software components to its customers but also to resell the licence. If that point was not expressly reflected in the text, it might be assumed that company D did not have the right to resell and therefore could not encumber that right because no one would want to take the licence as collateral without the right to resell that collateral in the event of default.

42. **Mr. Nigam** (India) said that he supported the Italian proposal.

43. **Mr. Brennan** (Observer for the Independent Film and Television Alliance), expressing support for the comments made by the representative of India, said that the statutes of several countries provided that non-exclusive licences were not transferable without consent. Therefore not only the licence itself but also the applicable law must be consulted in order to determine whether such consent existed. While he supported the proposal made by the representative of Italy, he said that an alternative solution might be to add a phrase to the last sentence of the paragraph in order to explain the purpose of presenting evidence to bank D, along the

following lines: “to determine whether the licensee may grant a security interest”.

44. **The Chairperson** said she took it that the Commission wished to amend paragraph 41 in order to make it consistent with paragraph 52, along the lines initially proposed by WIPO and with the modifications proposed by ABA. She also took it that the Commission wished to amend the last sentence of paragraph 41 along the lines proposed by the observer for the International Film and Television Alliance (IFTA). The secretariat would be asked to draft appropriate language.

45. *It was so decided.*

46. **The Chairperson**, drawing attention to the comment from the World Bank in document A/CN.9/701 that examples 6 and 7, in paragraphs 44 and 45 respectively, did not fall into the two broad categories mentioned in paragraphs 35 and 36, said that, in order to accommodate that comment, the secretariat had proposed that the following heading should be inserted before paragraph 43: “Security rights in intangible assets with respect to which intellectual property is used.” In addition, the secretariat had proposed that the second sentence of paragraph 43 should be modified to read “this category of transactions, illustrated by examples 6 and 7 below, involves security rights in tangible assets”, and that the words “except if otherwise agreed by the parties” should be added at the end of the third sentence. She took it that the Commission wished to adopt those proposals.

47. *It was so decided.*

48. **Mr. Bazinas** (International Trade Law Division) recalled his earlier proposal that a sentence should be added at the end of paragraphs 44 and 45 along the following lines: “Bank F does not have a security right in the trademarks unless the trademarks are described specifically in the security agreement as encumbered assets.”

49. **Mr. Alcantara** (Observer for the Commercial Finance Association) said that he was confused by the proposed amendment to paragraph 44 because, as he understood it, the trademarks referred to in that paragraph were not owned by the grantor of the security interest but by third parties. Therefore, if the secretariat’s proposal was adopted, it would be necessary to state that the document granting the

security interest had to refer specifically to the trademarks and that the third parties which owned the trademarks were the ones granting the security interest.

50. **Mr. Brennan** (Observer for the Independent Film and Television Alliance), expressing agreement with the comments made by the previous speaker, said that paragraph 44 did not specify that company F, the licensee of the trademarks, had the right to grant a security interest in the trademarks; that right would normally be reserved for the owner of the trademarks, in other words the licensor. He therefore did not understand the reason behind the proposed amendment. The important concept — namely that a licensee could not give more to a bank as security than it had actually received from a licensor — was already adequately expressed in the draft Supplement.

51. **Mr. Michael** (Observer for the Association of the Bar of the City of New York) said that, instead of adding the proposed sentence at the end of paragraph 44, the penultimate sentence of the paragraph could be amended along the following lines: “Company F provides bank F with its trademark licence agreements evidencing its right to use the trademarks and to grant a security right in goods bearing the trademarks and its obligations to the trademark owner.” The purpose for the secured lender of looking at the licence agreement was to verify that the borrower not only had a valid right to use the trademark but, more importantly, had the right to pledge the trademark to the bank as part of the collateral, which could then be used by the bank if the licensee foreclosed on the collateral.

52. **Mr. Weise** (Observer for the American Bar Association) said that the proposed language referring to the right to grant a security right in goods bearing the trademark raised the question of whether the security right in the goods was still effective if the trademark was somehow destroyed. The more important point for the secured creditor was whether it had the right to dispose of the goods including the trademark on them. Perhaps the language could be adjusted to reflect that point.

53. **Mr. Umarji** (India) said that similar language about the grant of a security right in goods bearing a trademark would have to be added to paragraph 41,

which dealt with software licensed from a third party.

54. **Mr. Bazinas** (International Trade Law Division) said that no matter what language was used, the creditor would have no security rights in the trademark unless the trademark itself was explicitly described as an encumbered asset by the trademark owner in an agreement.

55. **Mr. Umarji** (India) said that the owner of the trademark, by virtue of the licensing agreement with the manufacturer, authorizes the manufacturer to encumber the trademark as used in the goods bearing it.

56. **Mr. Cotten** (United States of America) said that it was not necessary to squeeze every caveat in the Guide into every example. Both the Association of the Bar of the City of New York and the American Bar Association had offered language intended to clarify that it was not the trademark, but the goods bearing it, that served as collateral for the financing. He suggested the following formulation: “Company F provides bank F with its trademark licensing agreements evidencing company F’s rights to manufacture and dispose of goods bearing the trademarks and its obligations to the trademark owner.” That would allow the lender in the example to satisfy himself that the borrower had the right to affix the trademark to the goods being offered as collateral without being misleading about the precise nature of the encumbered assets.

57. **Mr. Mittsdoerfer** (Germany) said that the language was still misleading because it gave the impression that the security right was in the goods, but what was important was that the security right was in the trademark.

58. **Mr. Tosato** (Italy) said as he understood it, examples 6 and 7 were supposed to involve tangible goods. If goods bore a trademark, then the creditor might encounter limitations in reselling them, but the security interest was still in the tangible goods, not the trademark.

59. **The Chairperson** said that it had been agreed to insert a heading before paragraph 43 indicating that the ensuing examples dealt with security rights in tangible assets with respect to which intellectual property was used.

60. **Mr. Alcantara** (Observer for the Commercial Finance Association) said that, as had been pointed out, there was no need to include all the technicalities in every example.

61. **Mr. Agthe** (Observer for the International Trademark Association) said that, while he agreed that not every example had to cover every detail, in the example under discussion it needed to be clarified that the security interest was in the tangible goods. The licensee could under no circumstances grant a security interest to a third party in the trademark, which remained the property of the licensor.

62. **Mr. Mittsdoerfer** (Germany) said that he had merely intended to point out that the example highlighted the problems that could be involved in the disposal of goods bearing a trademark belonging to a third party. He had not meant to suggest changing the example.

63. **The Chairperson** said that if there was no objection she would ask the secretariat to revise the third sentence of paragraph 44 to read along the following lines: “Company F provides bank F with its trademark licensing agreements evidencing its right to use the trademark and to grant a security right in the trademarked inventory, and its obligations to the trademark owner”. That would satisfy the need for an example that illustrated a security interest in tangible goods where an intellectual property right was involved. A similar change would be made in paragraph 45.

64. Turning to paragraph 48, she said that if there were no objections, in accordance with the suggestion of WIPO, the reference to “licensors or licensees” having exclusive rights would be deleted, because laws relating to intellectual property only accorded rights to the owner of intellectual property, not to licensors and licensees.

65. *Document A/CN.9/700, as orally amended, was adopted.*

A/CN.9/700/Add.1

66. **The Chairperson** said that a number of changes to document A/CN.9/700/Add.1 had been suggested by the World Bank and WIPO.

67. **Mr. Bazinas** (International Trade Law Division) said that WIPO had suggested that in paragraph 11 (g) the word “patent” in the clause “a person who first invented the patent” should be replaced with the word “invention”. A new subparagraph (h) should be added, reading: “The transferability of patents and the right to grant a license”. The World Bank had suggested that the following sentence should be added at the end of paragraph 17: “A State implementing the recommendations of the Guide may wish to address this question.” There had also been an editorial suggestion for re-drafting the penultimate sentence of paragraph 20, which would be implemented by the secretariat.

68. *Document A/CN.9/700/Add.1, as orally amended, was adopted.*

69. **The Chairperson** said that the secretariat should be given a mandate to make non-substantive editorial changes. If there was any question about whether a particular change was substantive or not, it would be put before the Committee.

A/CN.9/700/Add.2

70. **The Chairperson** said that a number of minor modifications had been proposed to document A/CN.9/700/Add.2.

71. **Mr. Bazinas** (International Trade Law Division) said that there had been an editorial change to paragraph 32 that would be implemented by the secretariat. There was also a more substantive point with regard to that same paragraph, which was the question of whether it was appropriate to include the example of a car that might contain a chip that included a copy of copyrighted software.

72. **Mr. Morán Bovio** (Spain) said that the text could be retained, but stressed that what was important in the example was the chip, which was unique, rather than the car, which was the sum of various intellectual and industrial property inputs.

73. **Mr. Tosato** (Italy) agreed that the example of the car might be misleading, and might better be replaced by “design rights in the shape of the car”. He also suggested that at the end of the paragraph, the word “product” should be changed to “component”.

74. **Ms. Hu Shengtao** (China) said that the car should be retained because it was the only example involving manufacturing.

75. **Mr. Hallock** (United States of America) suggested that the emphasis on the chip could be highlighted while still retaining the example of the car by replacing the word “car” with the words “car or some other device”.

76. *A/CN.9/700/Add.2, as orally amended, was adopted.*

A/CN.9/700/Add.3

77. **Mr. Bazinas** (International Trade Law Division) drew the Commission’s attention to the comments by the World Bank and WIPO (A/CN.9/701).

78. The World Bank proposed a change to the fourth sentence of paragraph 9, to refer to a security right in intellectual property. In paragraph 29 the statement that the provision of less information in a general security rights registry than in an intellectual property registry was both an advantage and disadvantage was a duplication, and should be avoided.

79. WIPO considered that the reference to the Madrid Agreement concerning the International Registration of Marks (1891) and the Madrid Protocol (1989) should be moved from paragraph 13 to paragraph 14, which referred to relatively modern treaties or other international legislative texts that simplified the registration process.

80. **The Chairperson** said that she would take it that the Commission wished to adopt the amendments proposed by the World Bank and the World Intellectual Property Organization.

81. *It was so decided.*

82. *A/CN.9/700/Add.3, as orally amended, was adopted.*

A/CN.9/700/Add.4

83. **Mr. Bazinas** (International Trade Law Division) said that paragraphs 5 and 6 referred to two potentially inconsistent ways of dealing with the issue of the relevance of knowledge of prior transfers in terms of priority. In the compilation of

comments (A/CN.9/701), the World Bank had proposed that wording should be added to paragraph 6 suggesting that States might consider harmonizing their secured transactions law and law relating to intellectual property with regard to that matter.

84. Regarding end-user licence agreements, referred to in paragraph 23, the World Bank suggested that they should be viewed as functional equivalents of sales of merchandise, while acknowledging that that might be controversial.

85. In paragraph 35, WIPO suggested that the question of whether or not a sub-licensee was duly authorized and the lack of protection under recommendation 245 of use of intellectual property by a sub-licensee were matters of contract law.

86. Lastly, regarding recommendation 245, the secretariat wondered whether explicit reference should be made to security rights in intellectual property.

87. **The Chairperson** invited comments on the suggestion by the World Bank, with regard to paragraph 6, that States might consider amending their intellectual property laws so as to make them consistent with the law recommended in the Guide.

88. **Mr. Agthe** (Observer for the International Trademark Association) said that while the International Trademark Association supported the harmonization of intellectual property law throughout the world, inclusion of the World Bank's suggestion for examination of intellectual property law went beyond the scope of the document, and should not be accepted.

89. **Mr. Brennan** (Observer for the Independent Film and Television Alliance) agreed that making such a change without full consideration of all the parameters involved would not be appropriate.

90. **Mr. Riffard** (France) said that his delegation was sympathetic to the substance of the proposal, which would increase the utility of the draft Supplement. However, considering that the Commission had already taken a decision in respect of recommendation 4 (b), and that acceptance of the World Bank's suggestion would amount to reopening discussion of the matter, his delegation was not in favour of accepting it.

91. **Mr. Umarji** (India) noted that elsewhere in the draft Supplement States were invited to consider harmonizing their intellectual property and secured transactions law, in view of which he saw no difficulty in accepting the suggestion.

92. **The Chairperson**, noting the lack of agreement, said that at the stage matters had reached it would be preferable not to accept the suggestion by the World Bank.

93. *It was so decided.*

94. **Mr. Du Jun** (China) said that paragraph 5 stated that earlier registration created priority whether or not there was knowledge of an earlier security right, which reflected normal trade practice. He wondered whether paragraph 6, by requiring prior knowledge, imposed a further condition, thereby undermining the efficacy of the registry scheme. In any event, there appeared to be an inconsistency between the two paragraphs.

95. **Mr. Bazinas** (International Trade Law Division) said that the Working Group had understood that there was a potential inconsistency between knowledge-based priority rules under secured transactions law and under intellectual property law and that knowledge-based rules might undermine the efficacy of registration. However, the Working Group had concluded that if such a rule under intellectual property law applied specifically to a security right in intellectual property, then knowledge-based priority would be preserved, since recommendation 4 (b) provided for deference to intellectual property law. The World Bank's suggestion had been made in recognition of the fact that States might wish to harmonize secured transactions law and intellectual property law in order to avoid such an inconsistency.

96. **The Chairperson** invited the Commission to consider the World Bank proposal in respect of paragraph 23.

97. **Mr. Cohen** (United States of America) agreed with the World Bank that its suggestion regarding paragraph 23 was controversial, in view of which his delegation could not support it.

98. **The Chairperson** said that she would take it that the Commission did not wish to accept the World Bank proposal in respect of paragraph 23.

99. *It was so decided.*

100. **The Chairperson** invited the Commission to consider the suggestion made by WIPO in respect of paragraph 35.

101. **Mr. Weise** (Observer for the American Bar Association) said that the issue was in fact a matter of intellectual property law and not of contract law. Under contract law, if a licensee was contractually bound not to enter into sub-licences but did so, the licensee might be in breach of its master licence. In that circumstance, under contract law, the sub-licence might still exist. However, under intellectual property law, an unauthorized sub-licence could not come into existence. Accordingly, the text should not be changed to refer to contract law or the law of obligations.

102. **Mr. Brennan** (Observer for the Independent Film and Television Alliance) said that the term “authorized” could be interpreted differently under the law of obligations and under intellectual property law and was thus better avoided. He requested an explanation of the words in parentheses at the end of paragraph 35, since it was not clear that they were necessary.

103. **Mr. Cohen** (United States of America) agreed that the statement in parentheses was an unnecessary statement about contract law, and would be better deleted.

104. **The Chairperson** invited the Commission to consider whether the reference to the law relating to intellectual property should be retained in the final sentence of paragraph 35.

105. **Mr. Umarji** (India) said that in the circumstances outlined in the paragraph, relating to the granting of a licence for a specific purpose, the law relating to intellectual property governed the granting of a licence. Should a sub-licensee use the licence for some other, unauthorized, purpose, the law relating to intellectual property was still relevant. Accordingly, the current drafting should be retained.

106. **Mr. Du Jun** (China) said that if the relevant law was that of intellectual property, the language should be retained so that each country could use its

national legislation as a legal basis for taking action. His delegation did not see that the language in parentheses in paragraph 35 conflicted with the rest of the paragraph, and felt that it could be retained.

107. **Mr. Cohen** (United States of America) said that if the Commission wished to retain the language in parentheses, thereby giving additional advice relating to contractual obligations, that advice should be full and accurate. While it was the case that under many legal systems failure by one party excused the other, that was not the case in systems where the two parts of a contract were independent of each other, so that failure of a licence, for example, would not excuse performance by another party but would give rise to a breach of contract. Which of those rules applied was dependent on circumstances under many legal systems. Therefore, to suggest that there was only one rule, applicable worldwide, was an inaccurate oversimplification. His delegation viewed the language as a distraction from the main point of the paragraph, but, if it was to be retained, it should be expanded to a more complete statement.

108. **Mr. Tosato** (Italy) said that his delegation agreed with the representative of the United States. The point made in the paragraph was abundantly clear, and nothing was lost by deleting the language in parentheses. If retained it would need to be made more complete and more accurate, and would then divert attention from the aim of the paragraph. It was better deleted.

109. **The Chairperson** said that, given the views expressed by members, she would take it that the Commission wished to delete the language in parentheses.

110. *It was so decided.*

111. **The Chairperson** reminded the Commission that the question had arisen of whether it would be appropriate to include in recommendation 245 a reference to a security right in intellectual property.

112. **Mr. Umarji** (India) said that such a reference such be added to make the position clear.

The meeting rose at 1.05 p.m.

Finalization and adoption of a draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (*continued*)

**Summary record of the 912th meeting, held at Headquarters,
New York, on Monday, 28 June 2010, at 3 p.m.**

[A/CN.9/SR.912]

Chairperson: Ms. Sabo (Vice-Chairperson) (Canada)

The meeting was called to order at 3.10 p.m.

Finalization and adoption of a draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (*continued*)

(A/CN.9/700/Add.4-6; A/CN.9/XLIII/CRP.7 and A/CN.9/XLIII/CRP.8)

A/CN.9/700/Add.4 (continued)

1. **The Chairperson** recalled that, at the previous meeting, it had been suggested that draft recommendation 245 might include a specific reference to a security right in intellectual property. In view, however, of the mention of the rights of a secured creditor under secured transactions law, there did not appear to be a need to make any such addition.

2. **Mr. Chan Wah-Teck** (Singapore) said that the stipulation in draft recommendation 245 that the rule in recommendation 81 (c) applied to the rights of a secured creditor and did not affect the secured creditor's rights under the law relating to intellectual property implied the existence of two distinct types of rights under the law relating to secured rights and under the law relating to intellectual property. That was not an accurate reflection of practice, since in the event of a dispute there was only a single applicable law.

3. **The Chairperson** said that the comment by the representative of Singapore was a timely reminder that the *Guide* would be read by interested parties who had not been involved in its development. It was important to note that, conceptually, the effects of the two bodies of law could be distinguished.

4. **Mr. Cohen** (United States of America) said that recommendation 81 (c), which referred to

licensees' rights, not being affected by a security right in intellectual property licensed to them, had been seen as overriding rights under intellectual property law. In cases where the licensor also became a secured party through taking a security right, the licensor could rely on two sources of rights, namely, security rights as a creditor and intellectual property rights as a licensor.

5. The intent of draft recommendation 245 was to make it clear that even though recommendation 81 (c) provided a licensee with protection against the holder of a security right, it would be beyond the scope of the *Guide* to undermine the rights of a licensor under intellectual property law. Draft recommendation 245 thus placed limits on recommendation 81 (c). The two recommendations in conjunction meant that secured transaction rights had no effect on intellectual property rights.

6. **The Chairperson** noted that the distinction between secured transaction and intellectual property rights was further developed and explained throughout the *Guide*.

7. **Mr. Chan Wah-Teck** (Singapore) asked whether, since draft recommendation 245 was for legislation to be enacted, it was to be understood as prescribing that any law to give effect to recommendation 81 (c) must be subject to an exception in respect of rights arising out of intellectual property law.

8. **Mr. Cohen** (United States of America) said that a great deal would depend on how the law was drafted. The effectuation of recommendation 81 (c) might be so narrowly defined as not to limit intellectual property rights.

9. **Mr. Weise** (Observer for the American Bar Association) said that, in practice, the rights of a

secured creditor under intellectual property law would not be affected by recommendation 81 (c).

10. *A/CN.9/700/Add.4, as orally amended, was adopted.*

A/CN.9/700/Add.5

11. **Mr. Bazinas** (International Trade Law Division) said that, in the second line of the note to the Commission following paragraph 47, “paragraphs 45-48” should be replaced by “paragraphs 44-47”. The proposed replacement text would recognize that a licensor of intellectual property subject to specialized registration might have priority over the licensee and thus obtain the benefits of an acquisition secured creditor by virtue of the nature of the transaction and the intellectual property involved.

12. The proposed revision stated that when a party registered a transfer or a licence that party could also register a security right in the intellectual property to secure any outstanding payment obligation; a secured creditor of a transferee or licensee could only register subsequently and would thus have a security right that was subordinate to that of the transferor or licensor.

13. **Mr. Macdonald** (Canada) said that a main concern in the *Guide* was to place all acquisition financiers in the same relative position and to permit lenders financing an acquisition to obtain an acquisition security right of the same order as a vendor. In the suggested replacement text the equivalent of an acquisition security right would accrue to the licensor simply because of how the registry operated, so that the licensor would always have a right superior to that of a general financier. Yet the situation of a lender acquisition financier, who did not benefit from the priority accruing to the licensor, was not addressed.

14. **Mr. Bazinas** (International Trade Law Division) said that the alternative text was intended to cover the obtaining of an acquisition security right by both vendors and lenders: the formulation “*A registers a transfer or licence to B on credit, A registers a security right in the intellectual property to secure any outstanding payment obligation*” did not mean that a lender who financed the acquisition of a licence or an asset by B did not benefit from the

priority position of an acquisition financier. The main point, as set out in the final sentence, was that the application of the principles of an acquisition security right for intellectual property needed only apply in cases where a security right in the intellectual property was subject to registration in the general security rights registry recommended in the *Guide*.

15. **Mr. Cohen** (United States of America) said that the note to the Commission was premised on the consideration that, since the acquisition financier already had priority, it would be superfluous for a super-priority rule to apply. However, the note presupposed a specialized registry which, by being asset-specific, did not allow pre-registration, although there existed in the world various types of specialized registries of which that was not true, so that the consideration expressed in the note was true only of a subset of registries, and the super-priority rule might not be superfluous in all cases.

16. The Working Group had been very careful not to specify how various specialized registries worked given that they operated in different ways, and, in particular, in view of recommendation 4 (b), not to make assumptions about how a specialized intellectual property registry would work. Since the Commission could not anticipate how specialized registries would develop, his delegation would prefer not to drop the rule relating to acquisition financing merely because it was unnecessary in contexts today. The original paragraphs should be retained.

17. **The Chairperson** said that she took it that the Commission wished paragraphs 44 to 47 to remain unchanged and not to be replaced by the proposed alternative text.

18. **Mr. Bazinas** (International Trade Law Division) said that the question was whether the text as it stood, particularly the second sentence of paragraph 44, accurately reflected the situation. The United States delegation had noted that the proposed replacement text rested on an assumption that might be unfounded in some cases, but that could also be said about the original text. The solution was perhaps not to replace paragraphs 44 to 47 altogether but to revise them, especially the second sentence of paragraph 44, so as to ensure that the approach envisaged in the *Guide* did not create an

obstacle to acquisition financing in cases where a specialized registry allowed pre-registration.

19. **Mr. Weise** (Observer for the American Bar Association) said that the task of identifying for the purpose of the *Guide* a set of rules applicable to acquisition financing similar to those applying to other encumbered assets had been very difficult because of the complexity of the subject matter. It was uncertain whether the procedure set out in the alternative text would work, and it would be risky to revisit the issue. In any event, nothing in the *Guide* would affect the law of intellectual property or the operation of specialized registries.

20. **Mr. Brennan** (Observer for the Independent Film and Television Alliance) concurred on the need for caution. The original text set out the reasons for the adoption of provisions on acquisition financing rights in respect of intellectual property. Paragraph 43 said that the acquisition financing rules in the *Guide* did not supersede priority rules in specialized registries. One reason for the suggested text was the existence of specialized intellectual property registration systems in which the priority rules permitted an acquisition financing right. The text aimed at providing the same result where only a general security rights registry applied. There was no intent to describe the functioning of all registries or to limit their development.

21. **The Chairperson** said that she took it that the Commission wished to adopt the existing text.

22. **Mr. Bazinas** (International Trade Law Division) said that he wished to confirm that the Commission wished to retain the essence of paragraph 44, since it felt that the approach taken in the *Guide* could create an obstacle to acquisition financing to the extent it did not allow acquisition financing priority with respect to security rights registered in an intellectual property registry, and that as a result States might wish to extend the special priority status of an acquisition security right to rights registered in an intellectual property registry. In his view, the paragraph was not accurate, as it was based on assumptions that might not be correct.

23. **The Chairperson** said that the Commission would suspend its consideration of document A/CN.9/700/Add.5 pending informal consultations.

A/CN.9/700/Add.6, chapters XI and XII

24. **Mr. Bazinas** (International Trade Law Division) referred the Commission to the report of Working Group V on insolvency (A/CN.9/691, para. 96), which had proposed the following addition to paragraph 64 of document A/CN.9/700/Add.6, dealing with clauses that automatically terminated and accelerated a contract upon application for commencement:

“The commentary to the *Insolvency Guide* explains the perceived advantages and disadvantages of such clauses, the types of contracts that may be appropriate to be exempted and the inherent tension between promoting the debtor’s survival, which may require the preservation of contracts, and introducing provisions which override contractual clauses. The possible application of such provisions to intellectual property is addressed in the commentary at part two, chapter II, paragraph 115 of the *Insolvency Guide*.”

25. **The Chairperson** said that she would take it that the Commission wished to adopt the proposed amendment.

26. *It was so decided.*

27. *A/CN.9/700/Add.6, chapters XI and XII, as orally amended, were adopted.*

The meeting was suspended at 4 p.m. and resumed at 4.35 p.m.

A/CN.9/700/Add.5 (continued)

28. **The Chairperson** invited the Commission to comment further on paragraphs 44 to 47 of document A/CN.9/700/Add.5, and the related note to the Commission following paragraph 47.

29. **Mr. Macdonald** (Canada) said that the existing wording of paragraphs 44 to 47 was sometimes unclear in expressing certain key considerations. The first consideration was that the regime of acquisition financing in the *Guide* was inspired by the general security rights registry. It failed to take account of any specialized registries, including intellectual property registries, or the priority principles developed in those specialized registries. As made clear in recommendation 4 (b),

the *Guide* did not seek to specify how any individual intellectual property registry should be organized, or what priority it should establish.

30. The second consideration was that, in a State with an intellectual property registry permitting registration against future assets but lacking specialized rules for acquisition financing, the application of the default “first-to-register” rule would result in the acquisition financier ranking second in terms of priority. It was that situation that paragraphs 44 to 47 of the draft Supplement were seeking to explain. The alternative wording proposed in the note to the Commission usefully added that in the event of such a situation, the acquirer’s rights could not be registered until after the seller’s rights had been registered.

31. Paragraphs 44 to 47 of the draft Supplement served to illustrate the *Guide*’s recommendation to States to consider establishing a system of acquisition financing, and to emphasize that there was a difference between the logic of general security rights registries and specialized intellectual property rights registries, particularly with regard to priority of rights.

32. **The Chairperson** said that the Commission seemed to take the view that the note to the Commission following paragraph 47 of document A/CN.9/700/Add.5 raised an issue that should be addressed in the draft Supplement and that the alternative wording in the note should not in fact replace, but rather be added to, paragraphs 44 to 47. She took it that the Commission wished to retain paragraphs 44 to 47 of document A/CN.9/700/Add.5, and to entrust to the secretariat the task of adding the text of the note to the existing text and making the necessary editorial changes.

33. *It was so decided.*

34. *A/CN.9/700/Add.5, as orally amended, was adopted.*

A/CN.9/700/Add.6, chapter X

35. **The Chairperson** said that deciding on the wording of draft recommendation 248, contained in chapter X, section B, regarding the law applicable to a security right in intellectual property was made complex by the fact that practitioners involved with secured transactions and practitioners involved with

intellectual property approached the issue from different standpoints. Aware of those opposing views, the Working Group had developed options A to D in document A/CN.9/700/Add.6, while members and observers had presented additional options in documents A/CN.9/XLIII/CRP.7 and A/CN.9/XLIII/CRP.8. The Commission could discuss the options and, in the light of its decision, determine whether to alter the related commentary.

36. **Mr. Bazinas** (International Trade Law Division) recalled that the law applicable to contractual matters had been successfully addressed in recommendation 216 in the *Guide* and paragraphs 53 and 54 of document A/CN.9/700/Add.6. The same was true of the law applicable to the intellectual property itself, as the Working Group, having explored the interaction between the law on secured transactions and intellectual property law, had determined that the *Guide* should not concern itself with intellectual property law at all. That mirrored the approach taken by the Commission to laws applicable to all other types of asset, such as intangible assets.

37. Option A in document A/CN.9/700/Add.6 was based on the consensus in the community of intellectual property practitioners that intellectual property rights were subject to national treatment. As a consequence, the law applicable to ownership of intellectual property should be the law of the State in which protection of that property was ensured, and by extension, the same was true for security rights in intellectual property, including in cases where the ownership rights of a transferee were at issue.

38. However, the Working Group had noted that in a transaction involving a multiplicity of intellectual property rights used as collateral for credit, application of a rule referring to the law of the protecting State would result in parties having to meet the requirements for creation, third-party effectiveness, priority and enforcement of multiple jurisdictions. That would increase the complexity and cost of the transaction and go against the overall objective of the *Guide*, which was to facilitate access to secured credit at lower cost.

39. The Working Group’s goal was to find a compromise between the application of the law of the protecting State and the application of the law of

the grantor's location. The latter was the *Guide's* general rule for intangible assets. Option B focused on establishing an exception to the general rule of the applicable law being the law of the grantor's location. That exception was that third-party effectiveness and priority of a security right as against the security right of a transferee or licensee would normally be subject to the law of the protecting State.

40. Option C made a distinction between intellectual property that could be registered in a specialized registry and intellectual property that could not be so registered. The main rule for the first type would be application of the law of the protecting State, while the enforcement of a security right relating to such intellectual property would be covered by the law of the grantor's location, on the understanding that enforcement — which involved several acts — fell under one State's law rather than several States' laws. In the case of the second type, creation and enforcement of a security right would be covered by the law of the location of the grantor, while effectiveness against third parties and priority of a security right relating to such intellectual property would be covered by the law of the protecting State. The Commission might wish to note the discussion in paragraphs 25 and 26 of document A/CN.9/700/Add.6 of the advantages and disadvantages of option C.

41. Option D applied limited party autonomy to the creation and enforcement of a security right. If the law applicable to such issues was the law of the protecting State, the parties could agree to apply the law of the grantor's location, and vice versa. The associated commentary, particularly paragraphs 30, 46 and 52 of document A/CN.9/700/Add.6, indicated the problems with that approach. The law applicable to effectiveness against third parties and priority of a security right in intellectual property as against the rights of a transferee, licensee or another secured creditor would be the law of the State of protection, while the law applicable to effectiveness against third parties and priority of a security right in intellectual property as against the rights of all other competing claimants would be that of the grantor's location. The primary example of such a claimant was an insolvency administrator.

42. The note to the Commission following option D sought to help with the choice of option, taking account of the fact that the components of the "hybrid" approaches, B to D, were not mutually exclusive. He drew attention to its penultimate paragraph, which indicated that, if the forum did not recognize the assignment of a copyright made under a foreign law, the transaction could be "salvaged" by classifying it as something that the forum did recognize, for example, as an exclusive licence — what was termed, in the context of conflict of laws, an "accommodation rule". He also drew attention to the final paragraph of the note, which indicated the possible relevance to the Commission's discussions of the work of other organizations. However, the concrete example given, that of the European Max-Planck Group for Conflict of Laws in Intellectual Property, was different from that of the Commission in three important ways. First, the text which the Group was developing was broader in scope than the *Guide*, in that it dealt with the law applicable to the intellectual property right itself. Second, it did not refer to creation, third-party effectiveness, priority and enforcement, but instead used detailed, neutral language that better accommodated the coverage of different issues by different laws and largely avoided problems of characterization. Third, the Group did not address the law applicable to intellectual property in the case of insolvency of the grantor, as that was already covered by existing European Union legislation.

43. **Mr. Weise** (Observer for the American Bar Association) said that the proposal by the Permanent Bureau of the Hague Conference on Private International Law, the Commercial Finance Association and the American Bar Association, contained in document A/CN.9/XLIII/CRP.7, was inspired by the twin guiding principles underlying the development of the draft Supplement to the *Guide*, namely to accommodate the policy interests of the intellectual property and secured transactions fields. The major concern in the former was to protect the rights of intellectual property rights holders. The major concern in the latter was to provide mechanisms for transparent, efficient, low-cost, secured financing. In many cases, the proposal deferred to the general rule in the *Guide*, which was to apply the law of the grantor's location to intangible assets, deeming that to be important for

the public policy goals relating to secured transactions while having little or no effect on the protection of intellectual property rights.

44. A key inspiration of the options in the proposal, labelled E and F, was the work of the European Max-Planck Group for Conflict of Laws in Intellectual Property and the Permanent Bureau of the Hague Conference on Private International Law, both of which had a strong interest in conflict of laws and private international law, but neither of which had a direct interest in secured transactions or intellectual property.

45. Options E and F both indicated that, where a question of property interests arose, the law of the State of protection (*lex protectionis*) should apply. However, where the question focused on secured transactions, and could be addressed without interfering with intellectual property interests, the law of the grantor's location should apply. Accordingly, questions such as whether and how a security right could be created were referred to the law of the State in which the intellectual property was protected. Questions such as determining whether or not notice must be served on a grantor, what that notice must say and how far in advance it must be served, whether a security agreement must be signed, and whether encumbered assets must be described, were referred to the law of the grantor's location.

46. Questions regarding the registration and transferability in a foreclosure sale of an encumbered asset (in the present case, intellectual property), were referred to the law of the State of protection. The law of the State of protection was also the applicable law in the case of effectiveness against third parties and priority, provided that the intellectual property could be registered in a specialized registry. If it could not be so registered, in the event of a dispute between two secured creditors or between a secured creditor and the insolvency administrator, the law of the grantor's location would apply.

47. **Mr. Deschamps** (Canada), introducing his delegation's proposed compromise text of recommendation 248 (A/CN.9/XLIII/CRP.8), noted that the first sentence set out the rule and the second sentence the option available to a secured creditor. It made the *lex protectionis* the applicable law in all

major areas but it gave secured creditors the option to use the law of the grantor's location to protect themselves against insolvency administrators and unsecured creditors. The same approach had been taken in the *Guide* in recommendations 210 and 211 on conflict-of-laws rules relating to bank accounts. Both the proposal set out in document A/CN.9/XLIII/CRP.7 and Canada's own made no distinction between registrable and non-registrable interests; and therefore the Canadian proposal always allowed the secured creditor to rely on the *lex protectionis*, especially where the transaction was asset-specific.

48. **Mr. Bazinas** (International Trade Law Division) asked, in the case of a secured creditor that used the option to create a security right in intellectual property under the law of the grantor's location, what law would apply to priority and enforcement of that right. If the *lex protectionis* applied, how would third-party effectiveness be separated from priority and from enforcement?

49. **Mr. Deschamps** (Canada) said that under Canada's proposal, the *lex protectionis* would apply to enforcement in all circumstances. The proposal had not specified a law applicable to priority issues because priority did not arise with respect to an insolvency administrator. Under the draft Supplement, once a security right was effective against an insolvency administrator, the secured creditor had priority, as it also did against unsecured creditors. Priority issues arose only between secured creditors. All other priority issues fell under the *lex protectionis*. However, that did not defeat the right of a secured creditor that had made its right effective against an insolvency administrator under the law of the grantor's location. Canada's proposal could be tweaked to encompass the other approach, but he himself did not think that was needed.

50. **Mr. Umarji** (India) asked how option E in the proposal introduced by the observer for the American Bar Association could make two different laws applicable to the enforcement of a security right in intellectual property: the enforcement itself was governed by the law of the grantor's location, but the sale of the intellectual property was governed by the law of the protecting State. Normally enforcement included the right to sell.

51. **Mr. Weise** (Observer for the American Bar Association) said that the goal was to bring

enforcement under the law of a grantor's location because otherwise notice would have to be given under the law of each State involved and necessitate multiple enforcement procedures, with the result that not even a willing buyer could buy the entire package of encumbered assets at one time. The thinking had been that a secured creditor conducting a foreclosure sale preferred to have only one foreclosure disposition and, if necessary, go on to figure out what property limitations there were, rather than having the costly burden of conducting multiple dispositions in each separate State. That also enhanced the prospect of getting more money for the encumbered asset, which was good for the grantor, the secured creditor and other creditors of the grantor.

52. **Mr. Alcantara** (Observer for the Commercial Finance Association) said that the simultaneous application of the two sets of laws was a common occurrence. In practical terms, the secured creditor would seek to enforce its secured credit rights according to the law of the grantor's location when it held an enforcement sale. Once the sale was complete, the purchaser of the rights would have to take the necessary steps to make its ownership rights effective against third parties under the assignment and transfer provisions of the law of the protecting State.

53. The enforcement and assignment provision singled out by India was illustrative of why his organization was a proponent of the proposal in document A/CN.9/XLIII/CRP.7. The proposal was not a matter of pure compromise, but offered the only approach that gave deference to both sets of laws by applying their underlying principles and taking into account how the laws affected the secured credit interests and the intellectual property interests in the place where they were centred.

54. **Mr. Brennan** (Observer for the Independent Film and Television Alliance) said that he saw some common areas of substantive agreement in the various proposals, especially those set out by the American Bar Association and Canada, the latter having the benefit of simplicity. In the area of insolvency, for instance, a secured creditor should in fact be able in some circumstances to rely on the law of the grantor's location to establish priority against an insolvency representative. The Canadian proposal seemed to apply to a broader class of registered and unregistered intellectual property, and

it was not clear how the *UNCITRAL Legislative Guide on Insolvency Law* would resolve that issue, but the Working Group should be able to find consensus in the area of insolvency.

55. In the area of enforcement, the kind of situations astutely analysed by the observer for the Commercial Finance Association were very common in intellectual property law, where assignments made under judgements or arbitral awards in one country often had to be enforced elsewhere; and whether such transfers were recognized in that other country depended upon the application of the local laws, in other words, on the *lex protectionis*. Perhaps further discussion was needed on the mixed nature of the security right, which had a unifying contractual component and an intellectual property component. While the *Guide* tended to see intangibles as accounts, which were contract rights to be governed by a unifying law, intellectual property was a property right and therefore had effects against third parties that did not exist in the abstract but were based on the law of the protecting country where they were enforced; and enforcement necessarily governed effectiveness and priority. In that connection, the distinction between security rights registered or unregistered in a local intellectual property registry would have to be clarified.

56. Further discussion was also needed on the transactional rules governing all-asset transactions that offered simplicity for the lender, as against transactions involving complex chains of title governed by many different laws. The two kinds of transactions had to be balanced in the intellectual property world, which was governed by the *lex protectionis*.

57. **Mr. Riffard** (France) asked why the *lex protectionis* was made to apply to priority in the area of insolvency. He observed that Canada's proposal had the benefit of simplicity. At any rate, France was non-negotiably opposed to option A (A/CN.9/700/Add.6, p.16), which made the *lex protectionis* applicable to enforcement.

58. **Mr. Cohen** (United States of America) said that he did not see that the Canadian rule was like the treatment of bank accounts in the conflict-of-laws rules. Also, when Canada stated that it was sufficient to have third-party effectiveness governed by the law of the grantor's location and to have the *lex protectionis* apply to priority, that in itself was a

priority rule that might not apply in all States. The relative rights of the insolvency administrator and the secured creditor might be different in protecting States, and he believed that a conflict-of-laws provision was indeed necessary.

59. He was, furthermore, puzzled by the Canadian proposal with regard to enforcement. The issue as the United States saw it was which set of rules would govern the process by which the secured creditor enforced its security right. The separate enforcement dispositions required for an encumbered asset protected under the law of different States would make the collateral less valuable not only to the secured creditor but especially to the grantor. He would like some explanation of why the Canadian approach was advantageous, when the goal of the *Guide* was to make more credit available on the basis of intellectual property rights.

60. **Mr. Sato** (Japan) said that his delegation had originally supported option C in document A/CN.9/700/Add.6, but now hoped that there would be a consensus on either option E or option F in document A/CN.9/XLIII/CRP.7.

61. **Mr. Deschamps** (Canada) explained that his proposal allowed the secured creditor to make its security right effective against the insolvency representative under the law of the grantor's location but not to obtain priority over the representative because third-party effectiveness necessarily entailed recognition of the security right against the insolvency administrator and the question of priority did not arise. The priority provisions in the *Guide* always framed the concept of priority in terms of a conflict of competing secured creditors. He was aware that the United States conception of third-party effectiveness might need to be supplemented by a concept of priority and he would have no difficulty in referring to the question of priority, which would be covered by either set of laws.

62. He would for the moment set aside the issue of bank accounts because it was not one of his central arguments. Regarding the question of enforcement, the Canadian proposal had aimed to rally the representatives of the intellectual property community. Since they usually preferred the law of the grantor's location to apply to enforcement, he would be ready to reopen the discussion on that point.

63. **Mr. Siebrasse** (Observer for the Independent Film and Television Alliance) observed that the Canadian proposal had two advantages: it was the simplest and it allowed a single registration in the location of the grantor to beat the insolvency administrator. In that respect it was more attractive than the proposal introduced by the American Bar Association because it covered patents and trademarks as well as copyrights. He believed the proposal was very sound in principle.

The meeting rose at 6.05 p.m.

Finalization and adoption of a draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (*continued*)

**Summary record of the 913th meeting, held at Headquarters,
New York, on Tuesday, 29 June 2010, at 10 a.m.**

[A/CN.9/SR.913]

Chairperson: Ms. Sabo (Canada)

Finalization and adoption of a draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (*continued*)

(A/CN.9/700/Add.6; A/CN.9/XLIII/CRP.7 and A/CN.9/XLIII/CRP.8)

1. **The Chairperson** urged the Commission to be flexible and objective in resolving the outstanding issues, bearing in mind the limited time available. It might be possible to leave the questions of creation and enforcement, and of the insolvency administrator and unsecured creditors, to the grantor's location, and to consider opposability and priority in the context of *lex protectionis*, along with the question of secured creditors and unregistered intellectual property. It would be helpful if the number of options before the Commission could be reduced.

2. **Mr. Son** Seung-woo (Republic of Korea) said that his delegation favoured option C (contained in document A/CN.9/700/Add.6), but in the interest of reaching consensus could support the proposals put forward by the Permanent Bureau of the Hague Conference on Private International Law, the Commercial Finance Association and the American Bar Association (A/CN.9/XLIII/CRP.7). *Lex protectionis* would apply regarding basic property issues, specifically third-party effectiveness and priority. More importantly, the law of enforcement should be that of the grantor's location.

3. **Mr. Umarji** (India) said that his delegation preferred option A with regard to *lex protectionis*. The proposal submitted by Canada (A/CN.9/XLIII/CRP.8) was similar to option A, with an adaptation in respect of insolvency representation. Adoption of that proposal would facilitate compliance by States parties with the international conventions providing for *lex*

protectionis referred to in the note by the Secretariat (A/CN.9/700/Add.6, para. 14). Accordingly, his delegation supported the Canadian proposal.

4. **Mr. Dolata** (Poland) and **Mr. Maradiaga** (Honduras) also endorsed Canada's proposal.

5. **Mr. Morán Bovio** (Spain) said that the primary concern was to arrive at a single solution; otherwise

the Guide, which embodied uniform recommendations, would be distorted. With that in mind, he supported the Canadian proposal, as both clear and simple. It would increase certainty in applying the Guide. However, if a majority view emerged in favour of a different solution, his delegation would join the consensus in the interest of a single solution.

6. **The Chairperson** agreed that it was vital to have one rule, as part of a uniform, harmonized regime.

7. **Ms. Smyth** (Australia) said that options E and F (A/CN.9/XLIII/CRP.7) were the closest to new legislation in Australia on conflict of laws rules in its personal property regime. While more complex than the Canadian proposal, those options provided greater certainty for parties taking a secured interest in intellectual property. With certain exceptions, where *lex protectionis* would apply, they also addressed the concerns of parties taking transfers of intellectual property. However, her delegation appreciated that a single rule would be most helpful to users of the Guide.

8. **Mr. Monardes** (Chile) said that his delegation preferred option A, in view of Chile's domestic legislation on the matter. The law governing priority of rights in intellectual property should be that of the State protecting the property.

9. **The Chairperson** reminded the Commission that the rule would need to function within the regime envisaged in the Guide as well as in the context of national intellectual property regimes.

10. **Mr. Hughes** (United States of America) said that he was not aware of any problems the conventions referred to by the representative of India might pose in terms of the choice to be made by the Commission, and he would welcome clarification. His delegation shared the concerns expressed regarding the Canadian proposal (A/CN.9/XLIII/CRP.8), since with respect to enforcement it referred to *lex protectionis*, so that a security interest in all of a company's worldwide intellectual property assets could not be enforced in one sale under one set of rules, which was bad economics. The proposals by the Commercial Finance Association (A/CN.9/XLIII/CRP.7) would have the grantor's location govern, which was preferable.

11. **Mr. Korma** (Egypt) asked whether, under the Canadian proposal, it was possible to have two different legal systems apply to different secured creditors, and, if so, what happened if the two systems conflicted. The proposal appeared not to cover that eventuality.

12. **Mr. Du Jun** (China) said that his delegation preferred option A, since security rights derived from intellectual property rights. The law of the country establishing the intellectual property rights was applicable.

13. **Mr. Özsunay** (Turkey) expressed his delegation's support for option E.

14. **Mr. Deschamps** (Canada) said that under his delegation's proposal, enforcement was governed by *lex protectionis*, so that if two secured creditors had obtained a security right in the same asset, one single law would apply in enforcement proceedings initiated by either secured creditor and in determining their relative priority. The same would be true, however, if the grantor's law, rather than *lex protectionis*, was applicable.

15. **Mr. Cohen** (United States of America) said that his delegation understood that if a single intellectual property right was protected under the law of a single State, enforcement would be governed by the law of one State, under both the

Canadian and the other proposals before the Commission. However, he wondered what the situation would be if there were many intellectual property assets protected under the laws of many different States and a secured creditor sought to enforce a security right. Would Canada's proposal still lead to enforcement under the law of a single State?

16. **Mr. Chan Wah-Teck** (Singapore) requested clarification of the statement by the representative of Canada that where intellectual property assets served as collateral and a secured creditor sought enforcement, *lex protectionis* determined priority, but that the grantor's law might apply in certain circumstances.

17. **The Chairperson** said that her understanding was that under the Canadian proposal only *lex protectionis* would apply, and that under the Commercial Finance Association's proposal only the law of the grantor's location would apply, so that under both proposals there was only one applicable law.

18. **Mr. Brennan** (Observer for the Independent Film and Television Alliance) said that *lex protectionis* with respect to an enforcement proceeding did not require a secured creditor to conduct multiple enforcement proceedings in multiple countries. Rather, the result of a transfer was determined by the law of each protecting country, and where a secured creditor exercised a licensor's power to make a disposition in the event of foreclosure under the law of a particular country that power existed in multiple countries. The only *lex protectionis* issue was whether the resultant transfer was recognized in another country, which normally simply meant compliance with due process. A contract or an enforcement judgement obtained in one country did not require a new contract or judgement in every other country, but whether such instruments were actually enforceable depended on local law.

19. **Mr. Riffard** (France) said that, while the Commission needed to limit the number of options proposed, it would not be a problem to have more than one option in the Guide, which contained variants in respect of other issues. The Canadian and Commercial Finance Association proposals sought to replace options A to D. Proponents of option A

and of *lex protectionis* favoured the Canadian proposal, but both proposals could be included.

20. **Mr. Weise** (Observer for the American Bar Association) said that, based on the options presented in document A/CN.9/XLIII/CRP.7, property issues would be covered by the *lex protectionis*, while enforcement issues would be covered by the law of the grantor's location. The Canadian proposal (A/CN.9/XLIII/CRP.8), on the other hand, said that all enforcement issues, whether related to property or to procedure, were governed by the *lex protectionis*. In that regard, if there were intellectual property rights protected under the laws of more than one State, more than one set of enforcement procedures would be required.

21. **Mr. Brennan** (Observer for the Independent Film and Television Alliance) said that there seemed to be some misunderstanding. As an intellectual property lawyer, he thought that the *lex protectionis* referred to the law of the State of protection, such that, under the conflicts rule, property issues would be governed by one law and contract issues would be governed by a different law. It was therefore important to clarify the meaning of the *lex protectionis*.

22. **The Chairperson** said that she had heard no support for options B and D (A/CN.9/700/Add.6, pp. 16-17), and that the State which had supported option C was now prepared to support the proposal in document A/CN.9/XLIII/CRP.7. As there were no objections to the elimination of options B, C and D, the discussion would be confined to the proposals in documents A/CN.9/XLIII/CRP.7 and A/CN.9/XLIII/CRP.8, along with option A. However, given that there were very few differences between the Canadian proposal (A/CN.9/XLIII/CRP.8) and option A, she wondered whether option A could be eliminated.

23. **Mr. Wiegand** (Observer for Switzerland) said that his delegation was willing to eliminate option A, but only on the condition that the proposal contained in document A/CN.9/XLIII/CRP.8 was included in the Guide.

24. **The Chairperson** said that, as there was no unanimous consent to eliminate option A, the Commission would consider it, along with the

proposals in documents A/CN.9/XLIII/CRP.7 and A/CN.9/XLIII/CRP.8.

25. **Mr. Deschamps** (Canada) said that the representative of Egypt had asked a question about competing claims from two different secured creditors in respect of the same asset. His response was that if the asset was protected under the law of a given State, and if the *lex protectionis* governed priority and enforcement of the two security rights, as would be the case under any proposal that used the *lex protectionis* for those issues, one single law would apply in relation to that asset. In response to the question asked by the representative of the United States of America about a grantor who had several intellectual property assets in several States, he said that if the *lex protectionis* was the applicable law, the secured creditors would have to look to the law of each State for each asset. However, any competition between the secured creditors would always be resolved by one single law.

26. **Mr. Weise** (Observer for the American Bar Association) said that the law of one State would apply as between two secured creditors in the case of a single intellectual property asset protected under the law of a single State. With multiple intellectual property assets protected under the laws of multiple States, on the other hand, the laws of those States would each apply to the particular intellectual property they protected.

27. **Mr. Deschamps** (Canada) said that he agreed fully with that interpretation.

28. **Mr. Bazinas** (International Trade Law Division) said that there was probably some misunderstanding. The point was that, in the event of a priority conflict between two secured creditors with respect to an intellectual property asset protected under the law of State A, priority would be resolved by the law of State A. If the same creditors had a security interest in another intellectual property asset protected under the law of State B, their priority conflict would be resolved under the law of State B. A priority conflict would always be resolved under one law, because intellectual property assets were subject to national treatment.

29. **Mr. Agthe** (Observer for the International Trademark Association) said that he agreed with Mr. Bazinas's summary.

The meeting was suspended at 11.15 a.m. and resumed at 12.10 p.m.

30. **The Chairperson** said that, in the hopes of establishing a single rule, it might be useful to consider the applicable law for each of the different components of the security right, namely creation, third-party effectiveness and priority, and enforcement.

31. **Mr. Deschamps** (Canada) said that the Canadian delegation was prepared to amend its proposal, but solely on the issue of enforcement, in order to address the concern expressed by many delegations which had supported the proposal in document A/CN.9/XLIII/CRP.7. The revised proposal, for which he did not have a text, would indicate that enforcement would be governed by the law of the grantor's location, instead of the *lex protectionis*.

32. **The Chairperson** said it was her understanding that creation, third-party effectiveness and priority would be governed by the *lex protectionis*, with the exception that the secured creditor could seek protection as against an insolvency administrator and unsecured creditors under the law of the grantor's location. Enforcement, on the other hand, would be governed by the law of the grantor's location.

33. **Mr. Tosato** (Italy) said that, while the proposal seemed acceptable in principle, it would be crucial to have a text. If there was strong support for the change to have enforcement governed by the law of the grantor's location, it would be critical to include a commentary to explain the issues that might arise, during the course of that enforcement, in connection with priority and third-party effectiveness.

34. **Mr. Weise** (Observer for the American Bar Association) said that although his delegation had been one of the proponents of the proposal in document A/CN.9/XLIII/CRP.7, it would support the proposed revision to the Canadian proposal (A/CN.9/XLIII/CRP.8). However, the general rule that creation was protected by *lex protectionis* should include an exception to the effect that creation might also be protected by the law of the grantor's location.

35. **The Chairperson** said she understood the suggestion to be that, with regard to creation, the

parties had the option of having the security rights governed by the law of the grantor's location or by the *lex protectionis*.

36. **Mr. Nigam** (India) said that the revised Canadian proposal should be clarified. If, for example, a patent owner in country A gave a licence to five licensees in five different countries, and the licensees created security interests over their rights, borrowed money from different lenders in their respective countries and thereafter defaulted on the loans, there would be enforcement under the law of the grantor's location. If the licence rights were sold to another third party, the patent and the security interest over that patent should also be registered in country A, where the original patent was protected. Any sale or transfer of the licensee's rights to another third party would also have to be registered in country A. He wished to know whether that would still be applicable with the proposed change to document A/CN.9/XLIII/CRP.8.

37. **Mr. Weise** (Observer for the American Bar Association) said that the legal requirements for registration of transfer of the intellectual property in the *lex protectionis* would still apply. In that regard, moving the commentary in document A/CN.9/XLIII/CRP.7 to document A/CN.9/XLIII/CRP.8, as requested by the representative of Italy, would help clarify the issue, and would show that the amended Canadian proposal would achieve the result sought by the representative of India.

38. **The Chairperson** said she took it that if someone held a patent in country A, which was licensed to licensees in countries B, C and D, who then granted a security interest to their respective lenders in countries B, C and D, and there was a default followed by enforcement in the respective countries of those lenders, the intellectual property laws of the countries in which the intellectual property was protected would continue to apply. She said she took it that there was general agreement to include the relevant portions of the commentary contained in document A/CN.9/XLIII/CRP.7 in the draft Supplement.

39. *It was so decided.*

40. **Mr. Deschamps** (Canada) said that he agreed fully with the explanation given by the Observer for the American Bar Association and that the

comments on the property aspects of the enforcement process should be contained in the commentary. However, for the sake of simplicity, the comments in document A/CN.9/XLIII/CRP.7 should be incorporated into the commentary and not into the Rule itself. Nonetheless, the Rule should be read in the light of the general provisions of the Guide, which were already to the same effect.

41. **Mr. Agthe** (Observer for the International Trademark Association) said that his delegation did not disagree with the principle that the effects of a disposition would be governed by the intellectual property law of the country where the intellectual property was protected. However, the example given was misleading: a patent registered in country A could not be licensed to a licensee in country B because it had no effect outside the country where it was registered. A patent also had to exist in country B, where the licensee was located and where it would be using the invention described in the patent.

42. **Mr. Weise** (Observer for the American Bar Association) said that a better example might be a situation in which a grantor owned a patent in country A that was protected under the law of that country and another patent protected under the law of country B, while the grantor itself was located in country C. Enforcement would take place under the law of country C, but the law of country A, which required that the patent should be registered in country A in order for the enforcement disposition to be effected or completed, would remain applicable.

43. **The Chairperson** asked whether there were any objections in principle to the Canadian proposal, with the suggested changes.

44. **Mr. Umarji** (India) said that the *lex protectionis* would be diluted if it were shifted from the principal rule to the commentary. His delegation would prefer the rule itself to provide that the *lex protectionis* would continue to apply to the enforcement of security rights, and for that reason he favoured option A. However, he could also accept the Canadian proposal with the suggested changes regarding insolvency practice.

45. **The Chairperson** said it was her understanding that, for those who favoured option A or the original Canadian proposal, third-party effectiveness and priority were the key elements that

should be subject to the *lex protectionis*. In the modified Canadian proposal, the *lex protectionis* still applied to both of those elements, along with creation.

46. **Mr. Deschamps** (Canada) reiterated that there would be only one change to the original Canadian proposal contained in A/CN.9/XLIII/CRP.8: a sentence would be added to the effect that enforcement was governed by the law of the grantor's location instead of the *lex protectionis* and the word "enforcement" would accordingly be deleted from the first sentence.

47. **Mr. Cohen** (United States of America), noting that, under the Canadian proposal, the creation of a security right would be governed either by the *lex protectionis* or by the law of the grantor's State, said that the question of how those options would operate could be clarified in the commentary. With regard to the proposed modification relating to enforcement, he agreed that it was necessary to see the suggested wording.

48. **Mr. Riffard** (France) said that his delegation's concerns regarding enforcement had been accommodated and it therefore supported the Canadian proposal with the suggested modifications.

49. **Mr. Wiegand** (Observer for Switzerland) said that, if the Canadian proposal was modified along the lines mentioned, his delegation could support it fully and would no longer wish to retain option A.

50. **Mr. Morán Bovio** (Spain), **Mr. Agthe** (Observer for the International Trademark Association) and **Mr. Son** Seoung-woo (Republic of Korea) expressed support for the Canadian proposal with the changes that had been outlined.

51. **Mr. Mittsdoerffer** (Germany) said that his delegation continued to believe that the *lex protectionis*, as set out in option A, should be the starting point for any discussion. It was, however, prepared to depart from that principle to some extent in the case of creation and enforcement and therefore fully supported the Canadian proposal with the suggested changes.

52. **Ms. Sanderson** (United Kingdom) said that her delegation also supported the Canadian proposal, subject to agreement on the new wording. She agreed with the representative of Spain that it

was in everyone's interests to have a single solution to the issue at hand.

53. **Ms. Hu Shengtao** (China) requested clarification as to whether all countries in which an intellectual property asset was registered, including the grantor's State, could be considered protecting States, and whether subjecting bilateral enforcement of contractual exchanges to the law of the grantor's State, in line with the suggested changes to the Canadian proposal, would therefore imply that such enforcement did not include effective enforcement against third parties.

54. **Mr. Bazinas** (International Trade Law Division) said it was his understanding that the first sentence of the Canadian proposal provided that a security interest could be created under the law of the State in which the intellectual property was protected, while the second sentence offered the option to create a security interest under the law of the grantor's State, where the secured creditor was not concerned about conflicts with other secured creditors but rather about situations in which the grantor became insolvent and the secured creditor was at risk of losing the collateral. It should also be borne in mind that, in accordance with recommendation 223 of the Guide, the commencement of insolvency proceedings should not affect which law was applicable, but it might have an impact insofar as certain issues such as avoidance, treatment of secured creditors, ranking of claims or distribution of proceeds might have to be resolved under the law of the State in which the insolvency proceedings were commenced.

55. If the Canadian proposal was revised along the lines suggested, enforcement would be subject to the law of the grantor's State. Therefore, if a secured creditor had a security interest in intellectual property assets located in many States, that security interest would be enforced under the law of the State in which the grantor was located. Of course, the question remained whether the jurisdictions in which the assets were protected would accept the result of that enforcement. Moreover, as set out in recommendation 222 of the Guide, any applicable

law rule was subject to the mandatory rules and public policy of the forum State.

56. **Mr. Brennan** (Observer for the Independent Film and Television Alliance) said that the Canadian proposal, with the suggested changes, represented an excellent way forward that would work well for intellectual property practitioners.

57. **Mr. Alcantara** (Observer for the Commercial Finance Association) said that his delegation had been one of the proponents of the proposal set out in document A/CN.9/XLIII/CRP.7 but could fully support the revised Canadian proposal as the single option to be included in the draft Supplement.

58. **Ms. Rogne** (Norway) and **Mr. Özsunay** (Turkey) said that they supported the revised Canadian proposal, subject to agreement of the precise wording.

59. **Ms. Longcroft** (World Intellectual Property Organization) said that, as stated in document A/CN.9/701, the World Intellectual Property Organization had consistently held that the *lex protectionis*, as set out in option A, should remain the guiding principle in determining the law applicable to a security interest in intellectual property. Her delegation would, however, support the Canadian proposal if it was modified along the lines suggested.

60. **Mr. Weise** (Observer for the American Bar Association) said that, under the Canadian proposal, the option to apply the law of the grantor's location to the creation of a security right was available in all circumstances and was not limited to cases in which there was a dispute with the insolvency administrator. The only element that was limited to such disputes was effectiveness against third parties.

61. **The Chairperson** said that there seemed to be broad support in principle for the Canadian proposal with the suggested modifications. Precise wording would be drafted in due course for the Commission's consideration.

The meeting rose at 1 p.m.

Finalization and adoption of a draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (*continued*)

**Summary record of the 914th meeting, held at Headquarters,
New York, on Tuesday, 29 June 2010, at 3 p.m.**

[A/CN.9/SR.914]

Chairperson: Ms. Sabo (Canada)

The meeting was called to order at 3.15 p.m.

Finalization and adoption of a draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (*continued*)

(A/CN.9/700/Add.6-7; A/CN.9/XLIII/CRP.5, A/CN.9/XLIII/CRP.7 and A/CN.9/XLIII/CRP.8)
A/CN.9/700/Add.6, chapter X (continued)

1. **Mr. Deschamps** (Canada) read out the following revised text of his delegation's proposal for recommendation 248:

“Recommendation 248

The law should provide that the law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected.

The law should in addition provide that a security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee.

The law should provide that the law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located.”

2. **The Chairperson** said that the essential change was that enforcement was now subject to the law of the grantor's location. The revised proposal was supported by the majority of members and observers. The adoption of a single rule balancing the various interests and the elimination of options would provide certainty, make the rule straightforward in application and lead to a

predictable result. The text met the objectives of the *Guide* and the draft Supplement. It might not correspond exactly to the systems in force in all States, but it had important advantages. She asked the Commission if the proposed rule was acceptable.

3. **Mr. Monardes** (Chile) said that although his delegation preferred option A in document A/CN.9/700/Add.6, it was ready to support the revised Canadian text. However, he would like it recorded, either in the commentary or in the report, that it was his delegation's understanding that the law of the grantor's location governed the enforcement of the security right in intellectual property only to the extent allowed by the *lex protectionis*.

4. **Mr. Deschamps** (Canada), concurring, said that a number of delegations, including his own, wanted the commentary to make it clear that issues of transferability upon enforcement would remain governed by the *lex protectionis*, in view of the considerations that had been set out by the secretariat at an earlier meeting and in view of recommendation 4 (b) of the *Guide*. The comments on that principle found in document A/CN.9/XLIII/CRP.7 could be used as a basis for the commentary, and he had no objection to having the report mention the matter.

5. **The Chairperson** said she took it that the Commission wished to adopt the revised text of draft recommendation 248 proposed by Canada, thus disposing of the last substantive issue to be resolved.

6. *It was so decided.*

7. **The Chairperson** invited the Commission to turn to the commentary to recommendation 248 contained in document A/CN.9/700/Add.6.

8. **Mr. Bazinas** (International Trade Law) asked, now that the unified rule had been adopted, whether it was still of value to include, as originally intended, guidance to States as to possible approaches under options A to D. The commentary might simply refer to the advantages and disadvantages of the different approaches without going into the actual options. It could then discuss recommendation 248 as adopted, explaining its advantages and disadvantages and how it would operate in relation to the issues of creation, third-party effectiveness, priority and enforcement. The commentary as a whole would need very little revision. A new paragraph 4 bis or 5 should probably be added in chapter X, section A, discussing the approach called for in the recommendation just adopted.

9. **Mr. Weise** (Observer for the American Bar Association) said that, if the proposal in document A/CN.9/XLIII/CRP.7 were, as suggested, used as the basis for wording to be included in the commentary, paragraphs 3 and 10 made the point raised by many members that property issues remained property issues under intellectual property law and their enforcement under the law of the grantor's location did not displace the need to refer to the *lex protectionis*.

10. **Mr. Dennis** (United States of America) said that the commentary should highlight the importance of the issue dealt with in recommendation 248, indicate why the chosen approach was the best, and explain the solution so that States could apply it. In discussing the recommended approach, its advantages should be stressed rather than the potential problems. Although it was a compromise solution, the Commission wanted every State to stand behind it.

11. **The Chairperson** said that it was the usual approach in the commentary to focus on the benefits of the recommendations made.

12. **Mr. Morán Bovio** (Spain) said that because the commentary had an educational value, he would not favour deleting the sections outlining the difficulties and the deliberations before the adoption of the recommendation. Also, the recommendation, presented as a satisfactory solution, should be discussed fully because it related to a very complex area.

13. **The Chairperson** said that none of the suggestions made was contradictory, and the secretariat would incorporate them in revising the commentary. Essentially there would be minor changes to the tone of the commentary, because there was now no need for it to be quite so neutral.

14. **Mr. Bazinas** (International Trade Law Division) asked whether the Commission still wished to refer to the so-called "accommodation rule" followed by many States.

15. **Mr. Deschamps** (Canada) said that, given the consensus now on a single rule, he believed it was not necessary to elaborate on the accommodation rule. In any case, the accommodation rule was not specific to intellectual property, security in intellectual property or security in general; rather, it was a general rule of private international law.

16. **The Chairperson** said she took it that the Commission wished not to include that point in the commentary.

17. *It was so decided.*

18. *A/CN.9/700/Add.6, chapter X, as orally amended, was adopted.*

19. *A/CN.9/700/Add.6 as a whole, as orally amended, was adopted.*

A/CN.9/700/Add.7

20. **The Chairperson** drew attention to the last part of the draft Supplement to be adopted, the annex on terminology and recommendations contained in document A/CN.9/700/Add.7. The document would be revised to reflect the amendments to the terminology and recommendations adopted in the course of the Commission's deliberations. It would also be included in the report as an annex.

21. *A/CN.9/700/Add.7, as orally amended, was adopted.*

**Draft decision A/CN.9/XLIII/CRP.5:
Supplement to the *UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property***

22. **Mr. Bazinas** (International Trade Law Division), introducing draft decision

A/CN.9/XLIII/CRP.5 adopting the Supplement to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property, said that the beginning of the last preambular paragraph would, at the request of the Chairperson, be redrafted to read “Expressing its appreciation to the participants of Working Group V as well as to the secretariat,”. In paragraph 1, the words “dealing with” after the word “Transactions” should be replaced by the words “under the title: Supplement on”. In paragraph 2, the words “to the *UNCITRAL Legislative Guide on Secured Transactions* dealing with security rights in intellectual property” would be deleted after the word “Supplement”. In paragraph 3, the same words would be omitted after the first occurrence of the word “Supplement”.

23. *Draft resolution A/CN.9/XLIII/CRP.5, as orally revised, was adopted.*

The meeting was suspended at 4 p.m. and resumed at 4.40 p.m.

Possible future work in the area of security interests (A/CN.9/702 and Add.1)

24. **Mr. Bazinas** (International Trade Law Division), introducing the note by the secretariat on possible future work on security interests (A/CN.9/702 and Add.1), said that five proposals had emerged from the discussions of Working Group VI in 2009.

25. In making its first proposal, in topic A, security rights in non-intermediated securities, the Working Group had decided to exclude rights in intermediated securities both on account of the specific issues raised and because the subject matter was covered by the 2006 Convention on the Law Applicable to Certain Rights in respect of securities held with an Intermediary of the Hague Conference and the 2009 Convention on Substantive Rules for Intermediated Securities of the International Institute for the Unification of Private Law (Unidroit) respectively. As those Conventions provided no guidance to States in respect of security rights in non-intermediated securities, the Commission could usefully seek to fill that gap, basing its treatment on the *UNCITRAL Legislative Guide on Secured Transactions*. The proposed work would need to be coordinated with Unidroit,

including with regard to financial markets where the issue of non-intermediated securities needed to be taken into account. The two options for future work were to ask Working Group VI to prepare a text on the topic, possibly as a supplement to the *Guide*, or to leave it for further study by the secretariat.

26. The second proposed topic, B, on the registration of security rights in movable assets, was covered in the *Guide*, particularly chapter III, which needed, however, to be read in conjunction with other chapters. Secured transactions law reform was inconceivable without an efficient registry, which required, in turn, good regulations. Considerable interest had already been shown by the Commission in the topic, on which further work could take the form either of referral to the Working Group with a view to the preparation of a text on registration, or further study by the secretariat.

27. The idea of a model law on security rights in movable assets, topic C, had been mooted in the Working Group, where it had met with a mixed response. Some experts had considered that despite the existence of a European Model Law and a Model Inter-American Law on secured transactions as well as a number of other related regional laws, no model law yet existed on the subject that could apply to every State in the world; however, other experts had felt that the topic should be set aside for the time being, so as to see how far the recommendations in the *Guide* might prove sufficient in that regard. Views on feasibility had also been divided: it had been suggested that it might not be easy to find the necessary agreement to transform recommendations into a model law and that several model laws might be required in view of the different types of security assets. It had been concluded that further study was needed.

28. Turning to proposed topic D, on rights and obligations of the parties to a security agreement, he recalled that an important principle set out in the *Guide* was the principle of party autonomy which required that, barring exceptions, parties might agree on how to address issues arising in a security agreement. They were accordingly in need of guidance in that respect, based on best contractual practices. It was therefore proposed that a text should be drawn up for that purpose, to complement the *Guide*.

29. The fifth proposed topic, E, on intellectual property licensing, was not an aspect of secured transactions law and would therefore not be referred to Working Group VI; it had, however, grown out of discussions within the Group. As no specific law existed on intellectual property contracting, which was at the intersection of intellectual property law and contract law and consequently came under the remit of several organizations, the Commission might take steps to fill that gap. The question was which part of the vast area of law relating to the subject could be addressed by the Commission and within what time frame. Further information was needed in order to determine the best way to proceed; that required further study by the secretariat.

30. He referred in conclusion to the current status of the United Nations Convention on the Assignment of Receivables in International Trade and recalled the Commission's recommendation that all States that had not yet done so should consider becoming parties. The Commission might wish to reiterate that recommendation, take note of the proven usefulness of the *Guide* in the area of secured transactions and request the secretariat to promote the implementation both of the *Guide* and of the Supplement thereto, following its adoption at the current session.

31. **The Chairperson** invited comments on the various topics. The Commission could then consider which were of interest, and then determine in which order of priority to take them up.

32. **Mr. Kohn** (Observer for the Commercial Finance Association) said that the Commission could usefully include in its future workplans the matter of security rights in non-intermediated securities, a category of commercial asset not addressed in the *Guide* but frequently present in transactions as pledges of a borrower's or borrower's subsidiary's shares. Those shares were not intermediated, in other words, they were not traded in a recognized market. Laws on corporate governance, taxation or financial assistance at times made it impossible for a borrower to grant an interest in its own assets, such as receivables, inventory or intellectual property, leaving directly held securities as the only collateral that could be provided to a lender. A supplement to the *Guide*

dealing with security rights in non-intermediated, non-public securities would be extremely valuable, as it would fill the last remaining gap in the *Guide*'s coverage of assets that played a role in commercial financing transactions.

33. **Mr. Umarji** (India) said that the practice of lending against promoter shares not listed on any stock exchange was a common practice among banks. Such transactions were currently treated as if they involved possessory securities, with enforcement rights being exercised also as if they involved possessory securities. The only constraint was that, because the shares could not be sold on the market, they must be sold by private placement. The Commission should ensure that such securities were covered in the *Guide*, though it should take into account the fact that, having carried out work in connection with intermediated securities, Unidroit might take up the matter of non-intermediated securities.

34. **Mr. Morán Bovio** (Spain) said that it was clear from documents A/CN.9/702 and Add.1 that the Working Group and the secretariat had important expertise and experience in a variety of areas. None of the possible topics of future work listed therein could be discounted. While the Commission could attach priorities to those topics, it was for the Working Group to define their actual scope.

35. **Mr. Cochard** (Observer for the Association Française des Entreprises Privées) said that, while he was himself involved in representing the Government of France in the Unidroit discussions on intermediated securities, the association he was representing in the Commission was an issuer of securities and was concerned with the direct rights between issuers and investors. In view of his experience with both bodies, he considered that non-intermediated securities were more an issue for Unidroit, which had worked on the securities issue for a decade already, and could easily extend the scope of its work. The Commission had left non-intermediated securities aside for a number of reasons, including the very specific considerations involved.

36. Moreover, he was concerned that, judging by the explanations given in paragraphs 8 and 25 in particular of document A/CN.9/702, the Commission had not properly grasped some of the

concepts involved. He had had occasion to point out, in previous discussions in the Commission and in Commission colloquiums, that it was inappropriate to assimilate in all cases securities held with intermediaries and indirectly held securities. The link between an investor and an issuer in terms of ownership of a security depended on the jurisdiction. The situations in China, France and the United States of America, for example, were not comparable. The risk of not grasping such concepts properly included a conflict between the recommendations regarding registration in document A/CN.9/702 and the European Union Directive on Financial Collateral Arrangements Directive (2002/47/EC).

37. **Mr. Dennis** (United States of America) said that his delegation agreed with the observer for the Commercial Finance Association on the importance of providing guidance on security rights in non-intermediated securities, and with the representative of Spain on the significance of all the suggested topics for future work. He emphasized, however, that the matter of intellectual property licensing was not related to secured transactions.

38. **Mr. Riffard** (France) said his delegation had concluded, on the basis of documents A/CN.9/702 and Add.1 and the outcome of the Third International Colloquium on Secured Transactions, that there appeared to be no reason not to apply the rules in the *Legislative Guide* to non-intermediated securities. He therefore wondered whether it was worth mobilizing, and consuming the time and energy of, a Commission working group, for one or more years, in connection with an issue which could be coped with simply by means of deletion of a phrase in the *Legislative Guide*: the statement that it did not apply to indirectly held securities. It could be stated that the *Legislative Guide* applied to indirectly held securities subject to the scope of the discussions being conducted by Unidroit. It would seem logical to request the Commission to investigate such an approach and contemplate extending the scope of the *Guide*.

39. **Ms. Hu Shengtao** (China) said that her delegation supported the comment by the observer for the Commercial Finance Association concerning topic A, on security rights in non-intermediated securities. It also agreed that topic E, intellectual

property licensing, was not a secured transaction topic. The other topics could be taken up by the Working Group but, in view of the limited time and resources available, they must be prioritized.

40. **Mr. Dennis** (United States of America) said that his delegation was in favour of retaining all the topics but would like intellectual property licensing to be considered as a separate matter since it did not relate specifically to secured transactions.

41. **Mr. Morán Bovio** (Spain) said that his delegation was in favour of retaining all the topics on the Commission's agenda regardless of the outcome of any future work by Unidroit. Any overlap must be avoided but that did not mean that the Commission should not start work on topics that might be taken up at a later stage by Unidroit.

42. **The Chairperson** noted that it was suggested in document A/CN.9/702, paragraph 42, that the Commission might wish to assign a lower priority to topic A, security rights in non-intermediated securities, in order to allow time for Unidroit to complete its work on the commentary and the accession kit to the Unidroit Securities Convention and to develop further its future work on capital markets. Collaborative efforts between the two bodies might be appropriate in order to ensure that there was compatibility between the *Guide* and the future work of Unidroit. Accordingly, she suggested that the Commission should consider the order of priority of topics B, C and D.

43. **Mr. Dennis** (United States of America) said that his delegation was in favour of according priority to topic B, registration of security rights in movable assets. As noted in paragraph 66 of document A/CN.9/702, secured transactions law reform could not be effectively implemented without the establishment of an efficient publicly accessible security rights registry and the *Guide* did not cover the myriad questions that must be addressed and resolved.

44. **Mr. Umarji** (India) said that his delegation agreed that priority should be given to topic B. Following the finalization of the *Guide*, enacting States would need to modernize their secured transactions laws; since most States already had registration systems it would be very important to

determine how to set up a new system and make it operational.

45. **Mr. Wiegand** (Observer for Switzerland) and **Mr. Tosato** (Italy) expressed support for the comments made by the representatives of India and the United States of America.

46. **Mr. Morán Bovio** (Spain) said that his delegation attached great importance to topic B, not only in relation to the *Guide* and the Supplement, but also because work on the topic would help strengthen the Receivables Convention.

47. **Ms. Umoren** (Nigeria) said that her delegation supported the view that the Commission should not take into account work being carried out by Unidroit; the Commission's task was harmonization of law and it would harmonize its work with Unidroit when the time came. Topic B was very important as, without the establishment of a publicly accessible registry system, the *Guide* itself would be incomplete.

48. **Mr. Son Seung-woo** (Republic of Korea) said that his delegation agreed that priority should be given to topic B.

49. **The Chairperson** said she took it that the Commission considered that the next topic for Working Group VI should be the preparation of a text on registration of security rights in movable assets. She asked whether there was any objection to the guidelines set forth in paragraph 67 of document A/CN.9/702.

50. **Ms. Smyth** (Australia) said that her delegation did not object to the content of that paragraph and supported the views already expressed about according priority to topic B. It was important, however, that any future work by the Commission should not duplicate work already undertaken, and should not conflict with the provisions of the Cape Town Convention on International Interests in Mobile Equipment.

51. **The Chairperson** said that the Cape Town registry was an international registry of a specific nature; it might be more useful for the Commission

to focus on work done in a national or regional context.

52. **Ms. Walsh** (Canada) said that the aircraft registry established under the Cape Town Convention was rather different from a security rights registry; while certain aspects of the operation of the Cape Town registry could provide guidance to the Commission, the security rights registry would be much broader in scope.

53. **Mr. Brennan** (Independent Film and Television Alliance) said that, with regard to topic E, it would be wise to ask the secretariat to prepare a paper on intellectual property licensing so that the Commission would know what such a project would entail.

54. **Mr. Agthe** (International Trademark Association) said that the members of the International Trademark Association had reacted with extreme scepticism to the idea of the Commission's preparing a text on intellectual property licensing. Certain discrete topics might be appropriate for consideration, however, so he agreed that further study might be in order.

55. **Mr. Umarji** (India) said that it was important to determine what kind of property right would be created when a licence was granted and whether the licensee would be able to use such a licence as security for a loan.

56. **Ms. Longcroft** (World Intellectual Property Organization) said that the World Intellectual Property Organization (WIPO) was opposed to the idea of the Commission taking up topic E on intellectual property licensing because of the differentiated nature of technology markets, the complexity and rapidity of developments and the sensitivity of questions related to the licensing of technologies in certain areas and the Commission's lack of expertise to deal with such areas. At a time of limited resources, the challenge was to avoid overlap and find the most efficient way forward.

The meeting rose at 6 p.m.

Finalization and adoption of a draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (*continued*)

**Summary record of the 915th meeting, held at Headquarters,
New York, on Wednesday, 30 June 2010, at 10 a.m.**

[A/CN.9/SR.915]

Chairperson: Ms. Sabo (Canada)

The meeting was called to order at 10.15 a.m.

Possible future work in the area of security interests (*continued*) (A/CN.9/702 and Add.1)

1. **The Chairperson** said that, at the previous meeting, members had shown interest in all the possible future work topics proposed in documents A/CN.9/702 and Add.1. In the case of intellectual property licensing, however, various members and observers, including the representative of the World Intellectual Property Organization (WIPO), had expressed reservations about the Commission's undertaking work on the topic or had suggested that it should be removed from the agenda altogether.

2. **Mr. Hughes** (United States of America) said that, at the previous meeting, the representatives of WIPO and the International Trademark Association had expressed reservations about possible future work on intellectual property licensing, envisaged in the note by the Secretariat (A/CN.9/702/Add.1). Since WIPO was the main United Nations agency with expertise in intellectual property law and policy, the Commission would be well advised to heed its views.

3. The variety of technologies involved in intellectual property licensing would make it impossible to have a meaningful project of the proposed breadth; licensing customs and practices relating, for example, to end-user software were quite different from those relating to feature films or patents in biotechnology. Indeed, an attempt in the United States of America in the 1990s to create a uniform law on intellectual property licensing had been a complete failure, and the lessons learned from that experience would doubtless be applicable to other countries too. His delegation therefore concurred with the views of WIPO and the International Trademark Association that a broad project, as described in document

A/CN.9/702/Add.1, would not be a good use of the Commission's resources.

4. If the topic of intellectual property licensing were to be kept on the Commission's agenda, his delegation could support a comparative project aimed at establishing whether certain specific issues would be appropriate subjects of study for the Commission in the future. The status of intellectual property licences in secured transactions, as referred to by the representative of India at the previous meeting, might be one such subject.

5. **Mr. Tosato** (Italy) said that he agreed with the views expressed by the United States representative and supported the idea of undertaking a comparative project of restricted scope. Within that restricted scope, the aim of identifying a specific market failure or juridical failure in the ambit of a particular licensing practice seemed a reasonable one.

6. **Mr. Morán Bovio** (Spain) said that the Commission should be cautious about removing from its agenda any topic that had not been fully studied. Retaining the topic of intellectual property licensing did not mean that that topic had to be the Commission's first priority; it merely indicated that the Commission considered the topic to be of interest and wished to keep open the possibility of studying it at some point in the future. The specific approach to be taken was a separate issue. The Commission could, for example, explore the possibility of joining forces with WIPO or other relevant United Nations agencies.

7. **Mr. Monardes** (Chile), expressing agreement with the position taken by WIPO, said that the Commission was not the appropriate forum in which to examine questions of intellectual property licensing.

8. **The Chairperson** suggested, in view of the different opinions expressed, and in particular the doubts raised by WIPO, that the Commission should request the secretariat to prepare a feasibility study limited to the specific question of intellectual property licensing in secured transactions, in order to help the Commission decide whether to take it up in the future. The study would be prepared only as resources permitted; that might mean a delay of several years, in view of the Commission's other priorities.

9. **Mr. Bazinas** (International Trade Law Division) asked whether the Commission wished to decide straight away that the scope of the proposed study should be limited to licensee rights as collateral for credit, or whether it wished to mandate the secretariat to conduct a broader study that would allow it to identify and suggest other narrower projects within the area of intellectual property licensing.

10. **Mr. Umarji** (India) said that the secretariat could address any other areas linked to the question of security interests in intellectual property rights that were identified in the course of the study.

11. **Mr. Hughes** (United States of America) said that the scope of the study should be restricted to the specific issue suggested by the Chairperson, since analysis of that issue alone would place heavy demands on the secretariat's resources. For the moment, the secretariat should not seek to identify additional areas for study relating to intellectual property licensing.

12. **Mr. Morán Bovio** (Spain) said that, in line with the approach taken to other topics, the scope of the study on intellectual property licensing should be broad, so that the secretariat had the freedom to identify any issues that might be appropriate for future work. Any attempt to narrow the focus of the study would place artificial limits on it. He understood, however, that it might be some years before resources permitted any study to be conducted.

13. **Mr. Bazinas** (International Trade Law Division) said that, in the light of the concerns that had been expressed, the secretariat would proceed very carefully with the topic at hand and, as already noted, would commence work on a study only as

existing resources permitted. If the secretariat followed its usual practice, it would begin by organizing a seminar or colloquium for the purpose of hearing expert views on the topic before attempting to identify narrow areas on which there was a consensus that future work would be appropriate; equally, the consensus might be that there were no such areas. The question was whether the Commission wished to proceed on that basis or whether it wished to define the scope of the study more narrowly from the start. Noting that the question of licensee rights as collateral for credit was addressed in the Supplement which the Commission had just adopted, he requested clarification as to whether the suggestion that had been made for future work was, essentially, to tackle the topic of intellectual property financing again.

14. **Ms. Walsh** (Canada) said that, as had just been pointed out, the Supplement addressed in detail the way in which the *UNCITRAL Legislative Guide on Secured Transactions* applied to the use of licensee or licensor rights as security. Her delegation therefore questioned whether there was much scope for further work on that subject.

15. **Mr. Hughes** (United States of America) said he had thought that there was some degree of agreement that the use of licensee or licensor rights as security in secured transactions would be an appropriate issue for comparative study and a suitably narrow project. He noted, however, the concerns expressed by the representative of Canada in that regard.

16. He disagreed with the view expressed by the representative of Spain that to narrow the focus of the proposed study would be to impose artificial limits on it. It was quite normal in any research project to set out to answer one central question. Therefore, the central question to be addressed by the proposed study should first be identified; the secretariat might then identify additional issues of interest along the way.

17. With regard to the topic of intellectual property licensing, it was important to establish whether anything needed to be done rather than simply to identify what could be done. Much had been said about the latter question, but little about the former. None of the stakeholder bodies in the field of intellectual property had identified pressing

issues in intellectual property licensing that the Commission should address. Indeed, the only two stakeholder bodies present at the current session had expressed concern about the Commission's embarking on a broad project. His delegation could not, therefore, support such a project.

18. **The Chairperson** said it seemed clear that the Commission needed more information on the topic of intellectual property licensing in order to make a decision about future work. She suggested that the secretariat should go ahead, as resources permitted, with its usual process of arranging meetings of experts in order to gather information for a report to the Commission that would identify specific areas, if any, in which work might be needed.

19. **Ms. Hu** Shengtao (China) said that her delegation favoured that approach.

20. **Mr. Morán Bovio** (Spain) also expressed support for the suggested approach. It was important to have a study on the topic of intellectual property licensing and not to limit its scope.

21. **Mr. Chan** Wah-Teck (Singapore) said, regarding the suggestion in the note by the Secretariat (A/CN.9/702/Add.1, para. 47) that a working group might prepare a text on intellectual property licensing, that, while there were a number of existing instruments in that domain, they all dealt with technical, rather than legal, issues. As observed, intellectual property licensing was at the intersection of intellectual property and contract law.

22. The question must be considered, however, of whether the Commission was the appropriate body to address that lacuna. The Commission's mandate was limited to the harmonization of trade law, as was its expertise, and the World Intellectual Property Organization might be a more appropriate forum. While the Commission had worked on some aspects of intellectual property licensing that fell within its remit, should it address every aspect of the question confusion would ensue within the international system as to which the appropriate forum was.

23. He agreed with the representative of the United States of America that the Commission should focus, not on what could be done, but on what needed to be done; there was, in fact, no

pressing need to address intellectual property licensing at all, let alone for the Commission to do so. Focusing on an area of interest, rather than an area of need, simply meant diverting limited resources.

24. **Ms. Hu** Shengtao (China) agreed that further consideration was needed of whether intellectual property licensing fell within the Commission's mandate. The question could, in fact, be regarded as a form of trade, and thus within the Commission's remit. While WIPO had worked on the question, its focus had been on the rights of owners and the structure for the national and international management of intellectual property. Those aspects did not concern international trade.

25. **The Chairperson** reiterated that, in view of the divergent views expressed, the Commission needed more information. It was clear that the intellectual property community, and Governments, had concerns. The secretariat should be given a mandate to undertake a study and report in due course to the Commission on what, if anything, the Commission might appropriately, suitably and usefully do.

26. **Mr. Chan** Wah-Teck (Singapore) said that the Commission should keep in mind that its work on intellectual property had related to secured transactions, which was patently a trade issue: there was a clear link between secured transactions, intellectual property and international trade. Regarding the proposal for a study, a general study of legal issues concerning intellectual property licensing would be far too wide. The Commission would need to define its scope narrowly.

27. **The Chairperson** said that the study might consider the legal issues relating to intellectual property licensing with a view to identifying specific topics for further work by the Commission. The question currently before the Commission was not that of work to harmonize intellectual property licensing law, but the identification of issues, if any, within that subject area that the Commission might consider.

28. **Mr. Chan** Wah-Teck (Singapore) said that that would merely amount to postponing a decision as to whether intellectual property licensing fell within the Commission's remit. Perhaps the study could be

on the legal issues relating to intellectual property licensing with a view to identifying modalities for the promotion of international trade; it would then fall squarely within the Commission's mandate.

29. **The Chairperson** said that it was a given that the Commission would not undertake work outside its mandate. The real issue was that more information was needed before it could come to a decision on specific work. To that end the secretariat needed to consult experts in the field.

30. **Mr. Umarji** (India) said that licensing was *per se* international trade, and that now it was conducted on a very large scale, particularly with regard to software. It was thus well within the purview of the Commission to undertake a study to identify issues requiring further work.

31. **Mr. Hughes** (United States of America) concurred with the representative of Singapore concerning the scope of a study. Any mandate should focus specifically on what it was useful to do. The experts to be consulted should be practitioners within the intellectual property industries.

32. **Mr. Bellenger** (France) said that initially the views of States might be sought, in writing, regarding the scope of the study. His delegation, for its part, had not yet considered the matter in sufficient depth.

33. **Mr. Bazinas** (International Trade Law Division) expressed his delight that the Commission remained a body mandated to harmonize and unify international trade law by resolving practical issues where there were specific problems that it could address within a reasonable time frame. Considerations of desirability, need, the existence of specific problems and feasibility had guided the Commission's work since its inception. Soliciting the views of States by means of questionnaires was useful to the extent that States responded. If only a few States responded, and only after some time, that did not give a complete picture.

34. A desirability and feasibility study, within existing resources, to identify specific problems of international trade, intellectual property licensing and contract law would cover a further issue at the intersection of the mandates of the Commission and of other organizations, as had been the case with

secured transactions, secured transactions and insolvency, and the Aircraft Protocol of the International Institute for the Unification of Private Law (Unidroit). There were matters where more than one organization might have a mandate and where it was useful for them to cooperate. There would be no encroachment on the mandate of WIPO.

35. **The Chairperson** said that member States should be invited to submit their views on intellectual property licensing. The secretariat would prepare a study, which would allow the Commission to take a decision on the basis of fuller information as to whether or not to proceed.

36. She drew the Commission's attention to section F, Implementation of UNCITRAL texts on secured transactions, of the note by the Secretariat on possible future work on security issues (A/CN.9/702 and Add.1, and stated that the Commission had concluded its consideration of the note.

The meeting was suspended at 11.30 a.m. and resumed at 11.55 a.m.

Finalization and adoption of a draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property (*continued*)
(A/CN.9/XLIII/CRP.1/Add.6-7)

A/CN.9/XLIII/CRP.1/Add.6

37. **The Chairperson** invited the Commission to adopt document A/CN.9/XLIII/CRP.1/Add.6.

38. **Mr. Macdonald** (Canada) recalled that, following its discussion of paragraphs 43 to 47 of document A/CN.9/700/Add.5, the Commission had authorized the Secretariat to make editorial changes. He accordingly suggested the addition of the following sentence before the penultimate sentence of paragraph 18 of document A/CN.9/XLIII/CRP.1/Add.6: "The secretariat was authorized to make the necessary editorial amendments."

39. A/CN.9/XLIII/CRP.1/Add. 6, as orally amended, was adopted.

A/CN.9/XLIII/CRP.1/Add.7

40. **The Chairperson** invited the Commission to adopt document A/CN.9/XLIII/CRP.1/Add.7.

41. **Mr. Deschamps** (Canada) said that, in the options for recommendation 248 listed in paragraph 1, option G, which had been adopted in a revised version, was not set out in the same way as the other options. He suggested the following layout for the revised version of the recommendation included in paragraph 9 and as also reproduced in annex II:

“The law should provide that:

“(a) The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected;

“(b) A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee;

“(c) The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located.”

42. **Mr. Bazinas** (International Trade Law Division) said that, in the third line of paragraph 10, the word “also” had been omitted between “could” and “be” and should be inserted.

43. **Mr. Cohen** (United States of America) said that it was his delegation’s understanding that the Commission had authorized the secretariat to make more extensive changes to the commentary than was suggested by the current wording of paragraph 13. He proposed the following wording for subparagraph (a): “the analysis of possible approaches should be revised to reflect the Commission’s adoption of revised option G and the reasons for that decision;”.

44. **The Chairperson** said she took it that the Commission wished to adopt those amendments.

45. *It was so decided.*

46. A/CN.9/XLIII/CRP.1/Add.7, as orally amended, was adopted.

The meeting rose at 12.15 p.m.

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)

**Summary record of the 916th meeting, held at Headquarters,
New York, on Wednesday, 30 June 2010, at 3 p.m.**

[A/CN.9/SR.916]

Chairperson: Ms. Sabo (Canada)

The meeting was called to order at 3.15 p.m.

**Possible future work in the area of security
interests** (*continued*)

1. **Mr. Bazinas** (International Trade Law Division, Office of Legal Affairs) read out an oral report on intellectual property licensing:

“1. The Commission next considered the topic of intellectual property licensing, a topic at the intersection of intellectual property and contract law. It was widely felt that the Commission did not have sufficient information to make a decision as to the desirability and feasibility of any work on that topic. The Commission, therefore, considered whether to request the Secretariat to prepare a desirability and feasibility study that would identify any concrete needs and suggest specific ways in which they could be addressed by a legal text to be prepared by the Commission with a view to removing any legal obstacles to intellectual property licensing practices hindering the development of international trade.

2. Differing views were expressed as to whether the topic of intellectual property licensing fell within the mandate of the Commission and, as a result, whether the Commission could undertake any work on that topic. One view was that, to the extent that intellectual property licensing involved contract issues and formed an important part of international trade, it was within the mandate of the Commission. Another view was that intellectual property licensing was a purely intellectual property law topic that fell within the scope of work of other organizations, such as WIPO. After discussion, the Commission agreed that intellectual property licensing was an issue at the intersection of intellectual

property and commercial law and thus, while it fell within the mandate of the Commission, any work by the Commission should be undertaken in cooperation with other organizations, such as WIPO.

3. Differing views were also expressed as to the scope of any study to be prepared by the Secretariat. One view was that the study should examine the desirability and feasibility of work on various issues related to intellectual property licensing. It was stated that the outcome of the study should not be prejudged. In that connection, it was observed that the result of the study could well be that work was both necessary and possible on a narrow topic or on no topic at all. In addition, it was pointed out that the Secretariat had experience in the preparation of such studies in the context of a careful, open and considerate process, involving expert group meetings, colloquia and seminars, and had every reason to have confidence that that process would produce the best possible and broadly acceptable result for consideration by the Commission. Moreover, it was said that, as the study would have to be prepared within existing resources and other work had priority, the Secretariat would probably need to take some time to prepare it.

4. Another view was that the study should examine a narrow topic related with secured transactions, such as, for example, whether licensee rights could be used as security for credit and if so, in which rights exactly and under which conditions. It was stated that, in the absence of any specific indication of a concrete need, no work was warranted of a broader scope. It was also observed that experience gained from work on intellectual property licensing at the national level

suggested that such work was not desirable or feasible. In that connection, it was emphasized that issues arising with respect to patent licensing were different from those arising with respect to copyright licensing. It was also pointed out that even within the area of copyright licensing, the issues arising with respect to software licensing were different from those arising in the context of movie or music licensing. In addition, it was said that difficulties would be compounded at the international level in view of the wide divergences existing among the various legal systems. Some doubt was expressed as to whether that topic warranted any future work in particular in view of the work done by the Commission in the draft Supplement.

5. After discussion, the Commission requested the Secretariat to prepare a study, within existing resources, that would identify specific topics and discuss the desirability and feasibility of the Commission preparing a legal text with a view to removing specific obstacles to international trade in the context of intellectual property licensing practices. It was widely felt that the study should establish the concrete needs and appropriate ways in which these needs could be addressed by a legal text to be prepared by the Commission. The study should also carefully identify the suitability and the scope of work to facilitate consideration of the topic by the Commission at a future session. It was also agreed that the Secretariat should consult with experts who had significant experience in intellectual property licensing, both from the public and the private sector, including relevant international organizations, such as WIPO, and consider addressing a questionnaire to States to assess the needs and any possible ways in which those needs could be addressed."

2. **Mr. Hughes** (United States of America) suggested that in paragraph 2, the words "a purely" should be changed to: "more properly viewed as an" since it had already been stated that the topic was at the intersection of intellectual property and contract law; in paragraph 3, the words "had every reason to have confidence" should be changed to "was confident" and that in paragraph 5, the words "those

who rely on the licensing of intellectual property in their own commercial practices, and" should be added after the words "the private sector, including".

3. *The oral report on intellectual property licensing, as amended, was adopted.*

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)
(A/CN.9/XLIII/CRP.1/Add.5)

4. **Mr. Sorieul** (Secretary of the Commission) said that since the adoption of the decision reproduced in section C, paragraph 1 of the addendum to the draft report (A/CN.9/XLIII/CRP.1/Add.5), it had been pointed out that it would be worth drawing attention to the value of the UNCITRAL Arbitration Rules in the context of activities for the promotion of the rule of law. To that end, a new preambular paragraph could be added after the fourth preambular paragraph which would read: "*Mindful* of the significant contribution of the UNCITRAL Arbitration Rules in the strengthening of the rule of law in international commercial relations as well as in certain relations involving States" and, at the end of the seventh preambular paragraph, the following words could be added: "and to the continuous strengthening of the rule of law".

5. **Mr. Bellenger** (France) said that his delegation had had the impression that delegations had some hesitations about the idea of the Working Group taking up the issues referred to in part E, paragraph 5; he therefore proposed that the words: "should also undertake" should be amended to read: "could consider undertaking". His delegation was not in favour of referring in the draft decision to the strengthening of the rule of law since that issue was related more closely to domestic law.

6. **Mr. Tosato** (Italy) said that his delegation felt that the draft report should reflect the content of the discussion that had taken place; it was therefore surprised that amendments were being proposed that appeared to concern the substance of the discussion.

7. **Mr. Chan** (Singapore) suggested that consideration of the report should be deferred until the end of the following week so as to allow time for consultations. His delegation strongly disagreed

with the comment by the representative of France about the rule of law which, it believed, was even more applicable to inter-State relations than domestic law since otherwise might would prevail over right and the strong over the weak.

8. **The Chairperson** said that, in view of the fact that document A/CN.9/XLIII/CRP.1/Add.5 had only just been issued, the Commission would defer consideration of it until the following week.

The meeting rose at 4.05 p.m.

Finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency

**Summary record of the 917th meeting, held at Headquarters,
New York, Thursday, 1 July 2010, at 10 a.m.**

[A/CN.9/SR.917]

Chairperson: Ms. Sabo (Vice-Chairperson) (Canada)

later: Mr. Wisitsora-at (Vice-Chairperson) (Thailand)

The meeting was called to order at 10.15 a.m.

Election of officers (*continued*)

1. **The Chairperson** said that the delegation of Japan, on behalf of the Asian Group, seconded by the delegation of Singapore, had nominated Mr. Wisitsora-at (Thailand) for the office of Vice-Chairperson of the forty-third session of the Commission.

2. *Mr. Wisitsora-at (Thailand) was elected Vice-Chairperson by acclamation and took the Chair.*

Finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency (A/CN.9/699 and Add.1-4, and A/CN.9/708; A/CN.9/WG.V/WP.92 and Add.1)

3. **Ms. Clift** (International Trade Law Division) said that the Commission had before it documents A/CN.9/WG.V/WP.92 and Add.1, which set out the draft commentary and recommendations of part three of the Legislative Guide on Insolvency Law, along with document A/CN.9/708, which set forth amendments and additions to that draft, and a number of other documents containing comments by States and intergovernmental and non-governmental organizations (A/CN.9/699 and Add.1-4).

Document A/CN.9/WG.V/WP.9

4. **The Chairperson** said that, if he heard no objection, he would take it that the Commission wished to adopt document A/CN.9/WG.V/WP.92, as revised by document A/CN.9/708.

5. **Ms. Clift** (International Trade Law Division) drew attention in particular to the expanded text proposed in the revised text for paragraph 26.

6. *Document A/CN.9/WG.V/WP.92, as revised by document A/CN.9/708, was adopted.*

Document A/CN.9/WG.V/WP.92/Add.1

7. **Mr. Boulos** (Egypt) suggested that, in the third line of paragraph 28, the word “may” should be replaced by “will”, since, once a communication was recorded, it must necessarily form part of the record.

8. **The Chairperson** said that, to his recollection, “may” had been adopted as a compromise: in some countries, communications were not required to form part of the record. If the word were changed in that paragraph, it would also have to be changed in paragraph 243 (d).

9. **Mr. Cooper** (Observer for the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)) said that at the judicial colloquia it had been reported that in some jurisdictions there was concern about the status of court-to-court communications. The consensus seemed to be that where there were parallel proceedings in two jurisdictions, as opposed to joint hearings, recordings would be made in accordance with the rules of the courts of those jurisdictions. The original wording was therefore to be preferred.

10. **Mr. Lifland** (United States of America), supported by **Mr. Ghia** (Italy), said the issue was a domestic one, determined by each country. The wording should therefore be left unchanged so as to ensure the maximum flexibility.

11. **The Chairperson** said that he took it that there was no support for the Egyptian proposal.

12. **Ms. Clift** (International Trade Law Division) said that changes had been proposed by the Working Group following its review of the document. At the

end of recommendation 242, after “members of that enterprise group”, and at the end of recommendation 248, after “enterprise group”, the words: “to facilitate coordination of those proceedings” should be added; and in paragraph 243 (c), the words “and claims” should be deleted.

13. **The Chairperson** said he took it that the Commission agreed to those changes.

14. *Document A/CN.9/WG.V/WP.92/Add.1, as revised by A/CN.9/708 and as orally amended, was adopted.*

The meeting was suspended at 11.15 a.m. and resumed at noon.

Draft decision on adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law (A/CN.9/XLIII/CRP.6)

15. **The Chairperson** drew attention to the draft decision contained in document A/CN.9/XLIII/CRP.6, which, once adopted, would be reproduced in part three of the Guide.

16. **Mr. Morán Bovio** (Spain), referring to the Spanish version of the text, said that the word “quebrar” in the third preambular paragraph might not be the most appropriate word for the English term “fail”.

17. **Mr. Bellenger** (France), referring to the French version of the text, said that the expression “sujet de droit” in the fourth preambular paragraph should be replaced with an expression such as “entité juridique”, which was closer to the term “legal entity” used in the English text.

18. **The Chairperson** suggested that the secretariat should be requested to adjust the French and Spanish versions of the text accordingly.

19. *It was so decided.*

20. **Mr. Redmond** (United States of America) suggested adding a new paragraph 5 along the following lines: “*Recommends also* that all States consider the implementation and use of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.”

21. **Mr. Morán Bovio** (Spain), welcoming the United States proposal in principle, said that the

Practice Guide could not be “implemented” as such because it was not a text that gave rise to legislative initiatives; rather, it was intended to be used as a basis for negotiations between parties to cross-border insolvency proceedings. It might be better simply to draw attention to the Practice Guide or to recommend that States should take it into consideration where appropriate.

22. **The Chairperson** suggested that the wording of the proposed new paragraph should be based on paragraph 3 of General Assembly resolution 64/112, in which the Assembly recommended that the Practice Guide should be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings.

23. **Mr. Oh Soo-geun** (Republic of Korea) expressed support for the inclusion of an additional paragraph, provided that appropriate wording could be found. Perhaps it would be acceptable to refer to “use” of the Practice Guide.

24. **Ms. Leblanc** (Canada) said that her delegation supported the United States proposal but shared the concerns expressed by the representative of Spain. She proposed the following wording for a new paragraph 5: “*Recommends also* that all States continue to consider encouraging reference to and use, where practicable, of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.”

25. **Ms. Sanderson** (United Kingdom), supported by **Ms. Smyth** (Australia), agreed that it was important to take the opportunity to remind States of the existence of the Practice Guide. Her delegation favoured wording based on resolution 64/112, as suggested by the Chairperson.

26. **The Chairperson** suggested the following wording for the proposed new paragraph 5: “*Recommends also* that the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation continue to be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings.”

27. **Mr. Redmond** (United States of America) expressed support for that suggestion.

28. *The draft decision contained in document A/CN.9/XLIII/CRP.6, as amended, was adopted.*

Possible future work in the area of insolvency law (A/CN.9/582/Add.6, A/CN.9/691 and A/CN.9/709; A/CN.9/WG.V/WP.93 and Add.1-6)

29. **Ms. Clift** (International Trade Law Division) said that Working Group V, in its report on its thirty-eighth session (A/CN.9/691), had recommended that activity should be initiated on two insolvency topics: a proposal by the United States of America on the Model Law on Cross-Border Insolvency relating to the centre of main interests and the development of a model law on insolvency (A/CN.9/WG.V/WP.93/Add.1); and proposals by the United Kingdom (A/CN.9/WG.V/WP.93/Add.4), the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International) (A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (A/CN.9/582/Add.6) concerning the responsibility and liability of directors and officers in insolvency and pre-insolvency cases. The Working Group had also suggested that the secretariat might be requested to monitor work on cross-border insolvency in the case of large financial institutions. Switzerland had submitted a proposal in that connection (A/CN.9/709).

30. **Mr. Burman** (United States of America) noted that the proposals put forward in Working Group V on directors' and officers' liabilities, and that put forward by his own delegation on international insolvency law, had met with widespread support. His delegation supported the recommendations made in that regard.

31. **Mr. Schoefisch** (Germany) said that the responsibility and liability of officers was a matter of liability law rather than insolvency law, and therefore should not be a topic of discussion in the Commission. However, his delegation supported the United States proposal regarding the centre of main interests, and the possible development of associated principles.

32. **Mr. Morán Bovio** (Spain) said that his delegation fully endorsed the views expressed by the representative of Germany. It was difficult to determine the scope of the responsibility of directors and officers in general and in situations of insolvency in particular. It was not possible to

consider the situation only at the time of bankruptcy, it would need to be considered over some indeterminate time frame prior to insolvency, during which the responsibility of directors and officers would also need to be considered, as being just as great as during insolvency. It would be difficult to determine the limits. However, his delegation saw merit in the United States proposal.

33. **Mr. Kuhn** (Observer for Switzerland) noted that his delegation's proposal for a study on insolvency affecting large financial institutions had not thus far generated sufficient support for inclusion in the Commission's agenda, and that the attendant policy issues were under consideration in other bodies. The proposal was for a study focusing on cross-border cooperation, as essential for the orderly resolution of such cases. The normal approach to such cooperation would be to conclude a treaty on insolvency measures, but that did not appear feasible at the global level, so that the study should look at alternative means. The study should be confined to technical issues. While policy issues were better dealt with elsewhere, such as in the Basel Committee on Banking Supervision, the Commission was the only body competent to consider the technical aspects, and had an important role to play in an issue of vital concern.

34. **Ms. Sanderson** (United Kingdom) said, with regard to the comments on directors' duties, that a company did not necessarily become insolvent on the day it made a formal declaration of insolvency. A company was likely to be effectively insolvent before any formal declaration of insolvency was made.

35. In reality the duty of the directors and officers to behave responsibly, and to have regard not only for the interests of shareholders but also of creditors, was all the more important as a company approached insolvency, even if formal insolvency proceedings had not yet begun. That meant that prior to formal insolvency directors and officers should take account of the interests of creditors, and that it was a matter that the Commission could usefully consider, including by defining the point at which a business became insolvent and by setting limits on the actions of directors, in the interest of better behaviour within the business community.

36. **Ms. Smyth** (Australia) said that her delegation supported Working Group V's recommendations that

work should proceed on the United Kingdom and United States proposals; in that regard, she endorsed the remarks made by the representative of the United Kingdom. The liability of directors and officers was a particularly important topic, and constituted a fundamental aspect of insolvency frameworks. Companies should be encouraged to enter into insolvency administration at an appropriate juncture if such frameworks were to be successful.

37. **Mr. Cooper** (Observer for the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)) said that the importance of restructuring had never been greater. Most countries had legislation providing for the restructuring of financially troubled companies. Effective use of such laws required insolvency proceedings to be started as early as possible, when more options were available. In practice, it was often left to creditors to commence what were liquidation proceedings, because directors had failed to act. One highly undesirable development was that directors “forum shopped”, commencing proceedings in jurisdictions with less onerous requirements. The issue of directors’ obligations when a company was becoming insolvent certainly fell within the purview of the Commission.

38. **Mr. Mokai** (World Bank) said that while the World Bank supported both the United States and United Kingdom proposals, it had a particular preference for the latter in the context of its work in developing and emerging markets. In virtually all the jurisdictions in which the World Bank was engaged, the issues touched on by the representative of INSOL International were key. It was essential for legal systems to create incentives for directors and officers to take the right steps at the right time, and the proposals on liability put forward by the United Kingdom were highly relevant. It would assist the World Bank in its own work of suggesting improvements in legislation on liability if the Commission laid down standards on international best practice in that domain.

39. Regarding the Swiss proposal, it was crucial to ensure coherence and harmonization in the treatment of bank resolutions. However, the World Bank had reservations about the timing of the proposal, and the appropriateness of the Commission as a forum.

40. Regarding timing, in many jurisdictions insolvency of enterprises was dealt with by a specialist government department, whereas bank resolutions were dealt with by the banking regulator, typically the central bank. Yet central banks were, and in the immediate future would remain, heavily engaged in stabilizing the financial and banking sectors. To request their participation in consideration of bank resolutions would be an excessive demand. Moreover, other institutions, the World Bank and the International Monetary Fund (IMF) in particular, were seeking to ensure coordination among banking regulators, identify best practice and formulate guidance. For the Commission to embark on consideration of the topic at the current juncture might well prove an obstacle to their work. Thus, while the topic was important, and the Commission had a role to play in due course, the Swiss proposal was inopportune.

41. **Ms. Liu Yan** (International Monetary Fund) said that IMF supported the proposals put forward by the United States and the United Kingdom. Regarding the Swiss proposal, there was a need for international action on cross-border bank insolvency arrangements. However, several bodies were engaged in that area, including IMF itself. The Commission, though, had a comparative advantage in many aspects, including private law issues, and could make an important contribution to the development of an international framework for cross-border bank resolution. The various proposals being put forward in different bodies were still at an early stage, and it would be premature to delineate the Commission’s role. IMF, and other bodies, were about to submit proposals to the Group of Twenty. Further discussion of the principal features of an international resolution framework was necessary to determine the way forward.

42. **Mr. Ghia** (Italy) said that his delegation supported the United Kingdom and United States proposals. Misconduct and malpractice by directors and officers had an international impact, and had resulted in thousands of redundancies worldwide in recent years. Guidance by the Commission on insolvency, on when and how to replace company directors and officers, and on restructuring, was of vital importance in international insolvency and in avoiding forum shopping.

The meeting rose at 1 p.m.

**Summary record of the 918th meeting, held at Headquarters,
New York, Thursday, 1 July 2010, at 3 p.m.**

[A/CN.9/SR.918]

Chairperson: Mr. Wisitsora-at (Thailand)

The meeting was called to order at 3.15 p.m.

Possible future work in the area of insolvency law
(*continued*) (A/CN.9/709; A/CN.9/WG.V/WP.93 and
Add.1-6)

1. **Mr. Tysebaert** (Observer for Belgium) said that his delegation could support the proposal by the United States of America (A/CN.9/WG.V/WP.93/Add.1), particularly regarding determination as to the location of the Centre of Main Interest (COMI), an issue which gave rise to many disputes and in respect of which a more harmonious approach was needed. His delegation had reservations about taking up the question of directors' and officers' responsibilities. Although that issue was undeniably important, there was a risk that discussion would move into very different areas such as good governance, civil liability and criminal law. If the Commission decided to take up the issue, it must clearly delineate the mandate of the Working Group. As to the Swiss proposal (A/CN.9/709), that issue was being considered by other bodies and the Commission should await the outcome of their work before taking it up.

2. **Mr. Bellenger** (France) said that his delegation had reservations about the United States proposal; insolvency law issues had been considered many times in the past and it was not clear whether the Working Group would be able to advance beyond the Model Law on Cross-Border Insolvency or the regulations developed by the European Union. The issues were so delicate that it would be difficult to achieve satisfactory results; in the absence of innovative ideas, it might be better to avoid them.

3. His delegation could support the proposal to take up the question of directors' and officers' responsibilities since that was a fairly new concept. It could also accept the Swiss proposal for the preparation of a study on the feasibility of an instrument regarding the cross-border resolution of large and complex financial institutions. Even if other bodies were working on the topic, the Commission could also develop its views.

4. **Mr. Soo-Geun Oh** (Republic of Korea) said that his delegation believed that the topics proposed by the United States of America and by the United Kingdom were both worthy of consideration. In terms of the feasibility of undertaking work on them, however, he observed that while the question of COMI was of universal concern, the question of directors' and officers' responsibilities might be excluded in some jurisdictions so that there could be controversy as to whether it should be taken up by the Working Group. His delegation therefore believed that priority should be given to the United States proposal.

5. **Mr. Burman** (United States of America) said that many of the successful and effective products developed by Working Group V and adopted by the Commission had been very difficult at the outset; his delegation did not believe that its proposal was too complex for the Commission to undertake.

6. While some aspects of the topic of directors' and officers' responsibilities would not be relevant or appropriate for consideration by the Commission, those aspects would not be included in the work. His delegation supported the Swiss proposal for the preparation of a study, which would indicate the extent to which there might be a need for the elaboration of general principles being developed by other bodies. The study should be carried out when resources became available, and the secretariat might wish to invite expert groups to participate in the work.

7. **Mr. Morán Bovio** (Spain) said that the Commission needed to determine whether directors had specific duties in relation to insolvency; if there were no such duties, the Commission would have to consider all the duties of directors. If the Commission wished to define the duties of directors in certain circumstances it would have to revisit the Legislative Guide, in particular recommendations 16 to 18. Accordingly, his delegation believed that there

was no justification for the Working Group to take up the issue.

8. **Mr. Chan** (Singapore) said that while, in some countries, the liability of directors to be disqualified arose only in connection with insolvency proceedings, in other countries, including Singapore, such liability arose in many other contexts, for example, failure to exercise due diligence, which could give rise to disqualification and other civil and criminal liabilities. If the Working Group was to address the general issue of the civil and criminal liabilities of directors it would be going well beyond its mandate. The liabilities of directors under civil and criminal law and disqualification, which was quasi-criminal in nature, were all governed by domestic law so it was hard to see how it would be possible to determine liability on a transnational basis.

9. **Ms. Sanderson** (United Kingdom) said that the Commission would have to be careful to consider directors' duties only in relation to insolvency; paragraph 16 of her delegation's proposal clearly referred to directors' and officers' responsibilities and liabilities in insolvency, including prior to entering formal insolvency proceedings, not to their general duties. That was a very important area of work which was much needed within the international community. As to the view that liability was a domestic issue, her delegation believed that provisions were needed to ensure that directors took responsibility for their conduct and that any liability or restrictions that might apply to that conduct also applied across borders and potentially internationally.

10. **Mr. Cooper** (International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)) said that the United Kingdom proposal clearly concerned only the duties of directors during and immediately prior to insolvency and would not involve issues of criminal law. Clarification was needed about such issues as the obligation of directors to commence insolvency proceedings and liability for wrongful trading and losses to creditors. The threat of liability was a powerful tool in relation to restructuring, which also fell within the Working Group's mandate.

11. **Ms. Leblanc** (Canada) said that the issue raised in the United States proposal was very

complex; it was hard to envisage how the current uncertainties could be overcome. Her delegation supported the proposal regarding directors' and officers' responsibilities; since the work would be carried out by the Working Group on Insolvency, it would clearly be confined to that context. With regard to the Swiss proposal, her delegation would not object to the preparation of a study but believed that the work should be undertaken only when the work of other international organizations had been completed or was sufficiently advanced for duplication to be avoided. In view of the limited resources available, the question of directors' and officers' responsibilities should take precedence over the study proposed by Switzerland.

12. **Ms. Rogne** (Norway) said that her delegation believed that neither topic should be excluded from further consideration by the Working Group; the discussions in the Commission demonstrated that both issues deserved further consideration. The Working Group should be given the flexibility to decide on the scope of its work.

13. **Mr. Chan** (Singapore) said that even if the scope of the work was confined to insolvency, the Working Group would also have to consider the period prior to insolvency, and in both cases, other liabilities of directors and officers would apply, so there was clearly an overlap with general duties. If the liability of directors or officers was to be enforced in different jurisdictions, issues of criminal law, and of the extraterritoriality of criminal laws, would arise; those issues went beyond the Commission's mandate.

14. **Mr. Schoefisch** (Germany) said that, in his view, the Swiss proposal was not a priority for the immediate future. On the United Kingdom proposal, his delegation believed that the Working Group should focus exclusively on liability with respect to insolvency.

15. **Mr. Ghia** (Italy) agreed that the topic of liability of directors should be kept within the context of insolvency. While the centre of main interest was an important topic that was well known in the European context, the subjects proposed by the United Kingdom and INSOL were of even greater importance, as they related to situations that could have major consequences for people all around the world.

16. **Mr. Mokal** (World Bank) said he wished to reassure the representatives of Spain and Singapore that it was possible to maintain a distinction between criminal law and civil liability in respect of the responsibilities of directors and other officers. A further distinction should be made between the commencement of formal insolvency proceedings, on the one hand, and the occurrence of factual insolvency, on the other. The latter often happened first. In the period between the two, directors should have specific responsibilities to creditors and indeed many legal systems attached great importance to their obligation to take into account the interests of creditors. In that connection numerous practical questions arose as to, for example, the circumstances that would trigger the duty of directors to take into account the interests of creditors in addition to those of shareholders and whether directors owed such a duty to the creditors as a group, to only some creditors or to the company. Such questions had a crucial impact on the incentives of directors of distressed companies and the ability of insolvency representatives to conduct insolvency proceedings. There was therefore much for the Working Group to consider from the strict perspective of insolvency.

17. **Ms. Sanderson** (United Kingdom) said it was not her delegation's intention that liability under criminal law should be discussed. The Working Group should endeavour to determine when insolvency occurred and at what moment might directors become liable. Some rules were in place in different countries and it would be beneficial to exchange experiences with a view to identifying best practices.

18. **Mr. Soo-Geun Oh** (Republic of Korea) said that in many jurisdictions the liability of directors was dealt with in corporation law, criminal law or civil law. His delegation believed that, instead of tackling such a difficult issue, the Working Group should take up the issue of the centre of main interest.

19. **Ms. Lim Ai Nei** (Singapore), referring to the first sentence in paragraph 6 of document A/CN.9/WP.93/Add.3, said she did not see how the concerns of individual directors with regard to their personal liability fell within the purview of

UNCITRAL. She emphasized the importance of delineating the issue clearly and narrowly.

20. **Ms. Smyth** (Australia) said her delegation was confident that the Working Group could deal appropriately with the issue of directors' liability, focusing on civil liability in insolvency and pre-insolvency. She welcomed the flexibility shown by other delegations and expressed the conviction that countries could benefit greatly from each other's experience in dealing with the matter.

21. **Mr. Morán Bovio** (Spain) urged the members of the Commission, before they took a decision to undertake work on the liability of directors and other officers, to consider the practical difficulties of dealing with the topic.

22. **The Chairman** said that the discussion showed that the United States and Swiss proposals enjoyed clear support. With regard to directors' liability, while a majority supported work on the topic, there was also a consensus that the consideration of criminal law aspects should be avoided. The mandate for that topic should therefore be linked directly to insolvency and not to general fiduciary duties.

23. **Mr. Chan** (Singapore) said that the mandate of the Working Group must make it clear that criminal law issues were not to be considered. Addendum 4 to the working paper (A/CN.9/WP.93/Add.4) did place emphasis on criminal liability, and he therefore welcomed the clarification provided by the representative of the United Kingdom.

24. **Ms. Clift** (International Trade Law Division) said that the secretariat wished to seek the approval of the Commission for a project it had in mind to undertake. In the judicial colloquia on insolvency that UNCITRAL had held, judges often expressed their desire to have guidance on cross-border issues and on how the Model Law on Cross-Border Insolvency operated. With the assistance of a high court judge from New Zealand, the secretariat had drafted a paper setting forth judicial perspectives on the interpretation of the Model Law. The secretariat wished to consult on the paper with judges and insolvency practitioners in order to bring it to the stage where it could be considered by the Working Group. Consideration of the paper in the Working Group should take only a few hours during one of its

sessions; thereafter the paper could be referred to the Commission for endorsement. A Practice Guide could be addressed to practitioners and another text to judges.

25. **Mr. Lifland** (United States) strongly endorsed the project proposed by the secretariat. Specialty judges in the United States would welcome a primer on the subject, which would provide clarity and benefit judges worldwide.

26. **Mr. Cooper** (International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)) said that guidance on the subject of cross-border insolvency would be of enormous value. He mentioned that the next judicial colloquium on insolvency would be held in Singapore in March 2011.

27. **Mr. Morán Bovio** (Spain) supported the secretariat's proposal.

28. **Ms. Smyth** (Australia) requested clarification on the decision with regard to the Swiss proposal. Her delegation had concerns about the timing of work and understood that the study would be carried out subject to the available resources.

29. **Ms. Clift** (International Trade Law Division) said that the secretariat's resources would not permit work on the Swiss proposal to be completed in time for the December session of the Working Group. It might be possible to produce something for the following year. It would be useful to wait to see whether work being carried out on the same topic by other organizations, such as the Group of 20, would come to fruition before the end of the year.

30. **Mr. Burman** (United States) said he was comfortable with the secretariat's explanations. Work on the topic proposed by Switzerland should be subject to the available resources and other established priorities. It was not even critical to have a final product on the topic by the Commission's next session. There should be effective coordination and collaboration with other international bodies such as IMF and the World Bank.

31. **The Chairman** said that the discussion and conclusions would be reflected in the draft report on the item, which would be taken up at the next meeting.

The meeting rose at 4.35 p.m.

Finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency (*continued*)

**Summary record of the 919th meeting, held at Headquarters,
New York, on Friday, 2 July 2010, at noon**

[A/CN.9/SR.919]

Chairperson: Mr. Wisitsora-at (Thailand)

The meeting was called to order at 12.10 p.m.

Finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency (*continued*)

Draft report on part three of the UNCITRAL Legislative Guide on Insolvency Law
(A/CN.9/XLIII/CRP.1/Add.8, sects. A and B)

1. **The Chairperson** said he took it that the Commission wished to adopt the section of the draft report on its consideration of draft part three of the UNCITRAL Legislative Guide on Insolvency Law (A/CN.9/XLIII/CRP.1/Add.8, sect. A) and the section setting out its decision thereon (A/CN.9/XLIII/CRP.1/Add.8, sect. B).

2. *It was so decided.*

Possible future work in the area of insolvency law (*continued*)

Draft report on the Commission's consideration of possible future work in the area of insolvency law
(A/CN.9/XLIII/CRP.1/Add.8, sect. IX)

3. **Mr. Schoefisch** (Germany) said that it should be made clear in paragraph 8 that there had been some disagreement on the proposal of the United Kingdom, as distinct from the United States proposal. He therefore suggested the insertion in the first sentence of the words “, especially on the proposal of the United Kingdom, which was considered more controversial,” after “After discussion”.

4. **Ms. Sanderson** (United Kingdom) said that any such addition would be more appropriately placed in subparagraph (b) of paragraph 8. She accordingly suggested inserting “In the light of concerns raised during extensive discussion,” before

“[t]he Commission agreed” at the beginning of the last sentence of that subparagraph.

5. *It was so decided.*

6. **Mr. Bellenger** (France) said it should be indicated that some States had expressed reservations about the United States proposal, on account of the complex and uncertain nature of the work on insolvency law envisaged. Moreover, he had no recollection of any mention of the possible form of the result of such work. He therefore suggested deleting all the words following “centre of main interests” in the fourth line of subparagraph (a).

7. **Mr. Burman** (United States of America) said that the suggestions of the French delegation were not appropriate for a final report. The recommendation had been adopted unopposed by Working Group V. If there was to be any mention of reservations regarding the United States proposal, it should be made clear that a delegation, not some delegations, had reservations thereon.

8. **Mr. Oh Soo-geun** (Republic of Korea) and **Mr. Morán Bovio** (Spain) expressed support for the current wording.

9. **Mr. Bellenger** (France) said that he withdrew his suggestions.

10. **Mr. Boulos** (Egypt) said that, in the fourth line of paragraph 10, the word used for “guidance” in the Arabic version, namely “twajihat”, carried a connotation of orders from a higher authority. He suggested replacing it by “irshadat”, which was closer in meaning to the English word.

11. *It was so decided.*

12. **Mr. Burman** (United States of America) suggested adding the following at the end of paragraph 10, before the final full stop: “; and it was

anticipated that coordination would be sought between the secretariats of interested international organizations.”

13. *It was so decided.*

14. *Document A/CN.9/XLIII/CRP.1/Add.8, as orally amended, was adopted.*

The meeting rose at 12.30 p.m.

**Summary record (partial)* of the 920th meeting, held at Headquarters,
New York, on Tuesday, 6 July 2010, at 10 a.m.**

[A/CN.9/SR.920]

Chairperson: Mr. Sandoval (Chile)

* No summary record was prepared for the rest of the meeting.

The discussion covered in the summary record began at 10.25 a.m.

Current and possible future work in the area of electronic commerce (A/CN.9/692)

1. **Mr. Sorieul** (Secretary of the Commission) said that, since the adoption in 2005 of the United Nations Convention on the Use of Electronic Communications in International Contracts, the Commission had not worked on matters relating to electronic commerce, but had continued its cooperation with the World Customs Organization (WCO). There were a number of topics relating to electronic commerce that the Commission might now wish to consider.

2. **Mr. Lee Jae Sung** (International Trade Law Division), introducing the note by the Secretariat on present and possible future work on electronic commerce (A/CN.9/692), recalled that the Commission had requested the secretariat to follow legal developments in the area of electronic commerce, in particular the legal aspects of implementing a cross-border single window facility, and to prepare studies on electronic transferable records.

3. The Commission might wish, in its Working Group IV on electronic commerce, to review progress by the Joint Legal Task Force on Coordinated Border Management of the World Customs Organization and the Commission on single window facilities. With regard to electronic transferable records, the Commission had requested the secretariat to prepare studies in the light of the proposals submitted by the United States of America (A/CN.9/681 and Add.1) and Spain (A/CN.9/682). In that connection, the Republic of Korea had introduced legislation enabling the use of electronic bills of lading. The Commission might now wish to consider whether that topic should be referred to

Working Group IV. The complexity of the issue was such that it might be helpful to organize a colloquium in late 2010 in preparation for a session of the Working Group in 2011.

4. Identity management had attracted attention as a promising means of authentication in the context of trusted remote relations. The use of mobile devices was becoming a powerful tool for financial transactions, especially in developing countries. The Commission might consider whether further studies of those two areas should be conducted by the secretariat.

5. **Mr. Loken** (United States of America) said that his delegation supported the convening of a colloquium, in particular to consider the closely related topics of electronic single window facilities, electronic transferable records and identity management. Discussion at a colloquium would help to define the work of the Working Group.

6. There had been progress on the single window mechanism in international and domestic commerce to an extent that rendered its consideration by the Commission appropriate and timely, within the broader context of electronic transferable records.

7. He welcomed the provision of information on the new legal framework in the Republic of Korea; it would provide a template for work on electronic bills of lading, as one aspect of transferable records. Electronic bills of lading were long overdue, and could greatly improve the efficiency of trade and commerce.

8. Identity management involved several of the issues dealt with by the Commission in the Model Law on Electronic Commerce, and was inextricably linked with electronic transferable records and single window mechanisms.

9. **Mr. Oh Soo-geun** (Republic of Korea) said that his delegation supported the suggestions in the

note on possible future work. With the rapid changes brought about by the application of information technology to commerce, it was important for the Commission not to delay. A colloquium, in fall 2010, would be helpful in identifying issues and establishing priorities.

10. **Mr. Morán Bovio** (Spain) said that his delegation did not agree with the previous speakers: the four topics covered in the note were completely distinct from one another. Moreover, the electronic registry system introduced in the Republic of Korea was diametrically opposed to the earlier proposals by his delegation for an electronic record subject to control.

11. He recalled in that connection that the question of electronic bills of lading had been definitively resolved by the adoption of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”), which the European Parliament had recently recommended for implementation. For the Commission now to pursue proposals on bills of lading based on the Korean model of a registry as outlined in the note would amount to taking two different positions on a fundamental element of international commerce, as the Rotterdam Rules were not compatible with that model, which represented a different system.

12. His delegation could not support any such proposals — they would, in effect, torpedo the Rules. In practice, States might well suspend implementation of the Rules pending the Commission’s deliberations.

13. The Korean model might provide a possibility in respect of single electronic transferable records, such as electronic promissory notes or bills of exchange, rather than bills of lading. The Commission would, however, need to decide between a registry and a control system.

14. The secretariat should separate out the various components of the note. The separated components could be considered individually, for example, in the case of the single window facility, in cooperation with the World Customs Organization, which had also yet to finalize its views.

15. The Commission could then consider further the concept of a single transferable electronic record

that could serve as a means of payment. As matters stood, the question could not be referred to a working group, or even to a group of experts, since it would similarly have to tackle the issue of a registry or control system. The Commission might revert to the topic at a later session, and perhaps consider both systems, but they must be kept separate.

16. The Commission was in the vanguard of electronic commerce. It must avoid any confusion in dealing with that vital issue if it was to continue to render the same level of service and maintain its leadership position.

17. **Mr. Maradiaga** (Honduras) said that his Government had ratified the United Nations Convention on the Use of Electronic Communications in International Contracts, though had yet to deposit the instrument of ratification owing to domestic political considerations.

18. The issues before the Commission were topical and important. In his view, they could be taken up by the Working Group, and the various points raised discussed on the basis of thorough analysis. That would allow the Commission to follow its traditional approach of devising a norm that would meet with universal acceptance. His delegation could accept the suggestions before the Commission.

19. **Ms. Sabo** (Canada) noted that the issues in question had come before the Commission before. Regarding the single window, the secretariat should continue to monitor the situation, and, in due course, the Working Group on electronic commerce could consider the results produced by the Joint Legal Task Force and provide input to the Commission.

20. The other topics presented in the note, however, posed difficulties for her delegation. Regarding electronic transferability of records, there was not sufficient commonality among the different areas involved for work on a broad project to be undertaken. The topic needed to be narrowed down. It was important for the Working Group on electronic commerce to have a clearly defined and circumscribed mandate. Resources were not available for unfocused discussion prior to the identification of specific tasks.

21. While identity management and use of mobile devices were of interest, not enough information was available to justify consideration by the Working Group.

22. The secretariat should organize a colloquium covering a number of electronic commerce topics, refine the results with a meeting of experts, then come back to the Commission in 2011 with more specific proposals, which the Commission would then prioritize.

23. **Ms. Lim Sai Nei** (Singapore) expressed her delegation's support for consideration of electronic transferable records and for the holding of a colloquium. The points raised by the representative of Spain could be discussed then.

24. **Mr. Bellenger** (France) said that his delegation had reservations concerning the note on possible future work. The question of single window facilities seemed to fall within the purview of the World Customs Organization, whose intentions were not known to the Commission. Electronic transferable records had already been discussed on prior occasions, most recently in the drafting of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, and was a closed topic.

25. He wondered whether the intent was to establish new working groups to consider the issues raised, including online dispute resolution. That would impose a burden on the secretariat; it would be better to refer the issues to one group.

26. **Mr. Schoefisch** (Germany) agreed that it was important for the Working Group to have a clear mandate; it was very difficult to work in working groups with broad mandates. It would be useful to have a colloquium to consider appropriate topics with a view to devising a clear mandate for the Working Group on electronic commerce.

27. **Mr. Loken** (United States of America) said that his delegation's earlier proposal on transferable records was designed to accommodate more than one approach, and did not favour the single controlled electronic document over an electronic registry mechanism. In fact, in practice, the two could be combined: it was possible to have a single controlled document that was provided a requisite level of assurance by means of an electronic

registry. For that reason his delegation's proposal had not taken a firm position on any particular mechanism.

28. In addition, different requisites might apply to different commercial sectors. There could not be a "one size fits all" approach to transferable records. The topic remained the single most important unresolved area of electronic commerce and merited the Commission's attention.

29. He did not see any complication or conflict regarding the Rotterdam Rules. Indeed, the experts involved in the formulation of those Rules were in agreement with his delegation that there were various methods by which the desired result could be attained and still fall within the definition of electronic transport record contained in the Rules.

30. The issues raised, while complex, were resolvable, and work thereon would be the next important development following on from the very successful Model Law on Electronic Commerce. He assured the Commission that the work would not result in any provisions on the transport of goods that were inconsistent with the Rotterdam Rules.

31. **Mr. Tornero** (Observer for the International Air Transport Association) said that the International Air Transport Association supported the position of the United States of America, and also favoured the holding of a colloquium on the transferability of electronic records, including electronic airway bills.

32. **The Chairperson** said that the Commission had before it suggestions for analysis of the proposals in the note on possible future work on electronic commerce, including the separating out of the various topics in view of the issues concerning control and registry mechanisms. The majority opinion was that a colloquium should be convened to consider the issues further, with a view to giving the Working Group on electronic commerce a clear mandate.

33. **Mr. Chan Wah-Teck** (Singapore) said that the note by the Secretariat (A/CN.9/692, para. 8) indicated that some of the legal issues identified with regard to electronic single window facilities were enforcement-related. When the work on electronic single window facilities had begun, his delegation had expressed concern that the work might stray into the realm of national regulatory

systems, which were outside the Commission's remit. While his delegation did not object to the work being done in conjunction with the World Customs Organization, if that work concerned regulatory systems more than the harmonization of rules for common approaches to customs clearances, then great care would be required. Different countries had different regulatory models in order to give effect to their differing national policies; attempting to harmonize them might be a futile exercise. Working modalities could, of course, be harmonized, but on that front much had already been achieved through the Model Law on Electronic Commerce and the United Nations Convention on the Use of Electronic Communications in International Contracts, which provided clear rules for functional equivalence between electronic communications and paper-based systems. While many delegations might wish the work on electronic single window facilities to continue, and considerable resources had been devoted to it already, the Commission should be wary of straying into the realm of national regulatory systems.

34. **Ms. Sabo** (Canada) said that the topic of electronic single window facilities could be explored at the proposed colloquium. It was important for the Commission to have another opportunity to discuss it, and to clarify the Working Group's mandate, before the Group took up any project in that regard.

35. **Mr. Morán Bovio** (Spain), expressing support for the comments made by the representative of Canada, said that a colloquium was necessary in order to have a more detailed discussion of the possible conflict that had arisen with regard to electronic records, and to establish a clear mandate for the Working Group. His delegation stood ready to work with others on the fundamental issue of negotiable electronic records. Like others, his delegation believed that registry systems and control systems were incompatible; the former implied the involvement of an external authority, whereas the latter did not. The Working Group should concentrate on the transferability of single electronic records. It should not address the question of single window facilities because such a discussion would depend on the outcome of any work on transferability of single electronic records.

36. **Mr. Dennis** (United States of America) said that no unnecessary limits should be placed on the scope of matters to be considered at the colloquium; in particular, the single window concept should not be separated from discussions on transferability. The topic of single window systems was broader than that of transferability, but some of the issues relating to single window systems were inherent in any discussion of the different modalities by which various rights or interests could be transferred through electronic means. Therefore, the discussion of each topic should be informed by developments in the other.

37. **The Chairperson** said that there seemed to be a consensus that a colloquium should be held in the near future in order to discuss all the topics proposed in document A/CN.9/692 and to determine a clear agenda for the Working Group.

38. **Ms. Sabo** (Canada) asked whether the secretariat would produce a report on the outcome of the colloquium for the Commission to consider at its next session.

39. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat would be guided by the Commission on that issue: either it could produce a report for the Commission to consider at its next session, or the Working Group could meet to discuss the outcome of the colloquium before the Commission's next session.

40. **Mr. Schoefisch** (Germany) said his delegation agreed that the proposed colloquium should cover all the possible topics set out in document A/CN.9/692. After the colloquium had been held and a report had been produced by the secretariat, the Commission should have the opportunity to discuss that report before it was taken up by the Working Group. It could decide on the Working Group's mandate at its next session.

41. **Mr. Morán Bovio** (Spain), expressing agreement with the comments made by the representative of Germany, reiterated his delegation's belief that the registry system and the control system were incompatible and said that his delegation looked forward to the outcome of the proposed colloquium in that regard. It was crucial for the question to be resolved if further progress was to be made. The secretariat might wish to hold a

meeting of experts as well as a colloquium, and should have full freedom to decide on the best way of proceeding.

42. **The Chairperson** said he took it that the Commission wished to request the secretariat to organize, as it saw fit, a colloquium and/or a meeting of experts on all the possible future work topics set out in document A/CN.9/692 and to prepare a report on the outcome of those discussions, including a proposed agenda for the Working Group, for submission at the Commission's forty-fourth session. The secretariat should be given broad discretion as to the best way to proceed.

43. *It was so decided.*

The meeting was suspended at 11.35 a.m. and resumed at noon.

Possible future work on online dispute resolution in cross-border electronic commerce transactions (A/CN.9/706 and A/CN.9/710)

44. **Mr. Lemay** (International Trade Law Division), introducing the note by the Secretariat on possible future work on online dispute resolution in cross-border electronic commerce transactions (A/CN.9/706) and the note supporting the possible future work on online dispute resolution by UNCITRAL submitted by the Institute of International Commercial Law (A/CN.9/710), recalled that the Commission, at its forty-second session, had requested the secretariat to prepare studies with a view to consideration of the matter of online dispute resolution at a future session. Pursuant to a further request from the Commission, the secretariat had organized a colloquium on the topic, which had been held in Vienna in March 2010. A summary of the colloquium proceedings, the key issues that had been identified and the colloquium's conclusions was contained in document A/CN.9/706.

45. **Mr. Boulou** (Egypt) said that his delegation attached great importance to the discussion on online dispute resolution in cross-border electronic commerce transactions. Communications technology had undergone remarkably rapid development in recent decades and, though the pace of development varied from one country to another, computers had become an integral part of everyday life for people all over

the world. In Egypt, with a view to gaining access to the international system of electronic signatures and promoting electronic commerce, a law on electronic signatures had been adopted in 2004 and licences had been granted to four private companies to operate as certificate authorities for electronic signatures in 2007. The use of laptops and mobile telephones to conduct electronic transactions was widespread and had spurred huge growth in electronic commerce in both business-to-business and business-to-consumer environments.

46. Two of the challenges associated with the growth in electronic commerce were how to develop an effective international system of settling disputes relating to electronic commerce transactions and how to ensure the protection of parties to electronic contracts in situations where one party failed to honour its obligations. Courts had difficulty settling such disputes for a variety of reasons, including the high volume of small-value claims, the contrast between the low value of the transaction and the high cost of litigation, questions of applicable law in both electronic commerce and consumer protection contexts and difficulties of enforcement of foreign judgements.

47. Some of the ideas that had been put forward, such as the institution of an automatic, easy-access system that would allow the majority of disputes to be resolved without the intervention of human beings, seemed somewhat utopian. However, the same had been said of many technological innovations that had subsequently become a reality. It was up to the Commission to apply its legal expertise to the ideas put forward by technology experts so as to ensure that justice was served in the field of electronic commerce.

48. **Mr. Loken** (United States of America) supported the remarks by the representative of Egypt. In view of the increasing number of people with access to the Internet, generic rules on online dispute resolution needed to be designed, as proposed in the note by the Secretariat (A/CN.9/706, para. 51); a working group should be mandated for that purpose. The lack of dispute resolution mechanisms was holding up the development of online commerce.

49. **Mr. Oh Soo-geun** (Republic of Korea) said that the Commission was the right forum to develop such rules, following discussion of their intended

scope and possible form. Hard or binding law would be required for some types of such commerce, while only soft or non-binding law would be applicable in others. The Commission, which already possessed expertise in the areas of electronic commerce and arbitration, could be relied on to adopt the necessary flexible approach and had the added advantage of reaching its decisions by consensus; moreover, any rules it might develop, being endorsed by the General Assembly of the United Nations, were likely to develop subsequently into hard law. His delegation accordingly supported the proposal to assign the topic of online dispute resolution to a working group for future development by the Commission.

50. **Ms. Sabo** (Canada) said that her delegation shared the interest expressed in the topic, but believed that the two issues of business-to-business commerce and business-to-consumer commerce should be dealt with separately. The former fell squarely within the mandate of the Commission, while consumer matters, on which it was more difficult to reach an agreement, lay outside its traditional concerns. She therefore suggested that work should focus initially on business-to-business commerce and move on subsequently to tackle the question of business-to-consumer transactions; alternatively, one working group could focus on the former and a separate working group could concern itself with the latter.

51. **Ms. Smyth** (Australia) concurred on the timeliness of work to develop generic rules for online dispute resolution and said that her delegation was favourable to the convening of a working group for the purpose. The distinction made by the Canadian delegation between the two types of electronic commerce should be borne in mind, as should the unequal access of States to such commerce.

52. **Mr. Mekjian** (Armenia) agreed that attention needed to be given to the issues raised relating to electronic and mobile commerce and that a working group should be charged with drawing up the required global rules.

53. **Mr. Schoefisch** (Germany), concurring, said that the working group could be one of the two already established on arbitration and electronic commerce respectively or be an entirely new working group. It should start by addressing

business-to-business commerce, leaving aside for the time being the more difficult field of business-to-consumer transactions.

54. **Ms. Umoren** (Nigeria) said that, like other developing countries, Nigeria lacked electronic communication capacity. While supporting the proposed work on electronic commerce disputes, her delegation hoped that it would take account of the differing situations of countries. The cross-border problems that arose in Nigeria in that area could not be addressed adequately owing to a lack of courts and enabling legislation. Clear rules must be designed.

55. **Mr. Bellenger** (France) said that if the proposed generic rules were not binding, the question would arise of the modes of implementation of decisions based on those rules. Such rules would create a system more akin to mediation than to arbitration; it would be a private system regulated by an international organization. Other concerns that should be addressed included the protection of personal data and consumer rights.

56. **Ms. Lim Sai Nei** (Singapore) said that both businesses and consumers must be protected and that the issues raised by the delegation of France could usefully be addressed in a working group, perhaps set up on an ad hoc basis.

57. **Mr. Sato** (Japan) said that the working group should focus on ways of encouraging electronic commerce while protecting consumers.

58. **Mr. Velásquez Argaña** (Paraguay) expressed support both for the work being done on the topic by the Organization of American States and for the proposed initiative by the Commission. In Paraguay a new law was shortly to be enacted on electronic commerce and electronic signatures.

59. **Mr. Boumsong** (Cameroon) said that, while in Cameroon, as in Nigeria, there were obstacles to the development of electronic commerce, it was becoming more widespread. In a pragmatic and forward-looking spirit, his delegation therefore supported future work on the topic by a working group of the Commission.

60. **Ms. Hu Guolei** (China) supported the proposal that a working group should initially focus on business-to-business commerce. When it turned its

attention to business-to-consumer transactions, it should address the concerns raised by the delegation of France.

61. **Mr. Leinonen** (Observer for Finland) said that the proposed working group would need to resolve a number of challenging issues. However, before it

was set up, the Commission should decide to confine its initial mandate to business-to-business commerce. It would be advisable to set aside for the time being any work on business-to-consumer transactions.

The meeting rose at 1.05 p.m.

**Summary record (partial)* of the 921st meeting, held at Headquarters,
New York, on Tuesday, 6 July 2010, at 3 p.m.**

[A/CN.9/SR.921]

Chairperson: Mr. Sandoval (Chile)

* No summary record was prepared for the rest of the meeting

The meeting was called to order at 3.05 p.m.

Election of officers (*continued*)

1. **The Chairperson** said that the delegation of the Russian Federation, on behalf of the Group of Eastern European States, had nominated Mr. Gerard Jirair Mekjian (Armenia) for the office of Rapporteur of the Commission at its forty-third session.

2. *Mr. Mekjian (Armenia) was elected Rapporteur by acclamation.*

Current and possible future work in the area of electronic commerce (*continued*)

Possible future work on online dispute resolution in cross-border electronic commerce transactions (continued) (A/CN.9/706 and A/CN.9/710)

3. **Mr. Morán Bovio** (Spain) said that the Commission must make three main decisions in connection with its future work on online dispute resolution. The first was whether the focus should be on business-to-business transactions, business-to-consumer transactions, or both. In his view, the working group should determine where the focus should lie. However, as the dividing line between a business and a consumer was often difficult to draw, it seemed unwise to exclude consumers from online dispute resolution, even though the Model Law on Electronic Commerce of the United Nations Commission on International Trade Law (UNCITRAL) and the United Nations Convention on the Assignment of Receivables in International Trade did not include consumers, or national consumer law, in their scope. Ideally, the same dispute resolution rules should apply to both types of transaction.

4. The second decision was that of determining which Commission working group should take up the issue. In his view, as the important

distinguishing feature of the mode of dispute resolution under discussion was its electronic dimension, Working Group IV, which was dealing with electronic commerce, was a more logical choice than Working Group II, which was dealing with international arbitration and conciliation.

5. The third decision was that of indicating what type of regulation should be established. He favoured leaving that choice to the working group as its work progressed. It could determine whether a convention, a model law, a legislative guide or some combination of those was best.

6. **Ms. Sabo** (Canada), recalling that her delegation had already expressed its view on whether the Commission should examine business-to-business or business-to-consumer transactions, said that the type of regulation to be proposed should depend on the nature of the transaction. Her delegation considered that business-to-business commerce was largely self-regulating and was unlikely to require a binding instrument, but rather a set of guidelines or principles to be adopted by the industry. If the Commission decided to include business-to-consumer transactions, consumer rights must be adequately protected. That implied the involvement of Governments and the need for some form of binding instrument. However, the variation in consumer-protection arrangements between States meant that agreeing on such an instrument would be difficult.

7. With regard to assigning the subject to one of the notional six working groups of the Commission, she pointed out that four of the six were currently occupied. The only working groups therefore able to take on new work were Working Group III, dealing with transport law, and Working Group IV, dealing with electronic commerce. While the Commission was of course free to rename, or revise the mandates, of those working groups, it seemed

logical to entrust Working Group IV with the task of considering online dispute resolution. However, in that event, the Commission must consider the implications for the residual business of that working group.

8. **Mr. Maradiaga** (Honduras) said that, in his view, the discussion of online dispute resolution should cover both business-to-business transactions and business-to-consumer transactions. While different, they were not mutually exclusive. Working Group IV should analyse the issue in greater depth and make appropriate proposals, taking into account the likely overlap with the business of Working Group II.

9. **Ms. Peer** (Austria) said that her delegation was comfortable with the proposal to entrust a working group with discussing online dispute resolution. However, it shared the concerns expressed by Canada and therefore urged a separation of business-to-business transactions from business-to-consumer transactions. The working group should be given a clear mandate, and be instructed first to consider business-to-business transactions. In the light of its conclusions, it could then decide whether to extend its discussions to business-to-consumer transactions. The issue should be assigned to Working Group IV, which should be left to decide what type of instrument was the most appropriate.

10. **Mr. Sorieul** (Secretary of the Commission) said that the Commission should not dwell unduly on the matter of which working group should discuss online dispute resolution, as the working groups were identified only by number, rather than by the subject with which they dealt at any particular time. The only decision to make, therefore, was to decide whether the working group dealing with online dispute resolution would be numbered III or IV.

11. **Ms. Rogers** (Observer for the Pace Institute of International Commercial Law) recalled that the Pace Institute of International Commercial Law had cosponsored a colloquium entitled "A Fresh Look at Online Dispute Resolution and Global E-Commerce", held in Vienna in March 2010, and had put forward a paper (A/CN.9/710) for consideration by the Commission at its current session. The practitioners involved in online dispute resolution

had concluded that millions of small-value business-to-business and business-to-consumer disputes could be resolved every year through a global online dispute resolution system. Generic rules for such a system could be determined by the Commission in a manner consistent with that of other UNCITRAL instruments such as the Model Law on Electronic Commerce.

12. With regard to the current question as to whether generic dispute resolution rules for business-to-business and business-to-consumer transactions should be developed together or separately, the Institute believed that the traditional distinctions between merchants and consumers were being blurred in electronic and mobile commerce. Examples of that phenomenon were the large Internet sites eBay and Alibaba which had a single terms-of-service agreement applied to merchants and consumers. Separation of business-to-business and business-to-consumer transactions could therefore hinder harmonization between industry-level developments and the UNCITRAL legal structures that supported those developments.

13. **Mr. Dennis** (United States of America) said that the Commission should take up online dispute resolution for two reasons, both emphasized in the conclusions of the colloquium held in March 2010. The first was the volume of online international commercial transactions, and the involvement of consumers in those transactions. The second was that, as was indicated in paragraph 50 of document A/CN.9/706, traditional judicial mechanisms did not offer an adequate solution for cross-border electronic commerce disputes. Consumers were excluded from the scope of the Hague Conference on Private International Law Convention on the Choice of Court, affecting such individuals' ability to rely on judicial resolution of disputes.

14. In the experience of the United States of America generic rules for business-to-business and business-to-consumer transactions were very similar. That conclusion was borne out by a comparison of a business-to-consumer proposal of the Organization of American States, described in paragraph 18 of document A/CN.9/706, and the business-to-business dispute resolution provisions of the American Arbitration Association, described in paragraph 29 of document A/CN.9/706. He favoured

requesting a working group to investigate whether a common approach to dispute resolution for both varieties of transaction was possible.

15. **Mr. Oh** Soo-geun (Republic of Korea) said that his delegation did not favour drawing a distinction between business-to-business and business-to-consumer transactions and excluding the latter from the mandate to be given to the working group. It was difficult in practical and theoretical terms to distinguish between the two, for example when buying books or airline tickets. The working group should have the discretion to alter the scope of its work or the nature of its approach, if necessary, according to the type of transaction. It should also have the discretion to select the most appropriate type of instrument to propose for adoption.

16. **Mr. Boulos** (Egypt) said that no distinction should be drawn between business-to-business and business-to-consumer transactions and that the mandate of the working group should not be confined to the former unless there were clear reasons to do so from the outset. He favoured a common set of rules for online dispute resolution and wondered whether any of the other working groups, including those dealing with arbitration or security interests, drew such distinctions between businesses and consumers. He agreed with the representative of the Republic of Korea on the need to give the working group the discretion to decide how it would approach the issue.

Possible future work in the area of microfinance (A/CN.9/698)

17. **Mr. Lemay** (International Trade Law Division), introducing the note by the Secretariat on microfinance in the context of international economic development (A/CN.9/698), said that the study had been prepared in response to the Commission's request at its forty-second session. As described in paragraph 1, the purpose was to identify the need for a regulatory and legal framework aimed at protecting and developing the microfinance sector and, to that end, to assess the issues at stake as well as proposals regarding the form and nature of a reference document which the Commission might consider preparing with a view to assisting legislators and policymakers around the

world. In the preparation of the study, reference had been made to the work of numerous organizations and bodies which were active in the field of microfinance. As indicated in paragraphs 63 to 65, the Commission might wish to consider whether guidance on microfinance regulation could be of value for countries with less developed regulatory regimes and limited resources, whether a reference document would prove a useful tool for Governments in that regard, and whether a colloquium of experts should be convened to further explore how the legal and regulatory issues surrounding microfinance should be dealt with at the international level. It was important to bear in mind the work already done or ongoing by other bodies and organizations and to ensure that any involvement by the Commission was undertaken in close cooperation with such bodies.

18. **Ms. Smyth** (Australia) said that her Government had long supported microfinance initiatives and believed that improving access to financial services could contribute to breaking down barriers to economic participation by the poor. To that end, countries needed a legal and regulatory environment that allowed microfinance institutions to enter the market and that provided appropriate incentives for those institutions to extend their outreach to underserved regions and groups. There were common challenges in respect of which guidance from the Commission could be a valuable resource. Her delegation therefore supported the idea of convening an expert group meeting and of preparing a reference document with recommendations on what form the future work of the Commission could take. She underscored the need for UNCITRAL to work in collaboration with other bodies, for example the Group of 20, a subgroup of which had recently developed a set of principles for innovative financial inclusion which would form the basis of an action plan to be developed later in 2010 on improving access to financial services among the world's poor. The future work of UNCITRAL must complement the initiatives of other bodies so as to share expertise and avoid duplication.

19. **Ms. Sabo** (Canada) said that her delegation agreed that the subject should be further explored by an expert group convened by the secretariat. She was concerned, however, that the work could

encroach too far into the area of banking and banking regulation, even though there were some considerations more directly related to banking that would have to be taken into account; a careful balance would have to be struck. It was important to avoid duplication of work; the secretariat should work in close collaboration with other bodies, in particular the International Institute for the Unification of Private Law (Unidroit), which had recently decided to undertake work in a related area.

20. **Mr. Chan Wah-Teck** (Singapore) said that it was undeniable that microfinance had proven to be an effective vehicle for alleviating poverty and an important means of achieving the Millennium Development Goals. The question remained, however, as to whether it was an appropriate topic for the Commission to address. Microfinance was directed towards segments of a nation's society that would otherwise not have access to credit and was essentially domestic in nature; different countries had differing modalities for its regulation. Microfinance could potentially play an important role in international trade, but the issues set out in chapter III of document A/CN.9/698 all related to regulatory and legal aspects; his delegation believed that the Commission should not become involved in questions of internal financial regulation. There was also an implication that there were regulatory issues in various national systems that needed to be liberalized so as to enable financial institutions, perhaps from other countries, to go in and offer microfinance services; the Commission should be wary of being drawn into that area, which had given rise to acrimonious disputes, such as those which had arisen in the World Trade Organization regarding liberalization of the banking sectors of individual countries. Any mandate would therefore need to be very carefully circumscribed so as to focus on developing rules to enable microfinance to contribute to the promotion of international trade, not domestic trade, and not poverty alleviation which, however laudable, was a developmental goal in respect of which other bodies had a more focused role to play.

21. **Mr. Morán Bovio** (Spain) said that his delegation shared the reservations expressed by the representatives of Canada and Singapore. He supported the idea of convening an expert group meeting, which could clarify the issues raised.

While microfinance was of enormous benefit in many countries, it was more a matter of national, than of international, law. The expert group must avoid taking up issues that were not strictly within the Commission's purview.

22. **Ms. Umoren** (Nigeria) said that microfinance was not new at the national level; what was lacking was intervention in the international arena. There was no denying that microfinance was a powerful tool for poverty reduction, particularly at the rural level, where access to credit was often close to zero. Her delegation strongly supported the idea of convening an expert group meeting to review the issues, bearing in mind the work carried out by other institutions so as to avoid overstepping boundaries. Work on the topic would contribute to the achievement of the Millennium Development Goals, especially with respect to poverty reduction.

23. **Ms. Banaken** (Cameroon) said that microfinance had undergone exponential growth in Cameroon, because of Cameroon's level of development and the complexity of modern banking systems, a large proportion of the population needed access to financial and banking services, which were vital to the growth of small and medium-sized enterprises, and to poverty reduction. Her delegation therefore fully supported the idea of convening an expert group meeting and believed that the Commission should work on the establishment of a legal and regulatory framework for the protection and development of the microfinance sector with a view to modernizing existing national systems.

24. **Ms. Lauer** (Observer for the Consultative Group to Assist the Poor) said that the Consultative Group to Assist the Poor was an independent policy and resource centre housed at the World Bank which worked with various agencies and groups within the World Bank and with a number of standard-setting bodies to develop policies on the regulation and supervision of microfinance. That work was becoming increasingly complex because of the growing commercialization of microfinance and the involvement of new players. As a wider range of services was offered to the poor, a number of legal and regulatory issues arose in ensuring that a wide variety of institutions provided those services in an appropriate, affordable and useful way. New modalities, including branchless banking, gave rise

to a host of issues in such areas as telecommunications and consumer protection. The Consultative Group looked forward to collaborating with the Commission if it decided to go forward with the issue.

25. **The Chairperson** said that there seemed to be agreement that the Commission should convene an expert group meeting and that, on the basis of the outcome, a document should be prepared for consideration at the next session; the Commission would then decide whether to set up a working group on the topic. The expert group would need to take into account the concerns raised at the current meeting.

26. **Mr. Sorieul** (Secretary of the Commission), replying to a question from **Mr. Schöll** (Observer for Switzerland), said that the expert group meeting would take the form of a colloquium.

27. **Ms. Smyth** (Australia) said that clarification was needed of what the Commission would be asking the colloquium to do. The Commission needed to focus on gaps that it could fill that were consistent with its mandate and should avoid engaging in a broad discussion which could lead to duplication of work.

28. **The Chairperson** said that the Commission would clearly work within its area of competence and would collaborate with other bodies so as to avoid duplication. It would need to determine the specific issues to be considered on the basis of the outcome of the work of the colloquium.

29. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat's understanding of the mandate given by the Commission was fully in line with what had been said by the representative of Australia. The secretariat was fully aware of the need to avoid duplication of efforts; its first concern in drafting the study in document A/CN.9/698 had been to consult all organizations active in the area of microfinance.

30. **Ms. Lauer** (Observer for the Consultative Group to Assist the Poor) said that the Consultative Group was finalizing a lengthy document on the regulation and supervision of microfinance. A number of issues were important, including the definition of microcredit in individual countries, in view of the complexity of economic, political and historical, as well as geographical, issues. An alternative to preparing model legislation would be to amend existing laws to permit different kinds of institutions to provide services to the poor.

31. **The Chairperson** said that, on the basis of the outcome of the work of the colloquium, a document would be prepared so that, at its next session, the Commission would have a framework for deciding on how to address the issue.

The discussion covered in the summary record ended at 4.30 p.m.

Adoption of the report of the Commission

**Summary record of the 924th meeting, held at Headquarters,
New York, on Friday, 2 July 2010, at 10 a.m.**

[A/CN.9/SR.924]

Chairperson: Mr. Sandoval (Chile)

The meeting was called to order at 10.30 a.m.

Adoption of the report of the Commission

1. **The Chairperson** invited the Rapporteur, Mr. Mekjian (Armenia), to introduce the draft report of the Commission on the work of its forty-third session.

2. **Mr. Mekjian** (Armenia), Rapporteur, said that documents A/CN.9/XLIII/CRP.1 and addenda, including addenda 1 to 4 and 6 to 8, already adopted at earlier meetings, would together form the report of the Commission.

A/CN.9/XLIII/CRP.1

3. **Ms. Musayeva** (International Trade Law Division) said that, in paragraph 5, “Colombia” should be deleted and, in paragraph 6, “Slovenia” should be added.

4. *Document A/CN.9/XLIII/CRP.1, as orally revised, was adopted.*

A/CN.9/XLIII/CRP.1/Add.5

5. **Mr. Sorieul** (Secretary of the Commission) recalled that, at its 916th meeting, the Commission had considered adding to the draft decision reproduced in paragraph 1 a fourth preambular paragraph that would draw attention to the contribution of the UNCITRAL Arbitration Rules to the promotion of the rule of law. As, however, that was a substantive matter which had not been discussed in the Working Group, it would be more appropriate to include words to that effect in the general resolution on the Commission’s work to be submitted to the General Assembly. He therefore proposed withdrawing the proposed text. It had also been suggested at the earlier meeting that, in the first and second lines of paragraph 5, the words “should also undertake” should be amended to read: “could also consider undertaking”.

6. **The Chairperson** took it that there was no objection to those proposals.

7. **Ms. Smyth** (Australia), supported by **Mr. Chan Wah-Teck** (Singapore), suggested that, in paragraph 5, fourth line from the bottom, the words “should seek to identify” should be replaced by “may identify”.

8. **Mr. Loken** (United States of America) suggested that, in the sixth and seventh lines of paragraph 3, the words “if they would benefit from” should be amended to read: “if they had the benefit of”.

9. *It was so decided.*

10. *Document A/CN.9/XLIII/CRP.1/Add.5, as orally amended, was adopted.*

A/CN.9/XLIII/CRP.1/Add.9

11. **Mr. Loken** (United States of America) suggested amendments to paragraph 4, to bring it into line with document A/CN.9/690. The second and third sentences should be amended to read: “It noted that the Working Group, at those sessions, completed a second reading of all chapters of the draft revised model law and began its third reading of the text. The Working Group settled many of the substantive issues [remainder of sentence unchanged]”. Before the last sentence of the paragraph, the following new sentence should be inserted: “The Commission noted that the Working Group also agreed to undertake work on a draft revised Guide to Enactment.”

12. *It was so decided.*

13. **Mr. Chan Wah-Teck** (Singapore) said that the final sentence of paragraph 6 should be amended to read: “The Commission instructed the Working Group to exercise restraint in revisiting issues on which decisions had already been taken.”

14. *It was so decided.*

15. *Document A/CN.9/XLIII/CRP.1/Add.9, as orally amended, was adopted.*

A/CN.9/XLIII/CRP.1/Add.10

16. **Mr. Loken** (United States of America) suggested adding a sentence at the end of paragraph 7, which would read: "Another view was that there was not necessarily such a conflict." At the end of paragraph 11, he suggested the replacement of the word "necessary" by "appropriate".

17. **Mr. Bellenger** (France) said that, likewise in the final sentence of paragraph 11, it should be specified that the mandate to be given to the Working Group should be not only clear but also circumscribed.

18. **Ms. Sabo** (Canada) suggested that the Working Group should be given a "clearly-defined mandate".

19. **The Chairperson** took it that there were no objections to the suggested changes.

20. *Document A/CN.9/XLIII/CRP.1/Add.10, as orally amended, was adopted.*

A/CN.9/XLIII/CRP.1/Add.11

21. **Ms. Sabo** (Canada) asked whether the square brackets around the word "Unamended" in paragraph 1, subparagraph (a), had any particular significance.

22. **Mr. Sorieul** (Secretary of the Commission) said that the title of the Convention listed in that subparagraph had been reproduced from the report of the previous year and that the square brackets must be maintained.

23. **Mr. Chan Wah-Teck** (Singapore) suggested the replacement, at the beginning of paragraph 3, of the words "Singapore also deposited" by "Following this, Singapore deposited". At the end of the third sentence of that paragraph, after the words "information and communication technology", he suggested adding "and that Singapore had enacted legislation to give effect to the Convention in its domestic laws." He also suggested that the beginning of the following sentence should be amended to read: "It noted that wider adoption [remainder unchanged]".

24. **Mr. Maradiaga** (Honduras) suggested the addition, at the end of paragraph 3, of words to the effect that Honduras encouraged the representatives of other States members of the Commission to promote the adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts in their respective countries.

25. **Ms. Smyth** (Australia) suggested the insertion of a new first sentence in paragraph 4, which would read: "The Commission was informed that Australia had enacted legislation based on the UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006." The word "also" would then need to be inserted between "was" and "informed" in what would then become the second sentence.

26. **Ms. Millicay** (Argentina) said that it would be more appropriate for the new sentence suggested by the delegation of Australia to be added at the end of paragraph 4.

27. **Ms. Sabo** (Canada) suggested that the new sentence could be added, rather, at the end of paragraph 3.

28. **Ms. Smyth** (Australia) said that the new sentence could become a new paragraph 4 and that the current paragraph 4 could become paragraph 5.

29. **Mr. Sorieul** (Secretary of the Commission) said that, for the sake of consistency, the new sentence suggested by the delegation of Australia might be inserted in paragraph 1, subparagraph (l), thereby enabling paragraph 4 to retain its general character.

30. **Ms. Smyth** (Australia) said that the information contained in paragraph 1, subparagraph (l), was described as having been received before the beginning of the current session, at which time Australia had not yet enacted the legislation in question.

31. **The Chairperson** took it that the Commission agreed to the insertion in paragraph 4 of the new sentence suggested by the delegation of Australia.

32. *Document A/CN.9/XLIII/CRP.1/Add.11, as orally amended, was adopted.*

A/CN.9/XLIII/CRP.1/Add.12

33. *Document A/CN.9/XLIII/CRP.1/Add.12 was adopted.*

A/CN.9/XLIII/CRP.1/Add.13

34. **Mr. Chan** Wah-Teck (Singapore) said that paragraph 7 did not adequately capture the Commission's extensive discussion or consensus on the issue. He therefore proposed that the first sentence should be amended to read: "After discussion delegates agreed that the secretariat should convene a colloquium to explore the legal and regulatory issues surrounding microfinance which fell within the mandate of UNCITRAL." The second sentence should be amended to read "This colloquium may include experts working from other organizations actively working on the issue."

35. **Ms. Sabo** (Canada), supported by **Ms. Umoren** (Nigeria), said that the report should make it clear that experts should be invited to participate in the colloquium.

36. **Mr. Chan** Wah-Teck (Singapore) said his delegation did not mean to suggest that experts should be excluded from participation in the colloquium, but it believed that the identification of participants should be left to the secretariat.

37. **Mr. Sorieul** (Secretary of the Commission) suggested that it could be left to the editorial services to finalize the wording of paragraph 7 to make clear that the colloquium could benefit from the participation of relevant experts and that the issues to be studied should fall within the Commission's mandate, which was, after all, quite broad.

38. *Document A/CN.9/XLIII/CRP.1/Add.13, as orally amended, was adopted.*

A/CN.9/XLIII/CRP.1/Add.14 and Add.15

39. *Documents A/CN.9/XLIII/CRP.1/Add.14 and Add.15 were adopted.*

A/CN.9/XLIII/CRP.1/Add.16

40. **Ms. Sabo** (Canada), noting that the first sentence of paragraph 8 referred to the chairpersons of working groups, said that the statement applied also to the Commission itself. She therefore

proposed the deletion of the words "of Working Groups".

41. **Mr. Chan** Wah-Teck (Singapore) proposed replacing the words "were expected to" by the word "can" in the last sentence of paragraph 8.

42. **Ms. Sabo** (Canada), supported by **Mr. Loken** (United States of America), said that the amendment proposed by the representative of Singapore might lead the Commission into consideration of the substantive issue involved. It was best to leave the text as it stood.

43. *Document A/CN.9/XLIII/CRP.1/Add.16, as orally amended by Canada, was adopted.*

A/CN.9/XLIII/CRP.1/Add.17

44. **Ms. Musayeva** (International Trade Law Division) said that paragraph 4 needed to be revised to reflect the statement that had been made in the Commission by the representative of the International Telecommunication Union (ITU). Accordingly, in the first sentence the words "a statement" should be replaced by "statements" and the words "and the International Telecommunication Union (ITU)" should be added at the end of the sentence. The rest of the paragraph should become a separate paragraph — new paragraph 5 — and a new paragraph 6 should be added, to read: "The Commission also heard a statement on behalf of ITU concerning its work on issues of cyber security, including identity management, data protection and security of electronic transactions. The Commission took note of the close cooperation between ITU and UNCITRAL in the formulation of legal standards relating to those issues and encouraged further cooperation in that direction."

45. *A/CN.9/XLIII/CRP.1/Add.17, as orally revised, was adopted.*

A/CN.9/XLIII/CRP.1/Add.18 to 21

46. *Documents A/CN.9/XLIII/CRP.1/Add.18 to 21 were adopted.*

A/CN.9/XLIII/CRP.1/Add.22

47. **Mr. Loken** (United States of America), referring to paragraph 3 (c), said that his delegation had been a strong proponent of work on online

dispute resolution (ODR) and was pleased to see that it had already been assigned to a working group. The timing of the working group's session, however, might create a challenge for the preparation of relevant documents and attendance by members, since the session would take place fairly soon and a major international meeting on ODR was scheduled to take place in Vancouver at the beginning of November. It would be especially useful to have the results of the latter meeting in hand before the working group began its work on the topic.

48. **Mr. Sorieul** (Secretary of the Commission) said that the concerns expressed by the United States representative were legitimate, but there were constraints regarding availability of meeting rooms and interpretation services in Vienna. The secretariat would try to juggle with the dates made available to the Commission, taking fully into account the concerns and needs of all the working groups. Once the final dates of the working groups' sessions had been set, they would be posted on the UNCITRAL website and communicated to all concerned in a note verbale.

49. **Mr. Schoefisch** (Germany) said he hoped the dates for all the meetings could be settled as soon as possible.

50. **Ms. Sabo** (Canada) said that the Commission had already decided to leave it to the secretariat to determine the dates of the working groups' sessions. The dates given in the draft report were in any event provisional, subject to adjustment. No amendment was necessary.

51. **The Chairperson** said that the Commission had given the secretariat maximum discretion in dealing with the calendar of meetings in the year before the next session.

52. *Document A/CN.9/XLIII/CRP.1/Add.22 was adopted.*

53. *The draft report as a whole, as amended and orally revised, was adopted.*

54. After the customary exchange of courtesies, **the Chairperson** declared the forty-third session closed.

The meeting rose at 12.15 p.m.

II. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW — NOTE BY THE SECRETARIAT

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Annex

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X. International construction contracts

[No publications recorded under this heading.]

XI. International countertrade

[No publications recorded under this heading.]

XII. Privately financed infrastructure projects

[No publications recorded under this heading.]

Annex

Checklist of short titles of UNCITRAL legal texts as cited in this bibliography and their equivalents in full

<i>Short title</i>	<i>Full title</i>
Hamburg Rules (1978)	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) ^a
Limitation Convention (1974/1980)	Convention on the Limitation Period in the International Sale of Goods, 1974 (New York), ^b and Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1980 (Vienna) ^c
New York Convention (1958)	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York) ^{d, e}
Rotterdam Rules (2008)	United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (New York) ^f
UNCITRAL Arbitral Proceedings Notes (1996)	UNCITRAL Notes on Organizing Arbitral Proceedings (1996) ^g
UNCITRAL Arbitration Model Law (1985)	UNCITRAL Model Law on International Commercial Arbitration (1985) ^h
UNCITRAL Arbitration Model Law (as amended in 2006)	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 ⁱ
UNCITRAL Arbitration Rules (1976)	UNCITRAL Arbitration Rules (1976) ^j
UNCITRAL Conciliation Rules (1980)	UNCITRAL Conciliation Rules (1980) ^k
UNCITRAL Credit Transfer Model Law (1992)	UNCITRAL Model Law on International Credit Transfers (1992) ^l
UNCITRAL Insolvency Guide (2004)	UNCITRAL Legislative Guide on Insolvency Law (2004) ^m
UNCITRAL Insolvency Model Law (1997)	UNCITRAL Model Law on Cross-Border Insolvency (1997) ⁿ
UNCITRAL Model Law on Electronic Commerce (1996)	UNCITRAL Model Law on Electronic Commerce (1996) ^o
UNCITRAL Model Law on Electronic Signatures (2001)	UNCITRAL Model Law on Electronic Signatures (2001) ^p
UNCITRAL Procurement Model Law (1994)	UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) ^q
UNCITRAL Secured Transactions Guide (2007)	UNCITRAL Legislative Guide on Secured Transactions (2007) ^r

<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) ^s
United Nations Guarantee and Standby Convention (1995)	United Nations Convention on Independent Guarantees and Standby Letters of Credit (1995) ^t
United Nations Sales Convention (1980)	United Nations Convention on Contracts for the International Sale of Goods (1980) ^u

^a United Nations publication, Sales No. E.95.V.14.

^b Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974; United Nations publication, Sales No. E.74.V.8.

^c Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980; United Nations publication, Sales No. E.81.IV.3.

^d The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York) was adopted prior to the establishment of the Commission, and the Commission is entrusted with the promotion and related activities regarding the Convention.

^e United Nations publication, Sales No. M.08.V.5.

^f United Nations publication, Sales No. E.09.V.9.

^g Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), part II.

^h United Nations publication, Sales No. E.95.V.18.

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

^j United Nations publication, Sales No. E.93.V.6.

^k United Nations publication, Sales No. E.81.V.6.

^l United Nations publication, Sales No. E.99.V.11.

^m United Nations publication, Sales No. E.05.V.10.

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

^o United Nations publication, Sales No. E.99.V.4.

^p United Nations publication, Sales No. E.02.V.8.

^q United Nations publication, Sales No. E.98.V.13.

^r Official Records of the General Assembly, Sixty-second session, Supplement No. 17 (A/62/17), part II.

^s United Nations publication, Sales No. E.07.V.02.

^t United Nations publication, Sales No. E.97.V.12.

^u United Nations publication, Sales No. E.95.V.12.

III. CHECK-LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
A. List of documents before the Commission at its forty-third session		
1. General series		
A/CN.9/683 and Corr.1	Provisional agenda, annotations thereto and scheduling of meetings of the forty-third session	Not reproduced
A/CN.9/684	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-first session (Vienna, 14-18 September 2009)	Part two, chap. I, A
A/CN.9/685	Report of Working Group VI (Security Interests) on the work of its sixteenth session (Vienna, 2-6 November 2009)	Part two, chap. II, A
A/CN.9/686	Report of Working Group V (Insolvency Law) on the work of its thirty-seventh session (Vienna, 9-13 November 2009)	Part two, chap. III, A
A/CN.9/687	Report of Working Group I (Procurement) on the work of its seventeenth session (Vienna, 7-11 December 2009)	Part two, chap. IV, A
A/CN.9/688	Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-second session (New York, 1-5 February 2010)	Part two, chap. I, C
A/CN.9/689	Report of Working Group VI (Security Interests) on the work of its seventeenth session (New York, 8-12 February 2010)	Part two, chap. II, D
A/CN.9/690	Report of Working Group I (Procurement) on the work of its eighteenth session (New York, 12-16 April 2010)	Part two, chap. IV, C
A/CN.9/691	Report of Working Group V (Insolvency Law) on the work of its thirty-eighth session (New York, 19-23 April 2010)	Part two, chap. III, C
A/CN.9/692	Note by the Secretariat on present and possible future work on electronic commerce	Part two, chap. V, A
A/CN.9/693	Note by the Secretariat on a bibliography of recent writings related to the work of UNCITRAL	Part three, chap. II
A/CN.9/694	Note by the Secretariat on the status of conventions and model laws	Part two, chap. VIII
A/CN.9/695 and Add.1	Note by the Secretariat on technical cooperation and assistance, including transport law	Part two, chap. VII
A/CN.9/696	Note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts	Not reproduced

<i>Document Symbol</i>	<i>Title or description</i>	<i>Location in Present Volume</i>
A/CN.9/697 and Add.1	Note by the Secretariat on the UNCITRAL rules of procedure and methods of work; comments received from Member States and interested international organizations	Not reproduced
A/CN.9/698	Note by the Secretariat on microfinance in the context of international economic development	Not reproduced
A/CN.9/699 and Add.1-4	UNCITRAL Legislative Guide on Insolvency Law: draft part three; compilation of comments by Governments and international organizations	Not reproduced
A/CN.9/700 and Add.1-7	Note by the Secretariat on the draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property	Not reproduced
A/CN.9/701	Note by the Secretariat on the draft supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property; compilation of comments by Governments and international organizations	Not reproduced
A/CN.9/702 and Add.1	Note by the Secretariat on possible future work on security interests	Part two, chap. V, B
A/CN.9/703 and Add.1	Note by the Secretariat on the settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules	Not reproduced
A/CN.9/704 and Add.1-10	Note by the Secretariat on the settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules; compilation of comments by Governments and international organizations	Not reproduced
A/CN.9/705	Note by the Secretariat on the settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules	Not reproduced
A/CN.9/706	Note by the Secretariat on possible future work on online dispute resolution in cross-border electronic commerce transactions	Part two, chap. V, C
A/CN.9/707 and Add.1	Note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law	Part two, chap. IX
A/CN.9/708	Note by the Secretariat: revisions to A/CN.9/WG.V/WP.92 and Add.1; UNCITRAL Legislative Guide on Insolvency Law: part three: treatment of enterprise groups in insolvency	Not reproduced
A/CN.9/709	Note by the Secretariat on insolvency law: possible future work; further proposal by the delegation of Switzerland for preparation by the UNCITRAL secretariat of a study on the feasibility and possible scope of an instrument regarding the cross-border resolution of large and complex financial institutions	Part two, chap. V, D
A/CN.9/710	Note supporting the possible future work on online dispute resolution by UNCITRAL, submitted by the Institute of International Commercial Law: possible future work on online dispute resolution in cross-border electronic commerce transactions	Part two, chap. V, E

2. Restricted series

A/CN.9/XLIII/CRP.1 and Add.1-22	Draft report of the United Nations Commission on International Trade Law on the work of its forty-third session	Not reproduced
A/CN.9/XLIII/CRP.2 and Add.1-3	Revised UNCITRAL Arbitration Rules	Not reproduced
A/CN.9/XLIII/CRP.4	Draft decision adopting the Revised UNCITRAL Arbitration Rules	Not reproduced
A/CN.9/XLIII/CRP.5	Draft decision adopting the Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property	Not reproduced
A/CN.9/XLIII/CRP.6	Draft decision on adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law	Not reproduced
A/CN.9/XLIII/CRP.7	Proposal by the Permanent Bureau of the Hague Conference on Private International Law, the Commercial Finance Association and the American Bar Association	Not reproduced
A/CN.9/XLIII/CRP.8	Proposal by Canada on the law applicable to security rights in intellectual property	Not reproduced
A/CN.9/XLIII/CRP.9	The panel discussion under agenda item 18 "Role of UNCITRAL in promoting the rule of law at the national and international levels"	Not reproduced

3. Information series

A/CN.9/XLIII/INF.1	List of participants	Not reproduced
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B. List of documents before the Working Group on Arbitration and Conciliation at its fifty-first session

1. Working papers

A/CN.9/WG.II/WP.153	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.154 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 and Conciliation at its fifty-first session	Part two, chap. I, B

2. Restricted series

A/CN.9/WG.II/LI/CRP.1 and Add.1-4	Draft report of Working Group II (Arbitration and Conciliation) on the work of its fifty-first session	Not reproduced
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3. Information series

A/CN.9/WG.II/LI/INF.1	List of participants	Not reproduced
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C. List of documents before the Working Group on Arbitration and Conciliation at its fifty-second session

1. Working papers

A/CN.9/WG.II/WP.156	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.157 and Add.1-2	Note by the Secretariat on settlement of commercial disputes: Revision of the UNCITRAL Arbitration Rules, submitted to the Working Group on Arbitration and Conciliation at its fifty-second session	Part two, chap. I, D

2. Restricted series

A/CN.9/WG.II/LII/CRP.1 and Add.1-4	Draft report of Working Group II (Arbitration and Conciliation) on the work of its fifty-second session	Not reproduced
A/CN.9/WG.II/LII/CRP.2	Settlement of commercial disputes. Revision of the UNCITRAL Arbitration Rules. Proposal by the Government of the Plurinational State of Bolivia	Not reproduced
A/CN.9/WG.II/LII/CRP.3 and Add.1	Settlement of commercial disputes. Revision of the UNCITRAL Arbitration Rules. Proposal on draft article 41 (Fees of arbitrators) of the draft revised UNCITRAL Arbitration Rules	Not reproduced

3. Information series

A/CN.9/WG.II/LII/INF.1	List of participants	Not reproduced
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D. List of documents before the Working Group on Security Interests at its sixteenth session

1. Working papers

A/CN.9/WG.VI/WP.38	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.39 and Add.1-7	Note by the Secretariat on the Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property, submitted to the Working Group on Security Interests at its sixteenth session	Part two, chap. II, B
A/CN.9/WG.VI/WP.40	Note by the Secretariat on the Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property, Proposal by the Permanent Bureau of the Hague Conference on Private International Law submitted to the Working Group on Security Interests at its sixteenth session	Part two, chap. II, C

2. Restricted series

A/CN.9/WG.VI/XVI/CRP.1 and Add.1-4	Draft report of Working Group VI (Security Interests) on the work of its sixteenth session	Not reproduced
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A/CN.9/WG.VI/XVI/CRP.2	Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property	Not reproduced
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A/CN.9/WG.VI/XVI/CRP.3	Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property	Not reproduced
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3. Information series

A/CN.9/WG.VI/XVI/INF.1	List of participants	Not reproduced
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E. List of documents before the Working Group on Security Interests at its seventeenth session

1. Working papers

A/CN.9/WG.VI/WP.41	Annotated provisional agenda	Not reproduced
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A/CN.9/WG.VI/WP.42/ and Add.1-7	Draft Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property	Part two, chap. II, E
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2. Restricted series

A/CN.9/WGVI/XVII/CRP.1 and Add.1-3	Draft report of Working Group VI (Security Interests) on the work of its seventeenth session	Not reproduced
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A/CN.9/WGVI/XVII/CRP.2	Proposal by the International Trademark Association (INTA) and the Commercial Finance Association (CFA) regarding the law applicable to a security right in intellectual property (recommendation 253)	Not reproduced
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A/CN.9/WGVI/XVII/CRP.3	Proposal by the Independent Film and Television Alliance (IFTA) regarding the priority of rights of non-exclusive licensees (recommendations 81, subparagraph (c), and 245)	Not reproduced
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3. Information series

A/CN.9/ WGVI/XVII/INF.1	List of participants	Not reproduced
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F. List of documents before the Working Group on Insolvency Law at its thirty-seventh session

1. Working papers

A/CN.9/WG.V/WP.89	Annotated provisional agenda	Not reproduced
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A/CN.9/WG.V/WP.90 and Add.1-2	Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-seventh session	Part two, chap. III, B
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2. *Restricted series*

A/CN.9/WG.V/XXXVII/CRP.1 and Add.1-4	Draft report of Working Group V (Insolvency Law) on the work of its thirty-seventh session	Not reproduced
A/CN.9/WG.V/XXXVII/CRP.2	Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency	Not reproduced
A/CN.9/WG.V/XXXVII/CRP.3	Proposal on future work for Working Group V by the Union Internationale des Avocats (UIA)	Not reproduced

3. *Information series*

A/CN.9/WG.V/XXXVII/INF.1	List of participants	Not reproduced
	t of documents before the Working Group on y Law at its thirty-eighth session	

1. *Working papers*

A/CN.9/WG.V/WP.91	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.92 and Add.1-2	Note by the Secretariat on the treatment of enterprise groups in insolvency, submitted to the Working Group on Insolvency Law at its thirty-eighth session	Part two, chap. III, D
A/CN.9/WG.V/WP.93 and Add.1-6	Note by the Secretariat on possible future work in the area of insolvency: Explanatory notes on drafting issues, submitted to the Working Group on Insolvency Law at its thirty-eighth session (A/CN.9/WG.V/WP.93 and Add.1-6)	Part two, chap. III, E

2. *Restricted series*

A/CN.9/WG.V/XXXVIII/CRP.1 and Add.1-3	Draft report of Working Group V (Insolvency Law) on the work of its thirty-eighth session	Not reproduced
A/CN.9/WG.V/XXXVIII/CRP.2	Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency. Proposal concerning draft recommendation 200	Not reproduced
A/CN.9/WG.V/XXXVIII/CRP.3	The impact of insolvency on a security right in intellectual property: discussion of intellectual property in the Legislative Guide on Insolvency Law	Not reproduced
A/CN.9/WG.V/XXXVIII/CRP.4	Legislative Guide on Insolvency Law. Part three: Treatment of enterprise groups in insolvency. Comments of the French delegation for the thirty-eighth session of Working Group V (Insolvency Law)	Not reproduced

3. *Information series*

A/CN.9/WG.V/XXXVIII/INF.1	List of participants	Not reproduced
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H. List of documents before the Working Group on Procurement at its seventeenth session

1. Working papers

A/CN.9/WG.I/WP.70	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.71 and Add.1-8	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services - a revised text of the Model Law, submitted to the Working Group on Procurement at its seventeenth session	Part two, chap. IV, B

2. Restricted series

A/CN.9/WG.I/XVII/CRP.1 and Add.1-4	Draft report of the Working Group on Procurement at its seventeenth session.	Not reproduced
A/CN.9/WG.I/XVII/CRP.2	Correlation table for draft revised Model Law and 1994 Model Law	Not reproduced

4. Information series

A/CN.9/WG.I/XVII/INF.1	List of participants	Not reproduced
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I. List of documents before the Working Group on Procurement at its eighteenth session

1. Working papers

A/CN.9/WG.I/WP.72	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.73 and Add.1-8	Note by the Secretariat on possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services - a revised text of the Model Law, submitted to the Working Group on Procurement at its eighteenth session	Part two, chap. IV, D

2. Restricted series

A/CN.9/WG.I/XVIII/CRP.1 and Add.1-4	Draft report of the Working Group on Procurement at its eighteenth session.	Not reproduced
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3. Information series

A/CN.9/WG.I/XVIII/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, chapter and page where documents relating to the work of the United Nations Commission on International Trade Law were reproduced in previous volumes of the *Yearbook*; documents that do not appear in the list here were not reproduced in the *Yearbook*. The documents are divided into the following categories:

1. Reports on the annual sessions of the Commission
2. Resolutions of the General Assembly
3. Reports of the Sixth Committee
4. Extracts from the reports of the Trade and Development Board, United Nations Conference on Trade and Development
5. Documents submitted to the Commission (including reports of the meetings of Working Groups)
6. Documents submitted to the Working Groups:
 - (a) Working Group I:
Time-Limits and Limitation (Prescription), (1969 to 1971); Privately Financed Infrastructure Projects (2001 to 2003); Procurement (as of 2004)
 - (b) Working Group II:
International Sale of Goods (1968 to 1978); International Contract Practices (1981 to 2000);
International Commercial Arbitration and Conciliation (as of 2000)
 - (c) Working Group III:
International Legislation on Shipping (1970 to 1975); Transport Law (as of 2002)**
 - (d) Working Group IV:
International Negotiable Instruments (1973 to 1987); International Payments (1988 to 1992);
Electronic Data Interchange (1992 to 1996); Electronic Commerce (as of 1997)
 - (e) Working Group V:
New International Economic Order (1981 to 1994); Insolvency Law (1995 to 1999);
Insolvency Law (as of 2001)*

* 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).

- (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.

** At its 35th session, the Commission adopted one-week sessions, creating six working groups.

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
1. Reports on the annual sessions of the Commission		
A/7216 (first session)	Volume I: 1968-1970	Part two, I, A
A/7618 (second session)	Volume I: 1968-1970	Part two, II, A
A/8017 (third session)	Volume I: 1968-1970	Part two, III, A
A/8417 (fourth session)	Volume II: 1971	Part one, II, A
A/8717 (fifth session)	Volume III: 1972	Part one, II, A
A/9017 (sixth session)	Volume IV: 1973	Part one, II, A
A/9617 (seventh session)	Volume V: 1974	Part one, II, A
A/10017 (eighth session)	Volume VI: 1975	Part one, II, A
A/31/17 (ninth session)	Volume VII: 1976	Part one, II, A
A/32/17 (tenth session)	Volume VIII: 1977	Part one, II, A
A/33/17 (eleventh session)	Volume IX: 1978	Part one, II, A
A/34/17 (twelfth session)	Volume X: 1979	Part one, II, A
A/35/17 (thirteenth session)	Volume XI: 1980	Part one, II, A
A/36/17 (fourteenth session)	Volume XII: 1981	Part one, A
A/37/17 and Corr.1 (fifteenth session)	Volume XIII: 1982	Part one, A
A/38/17 (sixteenth session)	Volume XIV: 1983	Part one, A
A/39/17 (seventeenth session)	Volume XV: 1984	Part one, A
A/40/17 (eighteenth session)	Volume XVI: 1985	Part one, A
A/41/17 (nineteenth session)	Volume XVII: 1986	Part one, A
A/42/17 (twentieth session)	Volume XVIII: 1987	Part one, A
A/43/17 (twenty-first session)	Volume XIX: 1988	Part one, A
A/44/17 (twenty-second session)	Volume XX: 1989	Part one, A
A/45/17 (twenty-third session)	Volume XXI: 1990	Part one, A
A/46/17 (twenty-fourth session)	Volume XXII: 1991	Part one, A
A/47/17 (twenty-fifth session)	Volume XXIII: 1992	Part one, A
A/48/17 (twenty-sixth session)	Volume XXIV: 1993	Part one, A
A/49/17 (twenty-seventh session)	Volume XXV: 1994	Part one, A
A/50/17 (twenty-eighth session)	Volume XXVI: 1995	Part one, A
A/51/17 (twenty-ninth session)	Volume XXVII: 1996	Part one, A
A/52/17 (thirtieth session)	Volume XXVIII: 1997	Part one, A

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
A/63/17 (fortieth-first session)	Volume XXXIX: 2008	Part one, A
A/64/17 (fortieth-second session)	Volume XL: 2009	Part one, A

2. Resolutions of the General Assembly

2102 (XX)	Volume I: 1968-1970	Part one, II, A
2205 (XXI)	Volume I: 1968-1970	Part one, II, E
2421 (XXIII)	Volume I: 1968-1970	Part two, I, B, 3
2502 (XXIV)	Volume I: 1968-1970	Part two, II, B, 3
2635 (XXV)	Volume II: 1971	Part one, I, C
2766 (XXVI)	Volume III: 1972	Part one, I, C
2928 (XXVII)	Volume IV: 1973	Part one, I, C
2929 (XXVII)	Volume IV: 1973	Part one, I, C
3104 (XXVIII)	Volume V: 1974	Part one, I, C
3108 (XXVIII)	Volume V: 1974	Part one, I, C
3316 (XXIX)	Volume VI: 1975	Part one, I, C
3317 (XXIX)	Volume VI: 1975	Part three, I, B
3494 (XXX)	Volume VII: 1976	Part one, I, C
31/98	Volume VIII: 1977	Part one, I, C
31/99	Volume VIII: 1977	Part one, I, C
31/100	Volume XIII: 1977	Part one, I, C
32/145	Volume IX: 1978	Part one, I, C
32/438	Volume IX: 1978	Part one, I, C
33/92	Volume X: 1979	Part one, I, B

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
48/34	Volume XXIV: 1993	Part one, D
49/54	Volume XXV: 1994	Part one, D
49/55	Volume XXV: 1994	Part one, D

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
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
63/120	Volume XXXIX: 2008	Part one, D
63/121	Volume XXXIX: 2008	Part one, D
63/123	Volume XXXIX: 2008	Part one, D
63/128	Volume XXXIX: 2008	Part one, D
64/111	Volume XL: 2009	Part one, D
64/112	Volume XL: 2009	Part one, D
64/116	Volume XL: 2009	Part one, D

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>
3. Reports of the Sixth Committee		
A/5728	Volume I: 1968-1970	Part one, I, A
A/6396	Volume I: 1968-1970	Part one, II, B
A/6594	Volume I: 1968-1970	Part one, II, D
A/7408	Volume I: 1968-1970	Part two, I, B, 2
A/7747	Volume I: 1968-1970	Part two, II, B, 2
A/8146	Volume II: 1971	Part one, I, B
A/8506	Volume III: 1972	Part one, I, B
A/8896	Volume IV: 1973	Part one, I, B
A/9408	Volume V: 1974	Part one, I, B
A/9920	Volume VI: 1975	Part one, I, B
A/9711	Volume VI: 1975	Part three, I, A
A/10420	Volume VII: 1976	Part one, I, B
A/31/390	Volume VIII: 1977	Part one, I, B
A/32/402	Volume IX: 1978	Part one, I, B
A/33/349	Volume X: 1979	Part one, I, B
A/34/780	Volume XI: 1980	Part one, I, B
A/35/627	Volume XI: 1980	Part one, II, C
A/36/669	Volume XII: 1981	Part one, C
A/37/620	Volume XIII: 1982	Part one, C
A/38/667	Volume XIV: 1983	Part one, C
A/39/698	Volume XV: 1984	Part one, C
A/40/935	Volume XVI: 1985	Part one, C
A/41/861	Volume XVII: 1986	Part one, C
A/42/836	Volume XVIII: 1987	Part one, C
A/43/820	Volume XIX: 1988	Part one, C
A/C.6/43/L.2	Volume XIX: 1988	Part three, II, A
A/43/405 and Add.1-3	Volume XIX: 1988	Part three, II, B
A/44/453 and Add.1	Volume XX: 1989	Part one, C
A/44/723	Volume XX: 1989	Part one, D
A/45/736	Volume XXI: 1990	Part one, C
A/46/688	Volume XXII: 1991	Part one, C

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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
A/63/438	Volume XXXIX: 2008	Part one, C
A/64/447	Volume XL: 2009	Part one, C

**4. Extracts from the reports of the Trade and Development Board of the
United Nations Conference on Trade and Development**

A/7214	Volume I: 1968-1970	Part two, I, B, 1
A/7616	Volume I: 1968-1970	Part two, II, B, 1
A/8015/Rev.1	Volume II: 1971	Part one, I, A
TD/B/C.4/86, annex I	Volume II: 1971	Part two, IV
A/8415/Rev.1	Volume III: 1972	Part one, I, A
A/8715/Rev.1	Volume IV: 1973	Part one, I, A
A/9015/Rev.1	Volume V: 1974	Part one, I, A
A/9615/Rev.1	Volume VI: 1975	Part one, I, A
A/10015/Rev.1	Volume VII: 1976	Part one, I, A
TD/B/617	Volume VIII: 1977	Part one, I, A
TD/B/664	Volume IX: 1978	Part one, I, A
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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
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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
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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
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5. Documents submitted to the Commission, including reports of meetings of working groups		
A/C.6/L.571	Volume I: 1968-1970	Part one, I, B
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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
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.1-2	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

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A/CN.9/82	Volume IV: 1973	Part two, V
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A/CN.9/87	Volume V: 1974	Part two, I, 1
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A/CN.9/91	Volume V: 1974	Part two, IV
A/CN.9/94 and Add.1-2	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
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A/CN.9/107	Volume VI: 1975	Part two, VII
A/CN.9/109 and Add.1-2	Volume VII: 1976	Part two, IV, 1-3
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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
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A/CN.9/117	Volume VII: 1976	Part two, II, 1
A/CN.9/119	Volume VII: 1976	Part two, VI

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A/CN.9/127	Volume VIII: 1977	Part two, III
A/CN.9/128 and annex I-II	Volume VIII: 1977	Part two, I, A-C
A/CN.9/129 and Add.1	Volume VIII: 1977	Part two, VI, A and B
A/CN.9/131	Volume VIII: 1977	Part two, II, A
A/CN.9/132	Volume VIII: 1977	Part two, II, B
A/CN.9/133	Volume VIII: 1977	Part two, IV, A
A/CN.9/135	Volume VIII: 1977	Part two, I, F
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
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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
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A/CN.9/169	Volume X: 1979	Part two, III, D
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A/CN.9/171	Volume X: 1979	Part two, IV
A/CN.9/172	Volume X: 1979	Part two, V
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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
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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.1-2	Volume XI: 1980	Part two, VI
A/CN.9/193	Volume XI: 1980	Part two, V, C
A/CN.9/194	Volume XI: 1980	Part two, V, D
A/CN.9/196	Volume XII: 1981	Part two, II, A
A/CN.9/197	Volume XII: 1981	Part two, I, A
A/CN.9/198	Volume XII: 1981	Part two, IV, A
A/CN.9/199	Volume XII: 1981	Part two, II, B
A/CN.9/200	Volume XII: 1981	Part two, II, C
A/CN.9/201	Volume XII: 1981	Part two, I, C
A/CN.9/202 and Add.1-4	Volume XII: 1981	Part two, V, A
A/CN.9/203	Volume XII: 1981	Part two, V, B
A/CN.9/204	Volume XII: 1981	Part two, VIII
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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
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A/CN.9/222	Volume XIII: 1982	Part two, III, C
A/CN.9/223	Volume XIII: 1982	Part two, II, A, 7
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A/CN.9/225	Volume XIII: 1982	Part two, VI, B
A/CN.9/226	Volume XIII: 1982	Part two, VI, A
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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
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A/CN.9/235	Volume XIV: 1983	Part two, I
A/CN.9/236	Volume XIV: 1983	Part two, V, C
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A/CN.9/238	Volume XIV: 1983	Part two, V, D
A/CN.9/239	Volume XIV: 1983	Part two, V, A
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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
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A/CN.9/255	Volume XV: 1984	Part two, V, A
A/CN.9/256	Volume XV: 1984	Part two, VII
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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.1-2	Volume XVI: 1985	Part two, II, B
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A/CN.9/270	Volume XVI: 1985	Part two, VIII
A/CN.9/271	Volume XVI: 1985	Part two, VII
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A/CN.9/274	Volume XVII: 1986	Part two, I, A, 2
A/CN.9/275	Volume XVII: 1986	Part two, III, A
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A/CN.9/283	Volume XVII: 1986	Part two, VII
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A/CN.9/304	Volume XIX: 1988	Part two, VII, A
A/CN.9/305	Volume XIX: 1988	Part two, VII, B
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A/CN.9/308	Volume XIX: 1988	Part two, V, B
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A/CN.9/310	Volume XIX: 1988	Part two, VII, D
A/CN.9/311	Volume XIX: 1988	Part two, VIII
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A/CN.9/317	Volume XX: 1989	Part two, I, A
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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
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A/CN.9/359	Volume XXIII: 1992	Part two, III, C
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A/CN.9/361	Volume XXIII: 1992	Part two, IV, C
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A/CN.9/364	Volume XXIII: 1992	Part two, VI, A
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A/CN.9/368	Volume XXIII: 1992	Part two, VII
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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
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6. Documents submitted to Working Groups

(a) Working Group I

(i) Time-limits and Limitation (Prescription)

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(ii) Privately Financed Infrastructure Projects

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(iii) Procurement

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(b) Working Group II

(i) International Sale of Goods

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A/CN.9/WG.II/WP.50	Volume XV: 1984	Part two, II, B, 3(c)
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A/CN.9/WG.II/WP.56	Volume XVII: 1986	Part two, III, B, 2
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